Indirectly Held Securities and Intermediary Risk

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In a wide range of international commercial and financial transactions, intermediaries hold assets in which they, as well as investors, share rights that entitle them to some direct beneficial or equitable interest in these assets.[1] This sharing raises a concern that, in the event of an intermediary's failure, creditors of the failed intermediary can claim against assets held by the intermediary for the benefit of investors – a risk referred to as "intermediary risk".[2]

Intermediary risk is important not only because it affects individual investors but also because it can be systemic. The failure of an intermediary can cause a chain reaction of failures of institutions that have invested in assets held by the intermediary. Indeed, because of the international tiering of intermediaries, such a chain reaction, if it involved an intermediary holding a large enough quantity of assets, could threaten the very stability of the global financial system.[3]

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1 This can occur, for example, in the trading of investment securities, the sale of loan participations and securitization transactions. See *Intermediary Risk, supra* asterisked footnote.

2 This intermediary risk is different than the risk that arises in traditional agency situations, in which intermediaries (called trustees or agents) hold assets in a custodial capacity on behalf of multiple investors. In those situations, the intermediary has no beneficial rights in the assets.

3 *Cf.* Charles MOONEY, "Beyond Negotiability: A New Model for Transfer and Pledge of Interests in Securities Controlled by Intermediaries", 12 *Cardozo Law Review* 305, 413 (1990) (noting the primary importance of the issue of intermediary risk); James Steven ROGERS, "Policy Perspectives on Revised U.C.C. Article 8", 43 *U.C.L.A. Law Review* 1431, 1450 (1996) (arguing that the first element of the "core of the package of rights and duties that define the relationship between a securities intermediary and a person ... who holds a securities position through that intermediary" is that such person "does not take the credit risk of the intermediary's other business activities; that is, property held by the intermediary is not subject to the claims of the intermediary's general creditors").

Intermediary risk is perhaps most prevalent in the indirect holding system for securities, on which this article focuses. In that context, it affects investors and their secured creditors. However, intermediary risk also arises in other contexts, such as securitization transactions [4] and the sale of loan participations.[5] In each of these contexts there is legal confusion, causing parties to incur significant and arguably unnecessary transaction costs.[6] Moreover, I have shown that any form of financing in which money flows through an intermediary is inherently subject to intermediary risk – that the intermediary will fail and its creditors will attempt to seize the cash flow.[7] For these reasons, the lessons learned from analyzing intermediary risk in the indirect holding system for securities may have broad application.[8]

I. – INDIRECT HOLDING SYSTEM FOR SECURITIES

Under the traditional system for direct holding of securities, individual securities were issued to investors that in turn had the right to trade those securities to other investors. However, an indirect holding system has evolved in its place, under which intermediary entities – "securities intermediaries" [9] – not only hold the securities on behalf of investors but also frequently own beneficial rights in those securities.[10]

4 Perhaps the most critical analysis in a securitization is whether the special purpose vehicle (SPV) and its investors will continue to be repaid in the event of the originator's bankruptcy. See *Intermediary Risk, supra* asterisked footnote, Part II.C. If the SPV owns the receivables, the SPV and its investors will continue to be repaid; if not, their right to be repaid will be suspended and subject to possible impairment. *Id.* The SPV will gain ownership of the receivables only if the transfer of those receivables from the originator to the SPV constitutes a sale under applicable bankruptcy law. Irrespective of the criteria governing this sale analysis, however, there is concern that an SPV that purports to purchase only an undivided interest in, as opposed to whole, receivables may be unable to gain an ownership interest in the underlying receivables. *Id.* The originator is therefore the intermediary, and the risk that the originator's failure will prevent the SPV and its investors from being repaid from the receivables is the intermediary risk.

5 Concern arises where the bank selling the participation fails. If the participant owns its underlying interest in the loan, it will be repaid from payments that the borrower makes under the loan. If, however, the participant does not own that underlying interest, it merely has a contract claim against the bank from which it bought the participation, which will rank at best *pari passu* with claims of the bank's other creditors. The participant's claim therefore will be impaired if the bank is insolvent. In this article's terminology, the risk that the selling bank's failure will impair the participant's claim is the intermediary risk. See *Intermediary Risk, supra* asterisked footnote, Part II.B.

6 See *Intermediary Risk, supra* asterisked footnote, Part II.D.

7 *Id.*

8 See *id.*

9 See UCC § 8-102(a) (using this same definition).

10 Thus, "[s]ecurities today are generally held indirectly through multiple tiers of intermediaries. Cross-border investment requires not only tiering of intermediaries, but also involvement by intermediaries in different countries, with each tier being subject to a different country's laws. Existing national laws contain unnecessary ambiguities when applied to such multi-tiered securities holding systems." *Morgan Guaranty Trust Co. of N.Y. Brussels Office as operator of Euroclear, Cross-Border Clearance, Settlement and Custody: Beyond the G30 Recommendations* (1993) (referring to legal ambiguities regarding intermediary risk). See also Richard POTOK, "Legal Uncertainty for Securities Held as Collateral", 18 *International Financial Law Review* 12, 12 (Dec. 1999): "[I]t is no wonder that financial institutions are paying more attention to the legal risk associated with taking securities held through multiple tiers of intermediaries [since] in the last decade there has been a sharp increase in the number of arrangements within the financial services industry ... involving a cross-border element."

Under the indirect holding system, an issuer of securities generally records ownership of its securities as belonging to one or more depository intermediaries.[11] Although physical certificates exist for most securities held through a depository intermediary, these certificates remain in that intermediary's possession and are never delivered to third parties.[12] The depository intermediary records the identities of other intermediaries, such as brokerage firms or banks, that purchase interests in these securities.[13] Those other intermediaries in turn record the identities of investors that purchase interests in the intermediaries' interests.[14]

For example, consider an investor that wishes to invest in 500 shares of ABC Corporation's stock. In theory, that investor could purchase 500 individual shares of ABC stock from a brokerage firm. However, for reasons discussed below, the broker may not directly hold individual shares; companies often issue securities in large blocks. For purposes of this example, assume that ABC issued a certificate for 1,000,000 shares of its stock to a depository. If a broker then wishes to purchase 50,000 shares of ABC stock, some perhaps for its own account and some for customers, it would pay the depository the market price for those shares.[15] In return, the broker would effectively receive a 5% undivided, or *pro rata*, interest in the 1,000,000 share certificate.[16] If the investor then seeks to purchase 500 shares of ABC stock from that broker, the investor would pay the broker the market price for those shares and, in return, would effectively receive a 1% undivided interest in the broker's 5% undivided interest.[17]

The indirect holding system is "widely used in global trading of securities" [18] and decisively replacing direct holding because indirect holding reduces the overall costs and complexities of record-keeping and lowers the risk of loss occasioned by physically transferring securities.[19] Sometimes the securities intermediaries are transnational organizations. For example, securities traded through Euroclear, the world's largest securities

11 See *Prefatory Note* to *Uniform Commercial Code Article* 8, Part I.D.

12 *Id.*

13 *Id.*

14 *Id.*

15 The depository then would turn over that payment to ABC. Although the actual payment mechanics sometimes (*e.g.*, in underwritten securities offerings) might work differently, the differences would not be relevant to this article's analysis of intermediary risk.

16 1,000,000 shares (held by depository) x 5% (broker's interest) = 50,000 share equivalent.

17 1,000,000 shares (held by depository) x 5% (broker's interest) x 1% (investor's interest) = 500 share equivalent. There are two clarifications to the foregoing example. In practice, the broker is most likely to buy equivalent shares in order to accommodate a simultaneous sale to the investor. Also, at least under UCC Article 8, the actual records would reflect the flat number of shares (in the foregoing example, 500), to avoid any confusion if the broker's undivided interest in the certificate later increases. These technicalities, however, are irrelevant to this article's arguments.

18 Roy GOODE, "The Nature and Transfer of Rights in Dematerialized and Immobilized Securities", in *The Future for the Global Securities Market, Legal and Regulatory Aspects* 107, 110 (Fidelis Oditah ed., 1996).

19 Investors, *e.g.*, "obtain expert safekeeping services rather than running the risk of keeping physical possession of their own certificates, assure themselves of the ability to transfer securities rapidly in settlement of trades, and obtain professional services in the complex record keeping involved in tracking their investments, distributions, calls, and the like." James Steven ROGERS, "Revised UCC Article 8: Why It's Needed, What It Does", *UCC Bulletin* 3 (Dec. 1994). Accord, *Prefatory Note* to *Uniform Commercial Code Article* 8, Part I.A.

intermediary for internationally traded securities,[20] are held by local depositories that are members of the Euroclear depository network.[21] Other times, the securities intermediaries are national entities that have created linkages through which a non-resident of the country of issue of a security could effect settlement of a cross-border trade: (1) through direct access to (membership in) the securities intermediary in the country of issue, *e.g.* DTC in the United States; (2) through a local agent that is a member of the securities intermediary in the country of issue; (3) through a global custodian that employs a local agent as sub-custodian; (4) through a securities intermediary in the non-resident's own country that has established a link to the securities intermediary in the country of issue; or (5) through an international securities intermediary, *e.g.* Euroclear or [CEDEL], that has established a direct or indirect (through a local agent) link to the securities intermediary in the country of issue.[22]

For ease of discussion, this article will use certain simplifying terminology when referring to a transaction with more than one securities intermediary. First, the term "investors" generally will be deemed to include not only investors but also intermediaries that have rights in securities held by other intermediaries. Second, when necessary to avoid confusion, this article will refer to a holder of an interest in securities through an intermediary that itself holds an interest in the securities through an intermediary as a lower-tier holder, and to that holder's interest as lower-tier rights. Thus, in the example used earlier in which a broker effectively holds a 5% interest in 1,000,000 shares of ABC stock held by a depository and an investor effectively holds a 1% interest in that 5% interest, the investor would be a lower-tier holder (and its interest would constitute lower-tier rights) with respect to both securities intermediaries, whereas the broker would be a lower-tier holder (and its interest would constitute lower-tier rights) only with respect to the depository.

Status of Indirect Holding Intermediary Risk

States are only now beginning to grapple with the intermediary risk raised by indirect holding.[23] Investors want to know that their fractional undivided interests in securities held by failed securities intermediaries are not subject to the claims of creditors of those intermediaries. Securities intermediaries such as brokers that themselves own undivided interests in securities held by failed intermediaries want to know that those interests are not subject to the claims of creditors of the failed intermediaries. Furthermore, the problem of intermediate risk is equally relevant for parties, such as lenders, that extend secured credit

20 See <http://www.euroclear.com/eoc/template.htm>. Euroclear is operated by the Brussels office of Morgan Guaranty Trust Company of New York and owned by Euroclear Participants, which are firms engaged professionally in the securities markets that meet admission criteria based, among other things, on financial soundness and reputation in the market. *Id.*

21 Hal S. SCOTT & Philip A. WELLONS, *International Finance* 845 (6th ed. 1999).

22 SCOTT & WELLONS, *supra* note 21 at 839-40.

23 Although there are numerous legal risks associated with indirect holding of securities, only intermediary risk is unique to an indirect holding system; other legal risks arise in any securities holding system and are addressed by traditional legal disciplines, such as the law of contract, agency, corporations, and securities regulation. See *Intermediary Risk, supra* asterisked footnote.

to investors because a creditor necessarily takes its security interest in collateral subject to any limitations of the transferor's rights therein.[24]

The issue of intermediary risk in the indirect holding system appears to be resolved only in the United States [25] and perhaps a handful of other countries.[26] This limited resolution, however, may reflect the complexities of the issue more than lack of concern. Federal Reserve Board Chairman Alan GREENSPAN has urged other nations to follow the lead of the United States in eliminating legal uncertainties by modernizing their legal rules on

24 This results from the universally recognized principle of *nemo dat quod non habet*, or one who has not cannot give. See, *e.g.,* Spiro V. BAZINAS, "An International Legal Regime for Receivables Financing: UNCITRAL's Contribution", 8 *Duke Journal of Comparative & International Law* 315, 319 (1998) (noting recognition of this principle in civil law States). Thus, a recent report by the First Secretary at the Permanent Bureau of the Hague Conference on Private International Law concludes that "there seems to be no reason to distinguish for [intermediary risk] purpose[s] title transfers under collateral transactions from ordinary transfers by way of sale." See "The Law Applicable to Dispositions of Securities Held Through Indirect Holding Systems", report prepared by Christophe BERNASCONI, First Secretary at the Permanent Bureau, Hague Conference on Private International Law, to the Working Group of January 2001 [regarding the taking of investment securities as collateral] 8 (Nov. 2000 Prelim. Doc. No. 1) available on http://www.hcch.net/e/workprog/coll_sec_pd1.pdf (hereinafter, the "*Bernasconi Report*").

25 In the U.S., Article 8 of the Uniform Commercial Code ("UCC") was recently revised to address concerns that intermediary risk in the indirect holding system would become systemic. Revised Article 8 resolves intermediary risk by clarifying that investors have property rights in the securities (or interests therein) held for them by intermediaries, not merely *in personam* claims against the intermediaries. See UCC § 8-503. Accordingly, these securities and interests "are not property of the securities intermediary, and are not subject to claims of creditors of the securities intermediary," except in specific cases that should not pose the threat of systemic risk. UCC § 8-503(a).

26 See*, e.g., Bernasconi Report*, *supra* note 24 at 3 (observing that "[i]n most jurisdictions, neither the substantive laws governing securities transactions nor the rules determining the law applicable to such transactions have been updated adequately to reflect this" risk). Besides the United States, only a handful of other countries appear to have addressed this risk. For example, Japan adopted a law providing that parties are presumed to have joint ownership in deposited stocks according to the records of their account books. See *Kabukento no Hokan to Furikae ni Kansuru Horitsu* [Law Concerning Keeping of Shares and other Securities], Law. No. 30 of 1984, Art. 24. Korea enacted legislation similar to the Japanese law. See *Chunggwonkoraebop* [Securities and Exchange Act], Act No. 2920 (1976), Art. 174-4, translated in KOREA LEGISLATION RESEARCH INSTITUTE, 11 *Statutes of the Republic of Korea* 720 (1997). German law gives investors preference, in certain circumstances, over creditors of an insolvent custodian with respect to securities owned by the custodian. See Bernd RUSTOR, 4 *Business Transactions in Germany* (FRG) § 39.16[e] (1987); *Gesetz über die Verwahrung und Anschaffung von Wertpapieren* (Depotgesetz – Depot G), v. (BGBI. I. S. 36). And Belgian law gives investors title to their share of dematerialized or immobilized securities. *Belgian Royal Decree No. 62 Facilitating the Circulation of Securities* (Nov. 10, 1967, as amended Apr. 7, 1995); see also Nina HVAL, "Credit Risk Reduction in the International Over-the-Counter Market: Collateralizing the Net Exposure with Support Agreements", 31 *International Lawyer* 801, 815-816 (1997) (explaining this Decree). Canada also is considering adopting provisions similar to UCC Article 8. See Eric SPINK, "Tiered Holding System – Uniform Legislation Project", Report of the Production Committee (1997), available on <http://www.law.ualberta.ca/alri/ulc/current/etiered.htm>. See also *Bernasconi Report*, *supra* note 24 at 21-24 (describing certain provisions in English, Luxembourg, French, Italian, and Brazilian law); Gilles THIEFFRY & Julie LYNCH BRIDSON, "Minimising Legal Uncertainty in Cross-Border Collateral Transactions", *Banking* 2000 2, at <http://www.bankingmm.com/sexc/sexc11.html> (visited Aug. 3, 2001) (reporting that Belgium and Luxembourg, the places of organization respectively of the depositories Euroclear and Cedelbank, have adopted legislation intended to reduce some of the uncertainty associated with conflict of law issues governing the transfer and pledge of securities held through intermediaries; and that the European Union adopted a Directive on Settlement Finality in Payment and Securities [Settlement] Systems [referring to the European Parliament's Directive 98/26/EC of May 19, 1998] that is intended to clarify the conflict of law rules governing collateral transactions in European Union settlement systems).

indirect securities holding.[27] The Hague Conference on Private International Law has placed this issue on its agenda,[28] by its mandate [29] focusing on the narrower topic of applicable law rules (as opposed to the unification of substantive law rules, which my article addresses).[30] And other international organizations, such as the International Institute for the Unification of Private Law (UNIDROIT) and the United Nations Commission on International Trade Law (UNCITRAL), are focusing (as does my article) on modernizing and unifying substantive legal rules on indirect securities holding.[31]

II. – ANALYSIS

Because securities trading crosses borders, intermediary risk must be addressed in an international context.[32] The analysis is set forth at length in my *Intermediary Risk* article [33] and therefore is only summarized here.

The analysis begins by examining the simple case in which an intermediary holds securities in which it has no beneficial rights. It then builds on that examination by analyzing the more difficult case, associated with the indirect holding system for securities and other transactional patterns, in which an intermediary holds securities in which it shares beneficial rights. These examinations reveal that there is no reliable precedent for the treatment of intermediary risk.

27 See ROGERS, "Policy Perspectives ...", *supra* note 3 at 1438 (quoting Chairman Greenspan's March 3, 1995 remarks to this effect at the Financial Markets Conference of the Federal Reserve Bank of Atlanta).

28 Hague Conference on Private International Law, "Conclusions of the Special Commission of May 2000 on General Affairs and Policy", Preliminary Document No. 10 of June 2000 for the attention of the Nineteenth Session, at 30.

29 See <http://www.voc.net/nl/hc/#Operation>.

30 See <http://www.voc.net/nl/hc/#Operation>, Hague Conference's "Conclusions of the Special Commission of May 2000 on General Affairs and Policy", *supra* note 28 at 29 which explains in the context of the indirect holding system that "[b]ecause securities have become computerised and because of the multiple levels of intermediaries, the traditional rule of *lex situs* is no longer appropriate in this situation," and therefore recommends the clarification of "applicable law rules for securities held through intermediaries [as] a basis for the world-wide adoption of consistent principles"). See also *Bernasconi Report*, *supra* note 24 at 4.

31 See *Comments on the Proposed Hague Convention on the Law Applicable to the Dispositions of Securities Held Through Indirect Holding Systems* 1 (Jan. 12, 2001) (submitted by UNIDROIT to the meeting of the Group of Experts, The Hague, Jan. 15-19, 2001) (stating that, "following advice by some of the private-sector experts involved, UNIDROIT may address the inherent problems of substantive law"). See also e-mail from Harold S. BURMAN, U.S. Department of State, Office of Legal Adviser (Private International Law), to the author (Aug. 7, 2000) (summarizing an August 3, 2000 teleconference of the Global Electronic Policy Subcommittee in which there was a consensus that "it may be timely to pursue unification of substantive rules[, which] already has been suggested as a topic for UNCITRAL within its secured interest working group"); as regards UNIDROIT, see UNIDROIT 2001, C.D. (79) 24, Report on the 79th Session of the Governing Council (Lisbon, 10-13 April 2000), at 3-5, indicating a preliminary list of problem areas regarding "Transactions on Transnational Capital Markets", and reporting the decision of the Governing Council "to set up a Study Group with the task of establishing member States' priorities with regard to the item transactions on transnational and connected capital markets with a view to commencing actual work as early as practicable"; *cf. Bernasconi Report*, *supra* note 24 at 4, 26 (noting that although the Hague Conference's "proposed Convention will be confined to *conflicts of laws issues*," harmonizing "the substantive law relating to the nature of interests in respect of securities held through intermediaries is a major undertaking that may be considered by UNCITRAL or UNIDROIT in the near future").

32 *Intermediary Risk, supra* asterisked footnote, argues that a unified approach to intermediary risk is also needed to address other forms of financing in which money flows through an intermediary.

33 *Supra* asterisked footnote.

The analysis then proceeds from first principles. It is a fundamental axiom that a creditor *qua* creditor cannot validly claim more rights than its debtor has in property.[34] This is a corollary of the universally recognized principle of *nemo dat quod non habet*, or one who has not cannot give.[35] Commercial law generally respects *nemo dat* (and by extension the axiom) [36] with only limited exceptions that are not applicable in this context.[37] If, therefore, an intermediary only owns a partial (*e.g.*, undivided) interest in securities, the axiom indicates that the intermediary's creditors in their capacity as such only should be able to reach that partial interest.

This axiom might appear to, but in fact does not, resolve the problem of intermediary risk. *That is because the difficult problem in analyzing intermediary risk is even more fundamental than the axiom: defining what rights the debtor should have in the property.* One simply cannot assume that contracts that purport to allocate partial rights – such as undivided interests – between intermediaries and investors should be enforced. Contracts are not universally enforced, notwithstanding the banner of freedom of contract. The presumption of contract enforceability is generally rebuttable where the contract violates law, harms the contracting parties (paternalism), or materially impinges on the rights of third parties (material externalities).[38] Hence, a contract that purports to allocate partial property rights between an intermediary and investors might be unenforceable if it violates law, causes such harm, or materially impinges on third-party rights. If unenforceable, the contract would be ineffective to allocate these partial property rights. That, in turn, would expose the property to claims of the intermediary's creditors, creating intermediary risk. The issue of intermediary risk thus conceptually turns on whether contracts that allocate partial property rights between intermediaries and investors *should*, for one of these reasons, be unenforceable.

In the context of the indirect holding system for securities, there is little reason to think that such contracts should violate law. I will assume for purposes of this article that they do not. Paternalistic concerns are also unlikely in this context because the

34 See*, e.g.,* Ian F. FLETCHER, *Insolvency in Private International Law*, 61-62 (1999) ("It is one of the fundamental principles of English bankruptcy law that the trustee in bankruptcy takes the bankrupt's property 'subject to equities,' in the sense that any imperfections in that title, and any valid and subsisting claims arising from the property or any security rights previously effected in relation to it, are transmitted intact so as to be exercisable against the trustee as the new owner."). The rationale is that "the trustee is essentially a *successor* to such title as the bankrupt actually had at the time of his adjudication, including any limitations or imperfections in that title, and can enjoy no better position in relation to the property than did the bankrupt himself formerly." Ian F. FLETCHER, *The Law of Insolvency*, 205 (2d ed. 1996). See also *In re* Kinsler, 24 B.R. 962, 967 (Bankr. N.D. Ga. 1982) ("The Debtor's creditors could not get more than that to which the Debtor is entitled").

35 See*, e.g.,* Spiro V. BAZINAS, *supra* note 24.

36 See*, e.g.,* John F. DOLAN & Lawrence PONOROFF, *Basic Concepts in Commercial Law*, 6 (1998) (arguing that the concept that transferees can enjoy greater rights than their transferors enjoyed "is an idea that offends clear thinking. To take by transfer more than the transferor had is akin to magic").

37 For example, bona fide purchasers of goods and holders in due course of negotiable instruments are not necessarily subject to defenses and encumbrances to which the transferor is subject. See UCC §§ 2-403, 3-305, 9-307. The rationale for these exceptions – that the importance of free market transferability should override *nemo dat* in these situations – has been questioned, however, and in any event does not apply to the transaction patterns of this article. See *Intermediary Risk, supra* asterisked footnote.

38 See*, e.g.,* Steven L. SCHWARCZ, "Rethinking Freedom of Contract: A Bankruptcy Paradigm", 77 *Texas Law Review*, 515, 545-46 (1999). *Cf.* Michael J. TREBILCOCK, *The Limits of Freedom of Contract*, 58, 147 (1993).

intermediaries are generally sophisticated commercial entities and the investors are often sophisticated or repeat players.

Accordingly, the contractual allocation of rights between an intermediary and investors should be enforceable absent the creation of material externalities. In our case, this allocation is effectuated pursuant to contracts in which intermediaries purport to sell undivided interests in their securities to investors. The potential externality is that a person extending credit to an intermediary may be misled into thinking that the intermediary owns all rights in the securities that it holds.[39] This externality is material because it goes to the very essence of the intermediary's ability to repay its creditors.

Although this externality can be mitigated and made non-material by disclosing the lack of ownership to potential creditors, disclosure would be ineffective against existing or involuntary creditors. These creditors therefore will be unable to engage in an informed allocation of risk, and the externality will remain. Legal systems therefore must address the extent to which contracts in which intermediaries purport to sell undivided interests in their securities to investors, thereby producing this material externality, should be enforced.

If these contracts are enforced, the investors would own the securities held by the intermediary to the extent of their undivided interests therein, and the intermediary would have no rights in the investors' interests in those securities. The investors then would have priority over claims of the intermediary's creditors in accordance with the aforesaid axiom that a creditor *qua* creditor cannot validly claim more rights than its debtor has in property. But if these contracts are not enforced, the investors would only be left with *in personam* claims against the intermediary, which would be *pari passu* with other unsecured claims and effectively subordinate in priority to secured claims.

To determine which path the law should take, I attempt to compare the consequences of enforcement with those of non-enforcement. Comparison is appropriate because I do not focus on whether, but merely assume that, the indirect holding system justifies its externalities. If I were to assume otherwise, my analysis would have to take into account the externalities that would be caused by prohibiting the indirect holding system, such as the increased costs and complexities of record-keeping and increased risk of loss occasioned by physically transferring securities. My analysis merely focuses on which parties – an intermediary's creditors, or its investors – should bear the externalities.[40]

39 *Cf.* Philip R. WOOD, *Principles of International Insolvency*, 36 (1995) (arguing that traditional civil law objections to the trust may be based on a concern that trusts are unfair to creditors of the legal owner, who believe they can claim against all assets that the legal owner appears to own).

40 This approach is a variant of the traditional law and economic approach of allocating risk to the lower-cost bearer of the costs of risk-bearing and monitoring. See*, e.g.,* Jeffery L. HARRISON, *Law and Economics*, 94 (2d ed. 2000). The first part of the variation – comparing consequences, instead of merely comparing which parties (the intermediary's investors or creditors) are the lower-cost risk bearers – is needed because the consequences of enforcing or not enforcing contracts that purport to transfer undivided interests affect more than those parties. The second part of the variation – disregarding which parties are the lower-cost monitors – is merely a deferral of that analysis for the sake of clarity. I later show that the same parties who are the lower-cost risk bearers are also the lower-cost monitors. That the lower-cost risk bearers and monitors are the same parties makes the analysis of risk allocation relatively simple by avoiding the need to discount the consequences of the risk by the probability of the risk occurring ("risk" being a function of both the probability of the risk-event occurring – the term "monitoring" merely being shorthand for trying to prevent the risk-event – and the amount of loss that will result if the risk-event in fact occurs).

In the context of the indirect securities holding system, the enforcement of contracts in which intermediaries purport to sell undivided interests in their securities to investors would give investors priority over claims of the intermediary's creditors. This might appear to discourage financiers from extending credit to intermediaries to enable them to engage in margin lending – the on-lending of such credit to investors to enable them, in turn, to purchase securities. Whether margin lending would be discouraged, however, is doubtful: intermediaries typically require investors to pledge the purchased securities as collateral for their margin loans, and financiers concerned about the credit of their borrowers will require the intermediaries to re-pledge these securities as collateral for the original credit.[41] This re-pledge effectively provides those financiers with priority over competing investor claims.[42]

Non-enforcement, on the other hand, would leave investors with mere *in personam* claims against intermediaries, which would be *pari passu* with other unsecured claims and effectively subordinate in priority to secured claims. The consequence then may be to discourage investors from dealing with any but the financially strongest intermediaries.[43] Moreover, even if an investor were to attempt to protect itself by dealing with a financially strong intermediary (such as a large and established brokerage house), it could not easily control the selection of upper-tier intermediaries – the investor may not, for example, even know the identity of all the upper-tier intermediaries. Yet, the failure of an upper-tier intermediary would permit that intermediary's creditors to attach securities in which the investor owns an interest. And even if the investor's intermediary were made liable, by law or contract, for upper-tier intermediary risk, an upper-tier intermediary's failure could, in an example of systemic risk, impair the ability of lower-tier intermediaries to pay their obligations. Recognizing this risk, investors may refuse to invest.

The balance therefore appears to favor contract enforcement. With enforcement, investors are protected, and financiers concerned about extending credit to intermediaries can protect themselves by demanding collateral. But without enforcement, investors would be exposed.[44] Hence, in an indirect securities holding system, contracts in which intermediaries purport to sell undivided interests in their securities to investors should be

41 Kenneth C. KETTERING, "Repledge Deconstructed", 61 *University of Pittsburgh Law Review* 45, 51(1999).

42 *Id.* at 185. In some States, it might be desirable to give even broader priority to claims of the intermediary's creditors over ownership interests of investors. As a practical matter, such priority could be achieved by statutorily subordinating investor ownership to such claims. Because, however, that could discourage investment, a State might not wish to impose subordination without compensating impaired investors, such as through regulatory protection of their interests.

43 For example, the "common response" in civil law States that lack a default rule limiting intermediary risk is "to employ as [intermediaries] only large and stable institutions, such as banks, that are unlikely to go bankrupt." Henry HANSMANN & Ugo MATTEI, "The Functions of Trust Law: A Comparative Legal and Economic Analysis", 73 *New York University Law Review* 434, 458 (1998) (citation omitted).

44 Only financiers would be protected, and even their protection would be at risk where the intermediary-borrower itself obtains its interest in securities through a financially weak intermediary; without enforcement, the financier's claim against its intermediary-borrower would be effectively subject to prior claims of creditors of the financially weak intermediary.

enforced, notwithstanding externalities to the intermediary's creditors. Intermediary risk thus should not arise.[45]

There appear to be only two arguments, both of which would fail, against this conclusion. The first argument is that, as between two parties, risk sometimes should be allocated to the lower-cost monitor of the risk. In our case, however, the intermediary's creditors *are* the lower-cost monitors because they already have an incentive to monitor the intermediary, the only party to which they can look for repayment. Investors, on the other hand, have no incentive, absent the existence of intermediary risk, to monitor the intermediary because they can only look to (and therefore only will monitor) the issuer for repayment. Concern over intermediary risk would only increase the overall monitoring cost by imposing on investors the additional incentive to monitor their intermediaries but, because an intermediary's bankruptcy would continue to jeopardize creditor repayment, not commensurately reduce the monitoring incentive of creditors. Furthermore, intermediary risk may increase more than monitoring cost if investors opt out of transactions in which this risk could arise. For example, investors faced with monitoring their immediate intermediary as well as each upper-tier intermediary whose identities may not even be known may decide to shift their investments to securities that are subject to direct holding. This shift, however, would further increase costs by forgoing the very real benefits that led to the creation of the indirect holding system.[46]

The second argument against enforcing contracts for the sale of undivided interests in securities is that divided ownership is traditionally viewed as inefficient because it would be awkward or impractical for the market alone to determine which third-party-transferees are to share possession with current owners. This argument fails because traditional inefficiencies do not apply to the transaction patterns of this article.[47] For example, the price of securities is readily determinable from the market, so each investor's undivided interest in securities at any time is simply the dollar amount of such investor's investment in such securities divided by the aggregate dollar amount of all unpaid investments in such securities. Accordingly, such contractually sharing of undivided interests should not, in and of itself, be inefficient.

I therefore conclude that contracts in which intermediaries purport to sell undivided interests in their securities to investors should be enforced, notwithstanding externalities to the intermediary's creditors. This, however, is a normative thesis. I next examine how it can be implemented into a rule of positive law.

45 I also reached this same conclusion in the context of each other transaction pattern considered. See *Intermediary Risk, supra* asterisked footnote. My conclusion therein, stated more intuitively, is that if a given transfer of assets would constitute a sale, the fact that only an undivided interest in those assets is being transferred should not defeat sale treatment.

46 Actual experience with loan participation and securitization transactions illustrates the cost increases from opting out. Banks frequently engage in the more complex and costly process of loan syndication in order to avoid intermediary risk from participations. Parties also frequently contract out of intermediary risk in securitizations by structuring their transactions, at increased cost, as sales of whole receivables. See *Intermediary Risk, supra* asterisked footnote.

47 *Id.*

III. – IMPLEMENTATION

In a domestic legal system, implementation of a proposition into law is relatively straightforward: articulate the proposition as a rule of law and enact the law. But in an international context, it is additionally necessary – in order to minimize transaction costs [48] – to implement the rule of law in a way that binds parties in different nation-States with maximum uniformity. To that end, I first examine how this article's thesis should be articulated as a rule of law. Then I examine how that rule should be implemented into law, taking into account that in many transactions involving intermediary risk, the parties – investors, intermediaries, and their creditors – may be located in diverse States.

Articulating the Thesis as a Rule of Law

This article's thesis is that an intermediary and investors should be able to make an enforceable contract that allocates their respective undivided interests in securities held by the intermediary, notwithstanding the creation of material externalities.[49] Because the thesis focuses on the enforceability of contracts, the simplest way to articulate it as a rule of law is to restate it in contract law terms. A hypothetical contract law rule thus might state that a contract between an intermediary and investors that purports to allocate their respective undivided interests in securities held by the intermediary shall be enforceable. This, however, might be insufficient because contract law usually only binds the parties to a contract.[50] Hence, third-party claimants – such as the intermediary's creditors – would not be bound.

Property law serves this function, and also is a more intuitive source of law in this context than contract law. In contrast to contract law, property law provides rights "good against the world", thereby binding non-contracting creditors.[51] Moreover, the consequence of the hypothetical contract law rule – that a contract between an intermediary and investors that purports to allocate their respective undivided interests in securities held by the intermediary shall be enforceable – is that such an allocation is effective to transfer

48 See, *e.g.,* Tamar FRANKEL, "Cross-Border Securitization: Without Law, But Not Lawless", 8 *Duke Journal of Comparative & International Law*, 255, 256 (1998) (arguing that "market and institutional intermediation are unlikely to arise, let alone flourish, without a legal infrastructure that provides uniform, predictable, stable rules of behavior").

49 See *Intermediary Risk, supra* asterisked footnote, where I actually analyze and propose a broader thesis: that an intermediary and investors should be able to make an enforceable contract that allocates their respective undivided interests in *any property* held by the intermediary, notwithstanding the creation of material externalities. The present article's narrower thesis is a subset of, and not intended to limit, that broader thesis.

50 See, *e.g.,* Michael W. MCCONNELL, "Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure", 76 *California Law Review*, 267 (1988) (observing that, analytically, "contract is a right good only as against determinate persons – those with whom one has made the contract").

51 See MCCONNELL, *supra* note 50 at 267 (observing that on the "sophisticated legal basis, expounded by Professor Wesley Hohfeld, ... the distinctive feature of property is that it is a right 'good against the world,' while contract is a right good only as against determinate persons ... with whom one has made the contract") (citing Wesley HOHFELD, "Fundamental Legal Conceptions as Applied in Judicial Reasoning", 26 *Yale Law Journal*, 710 (1917), and explaining that "A particular object may give rise to both contractual rights and property rights. X may contract with Y for exclusive use and enjoyment of real property owned by Y. X has a contractual right as against Y; if Y enters the property he is in breach of contract. However, X also has obtained, by virtue of the contract, rights against the world, in the nature of property rights.").

ownership of these interests. Transferring ownership, however, is traditionally addressed by property law.

The thesis therefore would have broader and more intuitive application if formulated as a rule of property law.[52] Such a rule could be *tentatively* articulated as follows:

> "The transfer of an undivided fractional interest in securities shall constitute a valid and enforceable transfer of that interest to the same extent and in the same manner as if that interest had been a separate asset."

The next step is to examine how this proposed rule should be implemented into property law on an international basis. Before engaging in that examination, however, it is necessary to ascertain whether the proposed rule should be subject to any exceptions.

Exceptions to the Proposed Rule

As a reality check, it is useful to compare the proposed rule to existing law that addresses intermediary risk. The most comprehensive such law is Article 8 of the UCC, which conceptually is consistent with the rule subject to three exceptions.

The first exception is for multiple tiers of intermediaries. An investor may not be in privity with all of the intermediaries that hold securities in which the investor owns an interest. It would be difficult for intermediaries that are not in privity to know the identity of those investors or the amount of their interests. Article 8 responds to this difficulty by limiting the ability of investors (and their creditors) to assert rights or claims against intermediaries that are not in privity. My analysis concludes that the proposed rule should similarly limit the assertion of rights and claims because, among other reasons, it is impractical in an indirect holding system for upper tier intermediaries to maintain records about, or even to know the existence of, investors with which they are not in privity.[53]

The second exception arises where investors don't need priority in order to satisfy their rights. This exception, however, is trivial because intermediary risk then would be non-consequential; therefore, any intermediary risk permitted by this exception could not give rise to systemic risk.

The third exception arises where secured creditors are in control of an intermediary's securities.[54] This exception appears extraordinary because it subordinates a third party's ownership interest to a security interest given without consent of the owner; thus, in the

52 In the context of revising UCC Article 8, some scholars have opposed property-based rules. See*, e.g.,* Jeanne SCHROEDER, "Is Article 8 Finally Ready This Time? The Radical Reform of Secured Lending on Wall Street", 1994 *Columbia Business Law Review*, 291, 357 (1991); MOONEY, *supra* note 3 at 310. These scholars, however, appear to have been opposing only the application of *traditional* property rules that attempt to trace property to *specific* underlying securities, not the concept of undivided ownership.

53 See *Intermediary Risk, supra* asterisked footnote. This limitation also would foster finality of settlement in securities trades. *See, e.g.,* Comment 3 to UCC § 8-503: "Although one can devise hypothetical scenarios where particular customers might find it advantageous to be able to assert rights against someone other than the customers' own intermediary, commercial law rules that permitted customers to do so would impair rather than promote the interest of investors and the safe and efficient operations of the clearance and settlement system. ... The uncertainties that would result from rules permitting such recoveries would work to the disadvantage of all participants in the securities markets."

54 Under UCC § 8-511, secured creditors in control of an intermediary's securities have priority over lower-tier holders.

event of a dispute between investors and secured creditors of an insolvent intermediary, the investors' ownership interest would be subordinate to secured creditor claims.

One possible explanation for this exception is pragmatic,[55] but a pragmatic explanation is ultimately unconvincing.[56] Another explanation is that the exception merely reflects how the market actually works; but that is not persuasive because one should not respond to an "ought" question with an "is" answer.[57] The official comments to Article 8 nonetheless offer a third, more compelling, explanation.[58] Investors are protected in the United States by a federal regulatory scheme against the risk that their ownership interests in securities held by a failed intermediary will be impaired.[59] This government protection thus minimizes the consequences of favoring secured creditors. Absent this type of comprehensive regulatory protection, however, it is doubtful that Article 8 would ever favor secured claims over ownership interests.[60] Accordingly, absent similar worldwide regulatory protection, there would appear to be insufficient justification for the proposed rule to favor an intermediary's secured creditors over investors. Nonetheless, on a case by case basis, States that have regulatory schemes protecting investors from the consequences thereof may wish to consider whether it is appropriate (for example, to encourage asset-based lending to securities firms) to favor an intermediary's secured creditors over investors as an exception to the proposed rule.

The foregoing analysis thus indicates that there should be only one general exception to the proposed rule, to address the problem of multiple tiering of intermediaries. Taking this exception into account, the rule can be restated as follows (as so restated, the "Rule"):

> The transfer of an undivided fractional interest in securities shall constitute a valid and enforceable transfer of that interest to the same extent and in the same manner as if that interest had been a separate asset. Holders of securities in which undivided interests have been transferred shall, to the extent of such transfers, be deemed to hold such securities for

55 See Comment 1 to UCC § 8-503.

56 See *Intermediary Risk, supra* asterisked footnote.

57 See*, e.g.,* Alan SCHWARTZ, "A Contract Theory Approach to Business Bankruptcy", 107 *Yale Law Journal*, 1807, 1814-15 (1998) (arguing that "the appropriate response to an 'ought' claim is an 'ought not' claim, not an 'is' claim").

58 See Official Comments to UCC § 8-511. Even this rationale fails to explain, however, why unsecured creditor claims are not likewise favoured.

59 Under Rules 8c-1 and 15c2-1 promulgated by the Securities and Exchange Commission, a securities intermediary is prohibited from giving a security interest in customer securities without the customer's consent. See Comment 2 to UCC § 8-511 (paraphrasing those SEC Rules). Brokers are required to maintain a sufficient inventory of unencumbered securities to satisfy customer claims. See SEC Rule 15c3-3; See also UCC § 8-504 (mirroring that requirement). If a failed broker fails to maintain a sufficient unencumbered inventory, its customers are protected against loss under the Securities Investor Protection Act, which established the Securities Investor Protection Corporation to pay that loss. See U.C.C. § 8-511 cmt. 2 (2000). See also Securities Investor Protection Act, 15 U.S.C. §§ 78fff-1 (d), 78fff-3 (a).

60 See Comment 2 to UCC § 8-511 (stating that "Article 8 is premised on the view that the important policy of protecting investors against the risk of wrongful conduct by their intermediaries is sufficiently treated by other law"). Accord*,* SCHROEDER, *supra* note 52 at 300-01 (cautioning that "[w]ithout [the regulatory protection provided in the U.S. by the SEC and SIPC], the overall preference given to the lending industry over consumers by the proposed revisions must be rethought."). But compare ROGERS, *supra* note 3 at 1539 (arguing that a highly regulated securities system is not essential to revised Article 8's functioning); e-mail from Eric Spink, Vice-Chair, Alberta Securities Commission, to the author 4-5 (Aug. 1, 2001) (on file with author) (arguing that favoring secured creditors over investors predates regulatory protection).

their transferees, but only transferors and transferees that are in privity may prosecute rights directly against each other on account of such transfers.[61]

In addition, States that have regulatory schemes protecting investors from the consequences thereof may wish to consider a non-uniform exception to the Rule, favoring an intermediary's secured creditors over investors.[62]

I next examine how the Rule can be implemented into law on an international basis.

Implementing the Rule into Law on an International Basis

In general, there are three ways that a rule can be implemented into law internationally. First, States can agree with one or more other States, in a treaty or convention, that they and their residents will observe the rule. Second, the rule can be formulated as a uniform model law to be enacted into national law by each State that wishes to do so. Third, the rule can be expressed as model language for parties to incorporate into their contracts as they deem appropriate. I argue that the Rule should be implemented as a uniform model law.

It is theoretically possible for the Rule to be implemented as a treaty, but such a formal approach appears unnecessary and might raise unwarranted political hurdles. It is unnecessary because the Rule does not purport to govern transactions between States *qua* States, merely transactions between residents of different States. Furthermore, one of the major advantages provided by a treaty – the ability to impose an international dispute settlement mechanism – is not needed in the context of the Rule. Implementing the Rule as a treaty might raise unwarranted political hurdles because some States, such as the United States, require extraordinary measures to bind themselves to a treaty. In practice, a rule that does not govern transactions between States *qua* States often can be more easily implemented through a uniform model law.

States that are prepared to adopt the Rule through a treaty therefore may simply prefer to enact it into national law based on a model law template. This sometimes is referred to as a uniform model law approach because, whenever a rule is formulated as a model law, the intention is for States to adopt the law in as uniform a manner as possible. Such an approach would be almost as effective as a treaty because, like a treaty, a model law would equally bind residents of States that have adopted it. Indeed, a model law, once adopted, is part of a State's national law, whereas treaties may have to provide that their rules be separately enacted by the State into national law in order to bind residents.[63]

61 As previously mentioned, *supra* note 49, in my *Intermediary Risk* article I analyse and propose a broader thesis and therefore (subject to exceptions) reach a broader rule: that an intermediary and investors should be able to make an enforceable contract that allocates their respective undivided interests in *any property* held by the intermediary, notwithstanding the creation of material externalities. The present article's narrower "Rule" is a subset of, and not intended to limit, that broader rule.

62 In this context, at least one noted scholar argues that favoring an intermediary's secured creditors over investors is a necessary consequence of the way that security interests ... work for securities. ... It's not that you can "[favor secured creditors] if you have a good regulatory structure; it's that you need a good regulatory structure because you must" favor secured creditors. E-mail from James S. ROGERS, Professor of Law, Boston College Law School and Reporter, NCCUSL Drafting Committee to Revise UCC Article 8, to Steven L. Schwarcz (Sept. 6, 2001).

63 This is not to say that a model law approach is categorically better than a treaty for implementing the Rule. A treaty approach, for example, could use the negotiation process to build consensus around the Rule and increase its perceived legitimacy. Any State unwilling or unable to ratify the treaty always could choose to

It is unrealistic, however, for the Rule to be implemented through model language for parties to incorporate into their contracts. This is because the parties primarily intended to be governed by the Rule – creditors of intermediaries – are not parties to, and therefore are not bound by, contracts between intermediaries and investors. In contrast, a State that enacts the Rule into its national law thereby binds not only intermediaries and investors but also creditors of intermediaries that are resident in that State.

IV. – CONCLUSIONS

The Rule therefore should be implemented as a model law, the text of which might read as follows:

Proposed Model Law to Regulate Intermediary Risk

(a) The transfer of an undivided fractional interest in securities shall constitute a valid and enforceable transfer of that interest to the same extent and in the same manner as if that interest had been a separate asset.

(b) Holders of securities in which undivided interests have been transferred shall, to the extent of such transfers, be deemed to hold such securities for their transferees, but only transferors and transferees that are in privity may prosecute rights directly against each other on account of such transfers.[64]

This model law approach is, of course, a model for the enactment of a uniform *substantive law*. It thus is useful, in closing, to compare this approach with the conflicts of law approach being considered by the Hague Conference on Private International Law. To be effective, each approach must address the problem that intermediary risk undermines the "absolute assurance" needed by lenders that

> "the collateral being pledged [to them] is enforceable against third parties." [65]

Such assurance requires that

> "[i]n the event of the insolvency of either the [investor] as collateral provider, or the financial intermediary, the [lender] has a perfected interest (either through outright ownership or a valid

enact national legislation consistent with the Rule. Also, a model law lacks an international oversight mechanism to ensure the consistency of each national law enacted pursuant to the template, whereas a treaty could create such an oversight mechanism.

64 States that have regulatory schemes protecting investors from the consequences thereof may wish to consider whether to adopt a non-uniform exception favoring an intermediary's secured creditors over investors, as discussed. Also, as previously discussed *supra*, notes 49 and 61, my *Intermediary Risk* article analyzes and proposes a broader thesis. Thus, it proposes a broader model law: "(a) The transfer of an undivided fractional interest in property shall constitute a valid and enforceable transfer of that interest to the same extent and in the same manner as if that interest had been a separate asset. (b) The transfer shall not be affected by the fact that the property in which the interest is being transferred is itself an undivided fractional interest. (c) Holders of property in which undivided interests have been transferred shall, to the extent of such transfers, be deemed to hold such property for their transferees, but only transferors and transferees that are in privity may prosecute rights directly against each other on account of such transfers." The present article's narrower proposed model law is a subset of, and not intended to limit, that broader model law.

65 THIEFFRY & BRIDSON, *supra* note 26 at 2.

security interest) in the collateral, free from the grasp of the [investor's], or the financial intermediary's, other creditors."[66]

Under existing legal systems, a lender can rarely obtain this assurance because it will not know, without consulting counsel in the investor's, each intermediary's, the issuer's, and perhaps other jurisdictions, whether its security interest has priority over the investor's and each intermediary's creditors. This uncertainty reflects that, in an indirect holding system, a proprietary interest in securities may

> "have a nexus with multiple jurisdictions – that of the issuer's place of organisation, the place where the underlying securities are physically located [in the case of securities evidenced by a certificate], the place where the register recording the interests [in securities] is maintained (assuming the securities are in registered form), the place where each intermediary maintains its records evidencing the book-entry interest and the place where the investor is located."[67]

The transaction costs of consulting counsel in so many jurisdictions can be prohibitive.

A conflicts of law approach would address this problem by imposing international rules to clarify which jurisdiction's laws are applicable, thereby reducing transaction costs.[68] However, a conflicts of law approach cannot, by itself, fully resolve this problem. Sometimes conflict of law rules might point, for example, to a jurisdiction whose substantive law effectively subordinates the lender's security interest to rights of the investor's or an intermediary's creditors. Also, whereas this discussion so far has assumed that the lender is collateralized by a *proprietary interest* in securities, sometimes there is uncertainty whether the collateral is a property right in underlying securities or merely an *in personam* claim against the immediate intermediary.[69] Then,

> "[n]o collateral taker would likely assume [the] intermediary insolvency risk."[70]

A substantive law approach, in contrast, would conclusively solve these problems to the extent nations harmonize their laws to clarify that investors in indirect holding systems hold, and therefore lenders to such investors would be collateralized by, proprietary interests in securities as to which lower-tier holders (such as investors) always have priority over upper-tier holders (such as intermediaries) and their creditors. That is the approach taken in this article and indeed by the UNIDROIT Secretariat, which has begun consultations with its member States in this vein, and it will form the basis for the deliberations of the study group which is to be established shortly.[71]

66 Accord, *id.*, *Bernasconi Report*, *supra* note 24 at 1 (arguing that a lender needs to know, before extending credit to an investor under the Report's typical fact pattern, "which requirements have to be fulfilled so as to ensure that the [lender] will receive an interest that will prevail over the interests of third parties").

67 THIEFFRY & BRIDSON, *supra* note 26 at 2. See also *Bernasconi Report*, *supra* note 24 at 16-17.

68 See *id.* at 26, 31-39.

69 See *Bernasconi Report*, *supra* note 24 at 20, 29.

70 THIEFFRY & BRIDSON, *supra* note 26 at 3.

71 Accord, *id.* at 5 (concluding that "[o]nly after all jurisdictions modernise, and ideally standardize[,] their laws [ ] will we mitigate further the risks, legal uncertainties and additional costs associated with cross-border collateral transactions").

LA DÉTENTION INDIRECTE DE TITRES ET LES RISQUES LIÉS À L'INTERVENTION D'INTERMÉDIAIRES *(Résumé)*

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De plus en plus, les marchés financiers mondiaux sont structurés autour d'intermédiaires agissant entre investisseurs et sociétés rémunératrices, dont l'intervention a pour effet de réduire les niveaux de risque des opérations. Cette construction génère cependant elle-même un risque nouveau, à savoir que les créanciers d'un intermédiaire devenu insolvable revendiquent des actifs que ce dernier détenait au bénéfice d'investisseurs. Si l'intermédiaire détient les actifs uniquement en qualité de gardien, ce risque relève traditionnellement du régime juridique du mandat et du droit du trust*. La nouveauté est ici que les intermédiaires, dans une large gamme de rapports internationaux – notamment le commerce des valeurs en portefeuille, la vente de titres de participations associées à des prêts et les opérations de titrisation –, détiennent aujourd'hui des actifs sur lesquels leurs droits, tout comme ceux des investisseurs, sont de nature purement économique. La portée de tels droits crée une incertitude importante pour les créanciers qui ne savent pas s'ils peuvent compter sur l'ensemble des actifs ou seulement sur les droits de l'intermédiaire pour réaliser leurs créances. Les risques liés à l'intervention d'intermédiaires ("*intermediary risk*"), outre le fait qu'ils affecte directement l'investisseur et augmentent les coûts des opérations, peuvent aussi avoir des effets systémiques: la faillite d'un intermédiaire pourrait déclencher une faillite en chaîne des institutions d'investissement qui ont contracté avec lui.*

*De plus, ce problème soulève des questions juridiques nouvelles dans la zone d'ombre qui sépare le droit commercial du régime juridique de la propriété. Visant le système de détention indirecte pratiqué sur le marché mondial des valeurs mobilières, le présent article analyse d'abord de quelle façon les systèmes juridiques pourraient répondre à un tel risque et, concluant à la nécessité d'une réglementation uniforme en matière d*e risque de l'intermédiaire*, il examine comment une telle règle pourrait être mise en œuvre au niveau international.*