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FINANCIAL MARKETS LAW COMMITTEE

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International Overview

Background paper to FMLC paper entitled, "Analysis of the need for and nature of legislation relating to property interests in indirectly held investment securities, with a statement of principles for an investment securities statute"

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INTERNATIONAL OVERVIEW AT JULY 2004

(A) PRESENT

In the **United States**, Article 8 of the Uniform Commercial Code underwent a fundamental revision in 1994. The previous version of U.C.C. Article 8 was based on principles of direct holding of securities. Revision was put on track after a US stock market crisis in 1987 revealed the insufficiency of the old system. The new feature was the institution of a securities entitlement, by virtue of which the investor has a bundle of rights and interests exclusively against his lead-intermediary instead of the traditional property right in his assets.

In **Belgium**, the investor's interest is defined as a co-proprietary right which consists of a notional portion of a pool of assets of the same type held by the intermediary for all its Clients collectively. The investor's title is the book entry and not a physical or dematerialised security. The co-proprietary right is accompanied by personal rights against the intermediary. In the event of insolvency of the intermediary, the investor's interests are superior to the claims of other creditors of the intermediary; he has a so-called right of revindication, i.e. a claim for the return of property enforceable against anyone in possession of it.

In **Luxembourg**, the law provides for a very similar framework. An investor, holding securities through an intermediary, has a right of (co-)ownership in a given pool of non-individually identified securities of the same type held by the intermediary on behalf of all owners of the same type of securities. This right of ownership can only be exercised against the direct intermediary. There is a right of revindication granted to investors in case of insolvency of the intermediary. The law precludes the attachment of securities accounts at the level of securities settlement systems. Upper tier attachments are equally precluded.

In **France**, securities were dematerialised in November 1984. There are no longer any certificates and securities are evidenced by book entries in accounts maintained by authorised financial intermediaries or by the issuer itself. Issuers and intermediaries in turn have an account with Euroclear France in which issued securities are evidenced by book entries. The number of securities appearing in the accounts maintained by issuers and intermediaries must correspond to the number of securities appearing in the accounts maintained by Euroclear France. If they did not, investors would lose any right to the securities that appeared in their account with the issuer or their intermediary. In other words, book entries in the accounts maintained by Euroclear France prevail over book entries in the accounts maintained by intermediaries.

Japan revised the legal framework applicable to bonds and other debt securities, including government bonds, in 2002. The changes became effective in January 2003. The financial instruments in question can now be dematerialised; however, the investor has the position of a proprietor. Neither an intermediary nor a Central Securities Depository (CSD) has any property right in the securities in question, they are merely responsible for making book entries and maintaining accounts. The investor's right is

determined by the book entry in his account with the lead intermediary. The Japanese government submitted to the National Diet on 5 March 2004 its proposals to change the laws in respect of shares in the same manner [the Diet's session is scheduled to end on 16 June 2004 - publication is, therefore, expected before 16 June 2004].

(B) FUTURE – NATIONAL

The Uniform Law Conference of **Canada** is at present preparing a draft of a uniform law on multi-tiered holding systems in Canada. This is intended to harmonise Canadian legislation on this subject and to stay close to the modernised framework in the United States.

In **Switzerland**, a governmental commission is reviewing a proposal for a Securities Custody Act launched by the private financial sector. The project is intended to codify the current legal framework, which works well, and to eliminate some minor inadequacies, in particular by introducing earmarking of encumbered securities and by providing a sound legal framework for the treatment of so-called Wertrechte (non-tangible securities). A draft bill is expected to be submitted to government by 30 June 2004.

(C) FUTURE – INTERNATIONAL

In November 2001, the International Organisation of Securities Commissions (**IOSCO**) together with the Bank for International Settlements (**BIS**), issued nineteen Recommendations for Securities Settlement Systems. Their main purpose is to give guidance for the reduction of legal and systemic risk in clearing and securities settlement systems. In particular, the recommendations refer to the general need for a sound legal framework for such systems, and to the imperative of protecting customers' securities against the claims of a custodian's general creditors.

The **G30** January 2003 Plan of Action concerning global clearing and settlement endorsed these calls, especially in its Recommendations 15 and 16. Particularly important is the fact that G30 identified the solution of conflict-of-laws problems by the Hague "PRIMA" Convention as an important first step towards increased legal certainty regarding rights to securities, but the report also pointed to complementary questions of substantive law that needed to be tackled. These include the need for effective protection against the risk of losing assets in the event of the intermediary's insolvency, for reshaping pledging formalities and the realisation procedures relating to collateral, and for harmonised rules of finality of settlement.

At the European level, in April 2004, the **European Commission** issued its second consultative Communication on securities clearing and settlement. In this Communication, the Commission, supported by the recommendations of the Giovannini Group of experts (whose reports were published in November 2001 and April 2003), proposes the establishment of a group of experts from academia, public authorities and

practicing lawyers who will be tasked with undertaking further analysis of the absence of a common legal framework for the treatment of ownership in securities held with an intermediary.

In the second half of 2002, **UNIDROIT** embarked upon a new 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, made up of 13 leading experts in the field of the law of securities holding, held its first meeting in September 2002. The challenge it faces is to draft an international instrument capable of improving the worldwide legal framework for securities holding and transfer, with special emphasis on cross-border situations. The draft is to be submitted to the Governments of the UNIDROIT member States to serve as a basis for an intergovernmental negotiation process conducted under UNIDROIT auspices, culminating in a diplomatic Conference and, perhaps, in the signing of an international convention with respect to the legal framework concerning indirectly held securities.