

TRANSACTIONS ON TRANSNATIONAL AND CONNECTED CAPITAL MARKETS

DESCRIPTION

The global financial system is only as good as the infrastructure that supports it. The smooth functioning of the system – and the confidence on which it depends – will be threatened if its infrastructure is considered unreliable. This is a particular concern in cross-border trading of securities because there are very often no common or even consistent structures, standards or operational rules. This concern was stressed by a number of international governmental and non-governmental organisations, like the EU Commission and the Group of Thirty, since the middle of the 1990s.

Substantial work has already been undertaken to address legal uncertainty in respect of the indirect holding of securities. For example, the Settlement Finality and Financial Collateral Directives harmonise key aspects of the laws of EU member States relevant to securities settlement systems and indirectly held securities, while the concerns relating to conflict-of-laws issues are addressed by the 2002 Hague Convention on indirectly held securities. But the former of these instruments operates only at a regional level while the latter is confined to rules to determine the applicable law.

In 2002, UNIDROIT embarked upon a project entitled “Harmonised substantive rules regarding securities held with an intermediary”. The Study Group convened by the Secretary-General of UNIDROIT to deal with the subject and comprising 13 leading experts in the field of the law of securities holding drafted an international instrument capable of improving the world-wide legal framework for securities holding and transfer, with special emphasis on cross-border situations. The purpose of the convention is to promote investor protection and the efficiency of the markets, particularly in cross-border transactions, and to reduce systemic risk.

It is important to consider the modernisation and harmonisation of key aspects of substantive law relevant to the cross-border holding and transfer of securities held through intermediaries. The issues at stake can be divided into two categories:

- the first category is **internal soundness**, which comprises issues relating to the key features which any structure for the holding and transfer of securities through intermediaries must possess if it is to be regarded as sound, bearing in mind in particular the objectives of investor protection and efficiency.
- the second category is **compatibility**, which comprises issues affecting the ability of different legal systems to connect successfully where securities are held or transferred across national borders

The provisions included in the instrument are entirely built on these two categories. They treat questions as important as investor protection in case of the insolvency of its securities custodian (bank or broker) and protection of the entire financial system as such against the so called “systemic risk”, i.e. the domino effect of failure of a major financial institution in the global securities market.

Further items on the Work programme are to address the creation of improved rules for trading on emerging markets, the development of statements for “global shaves” and delocalised transactions.

Who Benefits?

Investors, who are protected against loss of their assets to the intermediary’s general creditors.

Financiers taking investment securities as collateral for loans

Intermediaries (banks, brokers, central securities depositories, etc.), by reason of the increased legal certainty and the fact that the costs of transactions are cut.

The financial system, which is strengthened, while its efficiency and certainty are increased.