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REPORT
of
Ad hoc Working Group on Legislative Techniques for the Implementation of the *preliminary draft Convention on Harmonised Substantive Rules regarding Intermediated Securities*

The Committee of Governmental Experts ("the CGE"), during its session in May 2005, endorsed the "functional approach", one of the basic principles that underlies the drafting of the preliminary draft Convention on intermediated securities ("the draft Convention"). The reason for adopting the "functional approach"(which formulates rules by reference to facts and intentionally employs neutral, rather than "technical", language) is to enable the draft Convention to be accommodated by different domestic legal traditions in different jurisdictions without causing unnecessary disruption.

Against this background two issues were raised during discussions in the CGE, namely -

whether the current text of the draft Convention is consistent with the "functional approach" in the sense that it *could* be adopted in different jurisdictions as it stands *without* disrupting domestic legal traditions, and

which type of international instrument (binding Convention or "soft law" instrument) was most appropriate to give effect to, and secure the objectives of, its provisions.

In order to clarify thinking on these two issues the CGE proposed that inter-sessional research should be undertaken by an informal *Ad hoc* working group, to be chaired by the Italian delegation ("the Group"). Participants in the Group were to be asked to share information concerning their States implementation of international commercial law instruments and exchange opinions on how legal effect might be given to certain specific provisions of the draft Convention in their own State.

In June, members of delegations and observers were invited to join the Group. In July, those who accepted were sent a questionnaire. The purpose of the questionnaire was, *inter alia,* to ascertain

- Whether so - called "monist"[1] States would experience particular difficulty over implementation.

[1] The terms "monist" and "dualist" describe two different doctrines – "monism" and "dualism" - which govern the relationship between national and international law. Under monism, domestic and international law constitute a single integrated legal system. In a monist State, international law is automatically incorporated into national law without the need for further transposition. "Dualism" presupposes the existence of two separate systems of law – national and international. In a dualist State, international law does not become part of national law until, and to the extent that, appropriate national measures so provide.

- Whether the current text would amount to "new" law for States (and could be implemented as such without requiring the amendment of existing legislation), or whether its provisions would impinge on existing legislation to such an extent as to require its significant amendment.

As well as being asked for general information as to techniques by which international instruments were implemented participants in the Group were also asked if they could illustrate the effects implementation of certain Articles of the current text would have on their own domestic law.

The full texts of the participants' answers was attached as an Appendix to the provisional version of this report which was circulated to participants in the CGE in December with a request for their comment. These answers have enabled the preparation of this report. This final report on how States' practice (and their assessment of how it would be necessary to adapt their national law to implement the current text) should influence the form of the draft Convention is for discussion at the CGE's second session in March 2006.

Analysis of Responses

Participants were asked to respond to the following questions, set out below as they appeared in the questionnaire –

"Question 1. In your country, which techniques are used to implement the following types of international instrument -

(a) Convention ("hard law"), and

(b) Principles / Model Law ("soft law").

They were asked to illustrate their answers with examples of incorporating legislation such as, in the case of "hard law", the legislation which implemented the United Nations Convention on Contracts for the International Sale of Goods 1980 ("the CISG"), the ICAO Convention for the Unification of certain rules for International Carriage by Air 1999 ("the Montreal Convention"), the Warsaw Convention of 1929 as amended by The Hague Protocol of 1955 ("the Warsaw Convention"); the UNIDROIT Conventions on International Financial Leasing ("the Leasing Convention") and on Factoring ("the Factoring Convention") and the Cape Town Convention on International Interest in Mobile Equipment 2001 ("the Cape Town Convention") and, in the case of soft law, such as the legislation used to incorporate UNCITRAL Model Laws on International Commercial Arbitration of 1985 and that on Cross-Border Insolvency of 1997 ("the model laws on arbitration and on insolvency").

Question 2. Are the techniques of implementation in your country based on the assumption that an international Convention (a) is self executing; (b) will take the form of a new national law; (c) requires incorporation into existing national law(s); (d) is implemented in a way that combines (a)-(c); or, (e) is implemented in any other way?

Question 3. In your country, which, if any, bodies of law would be likely to require amendment in order to implement Article 4.1, 4.2 and 4.3 "Intermediated Securities"; Article 5.1 - 5.5 "Acquisition and disposition of intermediated securities"; Article 9.1 "Prohibition of upper – tier attachment"; Article 10 "Priority among competing interests"; Article 11 "Acquisition by a innocent person of intermediated securities"; Article 12 "Rights of account holders on insolvency of intermediaries" of the current text of the preliminary draft Convention – and in what way?". Participant's answers fell into two categories, broadly defined.

The first – the answers given to Questions 1 and 2 as to how "hard" and "soft law" international instruments were implemented in their States and as to how specific "hard" and "soft law" international instruments had been implemented – may be described as "factual". The second, in response to the request for opinions as to which, if any, bodies of law in their States were likely to

require amendment in order to implement certain Articles of the Convention and if so, how, are, to a greater or lesser extent, "conjectural"- inter alia - because it is not clear at this stage what the provisions of the draft convention will be.

I. Techniques and Examples of Implementation

A. "Monist" States

Accepting that the distinction is not so much between monist and dualist systems (States are rarely clear examples of either) but between a State which incorporates conventions/treaties ("hard law") into national law by an act of ratification as they stand and one which has positively to incorporate such instruments as a whole or by amendment of existing national law, out of the ten States that responded to the questionnaire, **Japan, Mexico, Portugal, Spain and Switzerland** seem to provide examples of a "monistic" approach, albeit not exclusively so.

In the case of **Japan** it appears that, depending on their content, the method of implementing "hard law" instruments (such as conventions) includes self-execution. The Montreal and Warsaw Conventions, for example, apply directly – i.e. they are self-executing. As to "soft law" instruments, Japan has enacted national legislation on arbitration which closely reflects the model law on arbitration and on the recognition and assistance of "foreign" insolvency proceedings which closely reflects the model law on insolvency[2].

In **Mexico**, a federal State, international treaties are signed and ratified after compliance with detailed constitutional requirements. If they are then to attain the status of supreme, national law they are subject to a procedure which, though it does not appear to involve legislation, does involve the satisfaction of a number of substantive conditions. When the President's decree is published in the Official Gazette, these further "constitutional" requirements having been satisfied, they overrule any inconsistent domestic law. A "hard law" text that has become part of the law of Mexico in this way is the CISG.

As far as "soft law" is concerned, model laws or principles do not have effect unless they are incorporated into national law through legislation - either in the form of national law inspired by them or in a form in which their text is recognisable, subject to such modifications as may be required to adapt them to Mexican law.

It appears from **Portugal's** response that the Portuguese constitution provides for international conventions, once they have been duly ratified or approved, to come into force and to be considered part of the law of Portugal on their official publication. Ratification/approval which precedes official publication is, however, a complex process – requiring the involvement of several bodies – i.e. the President, the Government and the Parliament. The text of the Montreal Convention, published in the official journal attached to Decree no 39/2002 of 27 November by which the Portuguese government approved it, is an example.

Since, once incorporated into national law, international provisions tacitly repeal existing inconsistent national provisions it is *de facto* necessary to amend such national provisions before incorporation. Conventions may therefore be implemented by self-execution, by new national legislation or by incorporation into existing national legislation.

The Portuguese constitutional provisions that provide for the application of international law to national law do not distinguish between "hard" and "soft law" instruments.

Spanish law appears to be "monist" in that international conventions are incorporated into Spanish national law by self-execution. When a convention is ratified by Spain the text automatically

[2] As regards the Warsaw Convention, the CISG and the UNCITRAL Model Law on Arbitration, the same is true for, inter alia, Germany. However, neither would those Conventions, from a German point of view, be defined as " self – executing" nor could that country be characterised as "monist", cf infra…

becomes part of the Spanish legal system and directly applicable. Spain has implemented the CISG, the Warsaw Convention and the Hague Protocol in this manner. As international law, conventions prevail over national law. Once ratified they can be directly invoked by private persons against the Spanish national authorities and other private parties.

"Soft law" instruments are incorporated into Spanish national law by basing national legislation on their provisions rather than by referring to them explicitly in national texts. The model law on arbitration is the basis of Spanish legislation on this subject.

In general, the **Swiss** legal system is "monist", as is implicit in a provision of the Constitution which gives individuals the right to rely directly on international law before the Federal Supreme Court. Swiss "monism" also derives from customary, unwritten law. The starting point of the system is that an international instrument is capable of being self-executing provided it is "directly applicable"[3]. When a "directly applicable" international treaty enters into force it has immediate effect. In that case, no implementing legislation is required. Examples in Switzerland are the CISG, the Montreal Convention, the Warsaw Convention and the Hague Protocol.

A convention is adopted by a resolution of the legislature – i.e. both Chambers of Parliament. Usually, a decree is adopted by the executive branch of government which determines its date of entry into force. Though parliamentary assent is, under the written constitution, required, that does not, as has been consistently affirmed by the Federal Supreme Court, constitute implementation into national law. In recent years, however, implementation by self-execution has been accompanied by the enactment of new national legislation or the amendment of existing national legislation so as to facilitate the application of the international instrument.

Although conventions are "directly applicable" in the domestic legal order, rules of international law retain their international character. Accordingly they are interpreted according to the principles of interpretation of international law.

As far as "soft law" is concerned, although model laws have the status of recommendations rather than of substantive law, they have considerable persuasive force and have an increasingly discernible effect on international and national law in Switzerland. Switzerland has, however, not yet implemented any model law as such. If it were to do so, the method of implementation would be through the adoption of federal legislation.

B. "Dualist" States

Of the States that responded to the questionnaire **Canada, Germany, Italy, the Russian Federation and the UK** appear, to a greater or lesser extent, to be examples of dualism.

Canada adopts one of three methods to implementing international "hard law" texts. The legislature may enact legislation which provides simply that the international text scheduled to it has effect in national law as scheduled. Alternatively, substantive provisions of legislation may, without making direct reference to the text, give effect to its provisions. A further alternative is legislation which, while referring to the text, does not expressly give effect to its provisions but makes whatever provision is necessary to comply with the international obligations which ratification requires.

The CISG entered into force in Canada following implementation by the first of the three methods described above.

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[3] Since international treaties rarely describe their provisions as "self-executing", the Swiss Federal Supreme Court had therefore adopted criteria for "self –execution" i.e. "In order for a provision of an international Treaty to be capable of being relied upon by an appellant it must be **directly applicable** …..That is the case where the terms are sufficiently certain and clear to be capable of forming the basis of a decision in an individual case.. the provision must ..be justiciable….concern the rights and obligation of individuals…addressed to public authorities implementing the law." (emphasis added).

"Soft law" international instruments are implemented in Canada by adopting one of the first two methods described above in relation to "hard law" instruments.

In **Germany** [4] as in other States the process of implementation is likely to begin with signature. The President has the power to sign[5] international instruments on behalf of the State. An act of the legislature is, however, required in order for ratification[6] to take place. If, as is likely, the Convention makes provisions which require to be given effect in national legislation, the legislature is further involved. It is at this point in the process of implementation that the provisions of "hard law" instruments are incorporated into German national law - either through new legislation or through the amendment of existing national legislation.

Before the implementing legislation is enacted it is of paramount importance to classify the provisions of the instrument into one of the existing "categories" of German law and, if possible, to implement the text by incorporating it fully within the appropriate "category". If that is not done the judiciary may be called upon to interpret and adjudicate on apparent inconsistencies between national law and the international text.

By way of example, the CISG was implemented by a single enactment passed by the legislature instead of by incorporation into existing enactments. Implementation by this method was chosen first, because the CISG regulates a discrete subject area and second, because it made it more likely that national interpretation would be consistent with interpretation internationally than if it had been incorporated into already existing national law. The UNIDROIT Factoring Convention was also implemented by a single enactment without further incorporation into existing national law. Even in that case, however, provisions of existing domestic legislation were amended.

By contrast, the Montreal Convention was implemented by two different enactments. The first implemented the Convention itself. The second contained specific executive regulations and adapted existing German law.

If Germany chooses to adopt a model law in its entirety, implementing legislation is generally required. A model law would in practice be adopted in much the same way as a "hard law" text. Although the legislature has complete discretion to implement a model law with modifications it generally tries to implement by keeping as close as possible to the original. The model law on arbitration was implemented by incorporation into existing German legislation on civil procedure and applies to national and international arbitrations.

The model law on insolvency is, in EU States, one of an increasing number of international texts whose implementation is likely to be affected by the fact that its subject matter is also the subject of Community legislation. Only Article 18 was incorporated into German law when national implementing legislation on the subject was introduced. German law on cross-border insolvency derives principally from Council Regulation (EC) No 1346/2000 on Insolvency Proceedings ("the EC Insolvency Regulation"). Community Regulations take immediate effect in member States without the need for further ratification or implementation by domestic legislation.

Although a "soft law" instrument is not binding if not incorporated in national law it may become so - unless inconsistent with existing law - if the judiciary finds it represents custom in the business or industry to which it relates. The German commercial code includes an obligation to take account of trade usages.

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[4] In addition to the response from the German delegation , CCP 12's response was also by reference to the legal system in Germany.

[5] In this summary "sign" and "signature" are used in the sense of the act whereby a State expresses its agreement in principle with a treaty, but not its consent to be bound by it (unless the treaty provides that it will come into force on signature). "Signature", where the treaty is subject to ratification, does not oblige a State to ratify the treaty.

[6] "Ratification" follows signature and signifies the consent of a State to be bound by a treaty.

In order to have effect in **Italian** law international treaties require not only signature and ratification but also the passing of national implementing legislation by the legislature incorporating the provisions of the international instrument into national law. Such domestic legislation either reproduces the text in full ("ordinary procedure") or (the most usual method) applies it simply by referring to the text ("execution order"). Even where the latter method is adopted, additional implementing legislation may be required.

The CISG was implemented by "execution order" .The Montreal Convention was adopted by the "ordinary procedure" - legislation which amended existing national legislation relating to air transportation.

"Soft" law instruments are not ratified and adopted formally as such into Italian national law. Instead, they are incorporated by means of implementing legislation which generally reproduces their content. Though not adopted *per se*, the model law on arbitration has inspired related provisions of national law (such as the statutory definition of "international arbitration"). Though the model law on insolvency may have an influence on it, Italian national law on this subject derives directly from the EC Insolvency Regulation.

In **the Russian Federation** international treaties whose implementation either requires the adoption of new, or the amendment of existing, federal legislation must be the subject of implementing legislation. In other cases the incorporation of the international instrument into federal law is by its official publication by the appropriate (depending on its status) official body – i.e. the Government , or the authorised ministry of the Russian Federation.

Russian legislation has therefore a differentiated approach to the "technique" of implementation. Depending on its content the international instrument can either -

- be incorporated into national legislation by means of a special law passed by the legislature, or
- apply as it is on the basis of the act of the government/ministry on signature/adoption/accession by the government.

By way of "hard law" examples the CISG was acceded[7] to by the USSR (the Russian Federation is its successor as regards participation in international treaties) by means of issuance of a resolution of the Supreme Soviet, following which an Instrument of Accession was deposited whilst, on accession, the Leasing Convention was the subject of a federal law before it came into force.

As far as the implementation of "soft law" is concerned, national legislation of 1993 on international commercial arbitration is based on the model law on arbitration. The Russian Courts (of the Chamber of Commerce and Industry) also use its provisions as guidelines in relation to international commercial and maritime arbitrations.

Legislation of the Russian Federation on insolvency is based on the model law on insolvency.

The UK is an example of a "dualist" state without a written constitution. Conventions are signed and ratified on behalf of the government using powers derived from the Royal Prerogative. These powers may be exercised without the consent of the legislature. International instruments such as Conventions do not, however, have effect in the domestic legal system unless they are incorporated into national law. If the subject matter of the international text is not covered by existing national law or if it is inconsistent with existing national law, implementation is by new national legislation which will repeal any inconsistent national law.

Typically, implementing legislation provides that the convention in question will have the force of law in the UK in the form of the international text as set out in a schedule to so-called "primary"

[7] "Accession" and "adherence" are acts whereby, instead of signature followed by ratification, a State expresses its consent to be bound.

legislation i.e. “an Act ”. The text may be modified or adapted as is necessary for it to become part of national law but only in a manner consistent with the international obligation. Examples are the Montreal Convention and the Warsaw Convention as amended by the Hague Protocol.

As with “hard law” instruments, “soft law” instruments such as model laws are also incorporated into national law by implementing legislation. Unlike “hard law” instruments, however, model laws are less likely to require implementation by the same form of legislation – i.e. by an Act. They can be implemented by “secondary” legislation made by government ministers under a power conferred by an Act. Although subject to control by the legislature this process is much simpler and quicker than that associated with “primary” legislation. Thus, although the model law on arbitration was implemented for Scotland by an Act, the model law on insolvency is proposed to be implemented by “secondary” legislation. As is the case in other EU member States there will be circumstances in which the EC Insolvency Regulation will prevail over the model law.

II. Implementation of the Convention

If States’ responses to the question concerning which, if any, of their laws would require amendment in order to implement Articles 4.1 to 4.3, 5.1 to 5.5, 9.1, 10 and 11 and why, are grouped in the same way as they are above, those from **Japan, Mexico, Portugal, Spain and Switzerland** might, if the Convention is to retain the form of a “hard law” instrument, at least in theory, be distinguishable from those of **Canada, Germany, Italy, the Russian Federation and the UK**.

That format is followed below, partly for ease of comparison with the answers to the “factual” answers described above and partly to assist the Group in considering on the most appropriate type of instrument.

A. “Monist” States

No amendment of **Japanese** law would be required to implement Articles 4.1 to 4.3, 5.1 to 5.5, 9.1, 10 and 12.

Depending on the meaning of “adverse claim” for the purposes of Article 11.1, Japan may, however, have to amend national legislation in order to implement that provision. Article 11. 2, which does not confer on gifts the protection given to a good faith purchaser, would also require the amendment of legislation. Such amendment would, however, be difficult because it would violate consistency with other areas of law where protection of a good faith purchaser *does* apply in the case of a gift or other gratuitous transaction. Implementation of Article 11(3)(b),would, because of its approach to what constitutes “gross negligence”, also require the amendment of national legislation.

If certain provisions of some of the Articles of the draft Convention (namely, Articles 4, 5 and 10) specified in the questionnaire were to be incorporated into **Mexican** law it would be necessary first to amend existing national legislation.

At this early stage in the development of the Convention it is difficult to predict the extent to which implementation would require the amendment of **Portuguese** law. Implementation is, however, likely to require the amendment of more than one body of law including those which provide specifically for securities and for company law in general.

In **Spain** the implementation of Articles 4 and 9 would not require the amendment of any existing Spanish legislation.

In order to implement Article 5, however, since the relevant Spanish Statutes are based on a different conceptual approach to the nature of rights that derive from securities holding and give effect to a significantly different regime for effecting transfers of securities, implementation would require existing Spanish law to be substantially amended.

Switzerland is likely to adopt a comprehensive reform of its securities law before the text of the draft convention is finalized. Its new federal statute on intermediated securities should, for the most part, be compatible with the final text. Where this is not the case implementation would require the new national legislation to be amended so as to be consistent with it.

Implementation does, however, raise a general concern related to the Swiss "monist" tradition. It does not sit comfortably with a situation where two legal texts, one national and one international, based on similar policy considerations and covering virtually the same issues, differ considerably in terms of their expression. For that reason it would be preferable, from the Swiss standpoint, if the Convention were not treated as self-executing.

B "Dualist" States

If, in its final form, the Convention contains provisions which are inconsistent with existing **Canadian** legislation (at federal and provincial level) relating to securities' and financial asset's transfer, security interests, corporations and insolvency, implementation may require specific amendment. Such a text might also impact on legislation governing the regulation of financial and capital markets and schemes intended to protect investors in the event of the insolvency of dealers in securities.

Because of the difficulty that Canada would face if it were to implement a Convention whose provisions are inconsistent with its recently modernized legislation Canada considers that the text should have a narrow focus and be restricted to commercial and property law issues only. It should not contain provisions likely to affect regulatory and corporate law.

In **Germany** a legislator faced with implementing the draft Convention would have to transpose the concepts used in the draft Convention into familiar German categories and reformulate either existing or new legislation accordingly. . At this stage it seems possible that the Convention would be implemented by legislation which would amend national laws governing *inter alia* insolvency and securities law. Specifically, it is likely that amendments of the Securities Deposit Act, the Code of Civil Practice, the Insolvency Act and the Civil Code would be required to implement Articles 4.1 to 4. 3, 5.1 to 5.5, 9.1, 10, 11 and 12.

The current text of the Convention is based on a different conceptual approach towards the ownership of securities from that taken by **Italian** law. The definition of "intermediated securities" as " the rights of an account holder resulting of a credit of securities to a securities account", for example, implies rights that derive solely from the inscription of securities to an account, rather than from their ownership. Under Italian law such rights would be construed as "credit rights" against the relevant intermediary and not as "property rights" *erga omnes*. In the case of dematerialised securities, Italian law already accepts that some rights do arise from the inscription of securities to the relevant account. Yet it continues to regard these as "property rights". Indeed, under Italian law, following inscription, the account holder acquires the full and exclusive rights that derive from ownership.

Because of this difference in underlying thinking those Articles that provide for matters such as the priority of rights and acquisition in good faith by a third party are not entirely consistent with existing Italian legislation. The adoption of the Convention within the Italian legal order would therefore involve reconsidering the national legal regime governing securities held with an intermediary.

Articles 5.1 to 5.5 and 11 are, for example, not consistent with Italian law as it stands. Their implementation would therefore require a restatement of existing law, both as stated in legislation and resulting from case law. Article 11, for example, does not apply to acquisitions by way of gift, while under Italian law the same level of protection is guaranteed to all acquirers in good faith, however acquisition occurred.

Implementation in **the Russian Federation** is unlikely to require significant amendment of existing law. Article 5. 5 would, however, introduce the concept of "netting" for which Russian law currently has no definition and which might therefore have to be defined. Some additional amendment of the general law may be required in order fully to implement Article 11.1 on acquisition in good faith.

In **the UK** the subject matter of Articles 4.1 to 4.3, 5.1 to 5.5, 9.1, 10, 11 and 12 is not regulated by any dedicated national legislation. Instead, it is regulated by a variety of means such as agreements between parties, by regulation, under common law rules and equity. As such, it is diverse and not transparent. This situation would arguably be improved if these different sources of regulation were codified and was contained in dedicated legislation. That might take the form of "primary" or "secondary" legislation which specifically implemented the provisions currently contained in the Convention by reference to them.

Specifically, though not strictly necessary for implementation of Article 4.1 to 4.3, it would probably also be desirable to amend certain "primary" and "secondary" national legislation.

Similarly, though Article 5.1 to 5.5 are generally believed to be consistent with existing national law implementation might – for the avoidance of doubt - involve the disapplication of some existing national legislation to the subject matter for which they provide.

Implementation of Articles 9, 10 and 11 would involve the enactment of legislation expressly to exclude upper tier attachment (Article 9), to put beyond doubt the application of rules consistent with those in the convention on priority between competing claims (Article 10) and to make provision regarding acquisition in good faith (Article 11).

Implementation of Article 12 would involve the enactment of legislation to confirm the provision made by this Article.

Conclusions

The conclusions that follow are subject to the caveats first, that they are preliminary and for discussion and second, that they are based on responses received from only a small number of States which are assumed to be, but may not be, a representative sample.

1. Two things are worth noting. First, that the distinction between "monist" and "dualist" systems does not by itself provide the answers as to how the draft Convention would have to be implemented. Second, that the responses received from States illustrate the fact that the only type of State which is in a position to implement a Convention as it stands into national law simply by an act of ratification (without disrupting its own national law) is likely to be one which has little or no national law linked to the subject matter of a "hard law" instrument. All other States – "monist" or "dualist" –are likely to have to go through a process of identifying what national law already exists on that subject and how it has to be adapted so as to accommodate the international text.

2. It seems possible that the CISG (which has so far entered into force in 66 States) is an example of a substantive "self contained" law text that "filled a gap" and did not need to be "connected" to existing national legislation by the amendment of that legislation. The Warsaw Convention may be another such text. By contrast, both "monist" and "dualist" States who responded to the questionnaire say that they would, for a variety of reasons, experience difficulty adopting the draft Convention without first undertaking a detailed assessment of what amendment would be required of their national legislation.

3. States' difficulties seem to take various forms. First, there is the difficulty likely to be experienced by States whose Article by Article analysis of the draft instrument shows that a significant number of different areas of their national law would require amendment before they would be able to adopt the draft Convention. Second, there is the difficulty of States (such as Spain) whose policy approach to the subject matter of the draft Convention is different - with the

result that their national law is not at all close to its provisions. Such States would have to take some fundamental decisions and make even further amendment of their national law before the draft Convention could enter into force. By contrast, a State (such as Switzerland) whose national law is likely, in principle, to be close to the draft Convention when a choice to ratify is made – would encounter the difficulty, if the instrument were to be treated as self-executing, of having two sets of provisions in force in national law which, whilst they reflected the same policy approach to the subject matter, were presentationally different.

4. If a "soft law" route were to be taken, however, it appears certain that harmonisation cannot be guaranteed. It is also true that transnational commercial law instruments elaborated and adopted in recent times would, generally speaking, appear to provide evidence that, although purely bilateral relations may usefully be shaped by "soft law" instruments, a binding treaty ensuring reliable implementation is required wherever third parties rights are at stake.

5. However "functional" the text of the international instrument is, it may be difficult to avoid its affecting States' national laws so as to require their amendment - albeit for a variety of different reasons. Accordingly it appears that – at the stage of implementing the Convention - there may be limitations to the "functional approach". Implementation in all but those Contracting States that have no or little domestic law in the area means "re – translation" into domestic legal "language" before the Contracting State in question can ensure it is in a position to honour its undertaking vis-à-vis other Contracting States.

6. Functional Convention language and domestic legal expression *may* produce perfectly coincident results. It will be for each Contracting State to analyse, *functionally,* whether that is the case with respect to its domestic law. Where a Contracting State reaches the conclusion that amendments of domestic law are needed, it remains that States' autonomous decision by way of *which* changes it wishes to achieve compliance.

7. The Committee may wish to consider whether any one (or a combination) of the following techniques ought to be chosen to *guarantee* compliance –

(a) a final clause stating explicitly a Contracting State's undertaking to "re-translate" into functionally adequate domestic language and/or concepts (perhaps along the lines of - "Contracting States shall bring into force whatever laws, regulations and administrative provisions are necessary t comply with this Convention, details of which shall be supplied to the Depositary.");

(b) a Resolution to that effect, to be adopted by the Diplomatic Conference;

supplemented, perhaps by an Official Commentary to provide guidance to Contracting States who are about to implement the instrument and thereafter.