

Preface

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When, in 2001, the UNIDROIT Governing Council and General Assembly included the project on *Harmonised Substantive Rules regarding Securities Held with an Intermediary* in its Work Programme, the Institute once again embarked on a project that was both conceptually ambitious from the legal point of view and of crucial importance in economic terms. The volume of securities held through intermediaries systems all over the world is stupendous, and against the backdrop of today's globalised economy, the need for a reliable and efficient legal framework regarding the cross-border holding and transfer of those assets is self-evident.

Work on the project started in September 2002 with the convening of a Study Group of independent experts, as is the rule at UNIDROIT. The Institute had the privilege of securing the involvement of fourteen eminent experts in the field who agreed to serve on the Study Group.¹

Since that time, five meetings have been held: three in Rome, at the UNIDROIT headquarters, one in Switzerland and another in Hungary. However, the tremendous progress made by the project was possible only because several members of the Study Group shouldered an important workload between sessions.

When work commenced at the first meeting, my first idea and indeed that of several of my colleagues was that the differences in legal framework underlying securities holding and transfer in the UNIDROIT Member States were such that only a fundamental reform could hope to remedy cross-border incompatibilities. To my

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¹ The Members of the Study Group were Mr J. Michel DESCHAMPS, Partner, *McCarthy Tétrault*, Montreal, Canada; Mr Philippe DUPONT, Partner, *Arendt & Medernach*, Luxembourg; Ms Dorothee EINSELE, Professor of Law, Christian-Albrechts-Universität zu Kiel, Germany; Mr Edgar I. JELONCHE, Attorney-at-Law, Professor of Commercial Law, Buenos Aires University School of Law, Argentina; Mr Hideki KANDA, Professor of Law, University of Tokyo, Japan; Mr Li Rui Qiang, Law Manager, China Securities Depository and Clearing Co. Ltd., Beijing, P.R. China; Mr Guy MORTON, Partner, *Freshfields Bruckhaus Deringer*, London, United Kingdom (Reporter); Mr Frédéric NIZARD, Direction juridique, Crédit Agricole SA, Paris, France; Mr Richard POTOK, *Potok & Co.*, Darlinghurst, New South Wales, Australia; Mr Curtis R. REITZ, Professor of Law, University of Pennsylvania Law School, United States of America; Mr Luc THÉVENOZ (Vice Chairman), Professor of Law, Centre for European Legal Studies, University of Geneva Faculty of Law, Switzerland; Mr WU Zhipan, Professor of Law, Vice-President of Beijing University, P.R. China. The Secretariat invited Mr Antoine MAFFEI, Partner, *De Pardieu Brocas Maffei*, Paris, France and Ms Sandra ROCKS, Counsel, *Cleary Gottlieb Steen & Hamilton*, New York, USA, to serve as co-ordinators for the private financial sector in the project. Mr Philipp PAECH, UNIDROIT Research Officer, served as Secretary to the Study Group.

mind, the situation demanded that we attempt to unify the nature of the investor's substantive right in securities, at least for those held through intermediaries. Others in the Group, however, opined from the outset that such an ample degree of harmonisation was unachievable, not only for political reasons, but first and foremost because the task of defining a right the nature of which would be compatible with other areas of law (such as insolvency, tax and corporate law – and this with regard to dozens of jurisdictions with fundamentally different legal traditions) was just too huge. Moreover, these members advanced convincing arguments that such top-to-bottom reform was not even necessary. Rather, they felt, the desired results, such as protection against insolvency of the intermediary etc, could be achieved by simple reference to facts and results. Ultimately, it was this conception that formed our starting point, in which the *functional approach* became one of the basic drafting principles of the project.

The second fundamental drafting principle was drawn from our experience that conflict-of-laws instruments such as the *Convention on the Law Applicable to Certain Rights in respect of Securities Held with an Intermediary*, adopted under the auspices of the *Hague Conference on Private International Law*, and the relevant rules in the EU-Directives on *Settlement Finality* and *Financial Collateral* cannot, by their very nature, address issues of substantive law. This means that two important questions remain open, even where the applicable law can be identified with any certainty: the question, first, of whether the applicable law is internally sound, and second, of whether it combines effectively with other jurisdictions with respect to legal issues that are governed, following the rules of conflict-of-laws, by the law of a different jurisdiction. The Study Group coined the terms *internal soundness* and *compatibility* to refer to these two aspects of the domestic law at its very first session in September 2002.

The aforementioned principle of functionality implied that the scope of the instrument should be limited to issues the harmonisation of which is indispensable with a view to achieving *internal soundness* and *compatibility*. Consequently, the Study Group started with a relatively short list of items on which it intended to work. However, as work advanced, it became increasingly clear that certain issues could not be addressed in isolation. The most telling example is probably the following: initially, the scope (and working title) of the project was limited to legal certainty regarding cross-border collateral interests in securities. It became clear relatively early on, however, that the project could not focus on collateral without taking into consideration the rules on acquisition and disposition of securities, as collateral issues are inseparably linked with issues of transfer and ownership. Apart from this very fundamental example, several other, less important points were included in the work, such as, for example, the treatment of dividends and voting rights under the future Convention, where at least some clarification was needed in the sense that intermediated holding of securities should not prevent the investor from exercising those rights efficiently. And finally, some minor points were even introduced in the draft at the request of the private financial sector, which had repeatedly underscored the need to strengthen economic efficiency in intermediated holding of securities.

On the basis of the above guidelines, the UNIDROIT Study Group drafted an instrument that maintains an equilibrium with respect to two aspects: first, it strikes a balance between the need for an appropriate degree of integration and unification, on the one hand, and national legislators' discretion as to how harmonisation is to be achieved, on the other hand. Second, the draft instrument succeeds in promoting legal certainty regarding the assets of an account holder and collateral over securities while remaining capable, at the same time, of considerably enhancing market efficiency.

As I mentioned earlier, the dedication and personal input of individual members of the Study Group was vital to this project, as were the Secretariat's careful husbandry and efforts to promote the future instrument amongst member States and interested circles in both the public and the private sector. In what seems like no time at all, public interest in the project has mushroomed, a circumstance which cannot but augur well for its future.

