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# The harmonisation of securities law in the Geneva Securities Convention

## A Latin American perspective: the case of Argentina

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Pablo Iannello\*

### I. Introduction

The harmonisation of commercial law has been the subject of intense analysis in the field of comparative law in recent years. The purpose of this research is to shed light on the way in which the UNIDROIT Convention on Substantive Rules for Intermediated Securities (hereafter: the Geneva Securities Convention) is being implemented, and to identify some of the difficulties encountered by emerging economies, with a special focus on Argentina.

This article argues that although emerging markets, such as Argentina, meet the conditions for applying the Geneva Securities Convention, this is not enough for its successful implementation, since a variety of legal and economic factors come into play. As a result, further steps need to be taken if the harmonisation process is not to remain a mere statement of law but is actually translated into legal practice.

This article does not purport to provide a comprehensive analysis of the Geneva Securities Convention, on which much literature already exists. Instead, it seeks to explain the difficulties that emerging economies encounter in implementing the Convention and to afford some insight into the public choice<sup>1</sup> both from an economic analysis of law perspective and the traditional comparative law approach.

I believe that such a public choice and law-and-economics approach can contribute to the analysis of the level of implementation of the Convention. The normative tools used in these areas of legal research may help to provide a

\* Pablo Iannello, Professor of Law and Economics, International Economic Law, Political Economy and Comparative Law at Universidad Argentina de la Empresa (UADE) in Buenos Aires. I would like to thank Silvia Toscano and Ricardo Lucarelli for all the support provided by UADE and Frédérique Mestre, John Wilson, Laura Tikanvaara, Bettina Maxion, and all the UNIDROIT Team for the extremely helpful support during my research stage. I would like Thomas Keijser for his comments on the article.

<sup>1</sup> Public choice is a theory of normative economics which provides strategic interpretation of the politics behavior. The idea has not only be applied to politics in a traditional sense but to all processes that involve the production of legal norms and statutes, as well as their interpretation. For a description of public choice in statutory interpretation and a basic survey of the literature, see William N. Eskridge Jr., 'Politics Without Romance: implications of Public Choice Theory for Statutory Interpretation' [1988] *Faculty Scholarship Series* paper 3824 <[http://digitalcommons.law.yale.edu/fss\\_papers/3824](http://digitalcommons.law.yale.edu/fss_papers/3824)> accessed 9 February 2014.

different perspective on why and how policy makers apply the Geneva Securities Convention.

Producing and maintaining sound legal rules to govern the intermediated holding of securities in the many jurisdictions that participate in the global capital market is, as Professor Thévenoz has pointed out, a very difficult undertaking.<sup>2</sup>

In conclusion, the article recommends a number of topics for further research into the harmonisation process that might lead to improved implementation in emerging markets.

The article is structured as follows: the first section develops the notion of harmonisation, including some of the criticism levelled at the concept itself, and suggests that harmonisation is a useful concept if understood as a consensual way of effecting legal transplants. The second section provides a public choice analysis that shows how adopting an instrument such as the Geneva Securities Convention is an efficient solution in a globalised financial world. The article then moves to the issue of implementation of the Convention in emerging economies, analysing the evolution of the dematerialisation of Argentina's securities system and to what extent the Convention might be applied. Special attention is paid to the comments made by the Argentine Committee of Governmental Experts in the preliminary draft, explaining Argentina's transparent securities system. Finally, the article focuses on the circumstances that might impede the implementation of the Convention in Argentina and suggests some avenues of further research.

## **A. Some observations on the process of harmonisation of commercial law – the case of securities**

### ***a. Conceptualising harmonisation***

The process of harmonisation has focused almost exclusively on questions relating to the feasibility and desirability of unifying various areas of law at an international level, as well as on the methods or techniques that should be employed to that end.<sup>3</sup>

However, the actual adoption of an international convention is only the first step in the process of unification. Upon accession to a Convention, it is necessary to consider how to adapt the Convention or the uniform rules into the domestic law of each of the States concerned, while a major concern is the potential interpretation by local courts, a complicated issue because of divergences in the methods of interpretation in different legal families.<sup>4</sup>

Law reform in its broadest sense is a synonym of the natural evolution of legal systems. Meaningful law reform must, therefore, be sensitive to the concept of law

<sup>2</sup> Luc Thévenoz, 'Intermediated Securities, Legal Risk and the International Harmonisation of Commercial Law' [2008] Duke Law School Legal Studies, Paper No 170, *Stanford Journal of Law, Business, and Finance* 8.

<sup>3</sup> Roderick Munday, 'The Uniform Interpretation of International Convention' [1978] 27 *The International and Comparative Law Quarterly* 450–59.

<sup>4</sup> Michael Joachim Bonell, 'International Uniform Law in Practice – or Where the Real Trouble Begins' [1990] 38 *The American Journal of Comparative Law* 865–88.

as an organic entity combining past, present and future, as an entity that may evolve in what are often unpredictable and inexplicable ways.<sup>5</sup>

Harmonisation is a process in which several elements are combined or adjusted so as to form a coherent whole while retaining their individuality. In this sense, harmonisation cannot be understood as a neutral concept with respect to the idea of convergence as a legal solution; proper attention must be paid to the adaptation process of legal rules.

There has been some criticism in the legal literature of the harmonisation process itself, judging it as either redundant or meaningless. This is because a legal system somehow implies an internal logic, with its own level of consistency, that produces a degree of harmony. I believe that harmonisation should be understood as a pragmatic concept used to describe a process of adaptation of legal systems in which determinants of legal transplants play a key role.<sup>6</sup>

It could be argued that harmonisation of legal institutions (such as securities regulation) may be understood as an evolutionary process; therefore the level of adaptation will be the result of an adaptation process of a given legal culture to the new international instrument.

Basically, new legal institutions can be developed in two ways. They can either be negotiated by a (large) number of social actors, or they can be imposed on a community by a powerful economic or political force that may even be an external one. In modern times, reforms made by democratic forces are inspired by external experiences and seek to achieve consensus as to the best way of reaching some level of harmonisation.<sup>7</sup>

In sum, harmonisation should be seen as only the start of a long process that may end in some type of convergence. In order to understand this process, we should consider why lawmakers do what they do, as well as the implementation agents. The following section looks at these aspects as they relate to securities regulation.

## **B. Public choice approach to the Geneva Securities Convention**

The Geneva Securities Convention could be seen as an example of legal convergence aimed at solving a global public goods problem, ie how to achieve financial stability. Specifically, intermediation systems will necessarily involve different jurisdictions, so that externalities may arise due to a lack of convergence.

The actions of States may have positive or negative effects on other States. Thus, financial regulation in any State may be associated with adverse or beneficial effects in other States. If global public goods issues are involved, this is a serious

<sup>5</sup> Martin Boodman, 'The Myth of Harmonisation of Law' [1991] 39 *The American Journal of Comparative Law* 699–724.

<sup>6</sup> *Ibid* 710.

<sup>7</sup> Martin De Jong, Konstantinos Lalenis and Virginie Mamadouh, 'An Introduction to Institutional Transplantation' [2002] Vol. 9 No 13, University of Thessaly, Discussion Paper Series, 27–392. Available at <<http://www.ssrn.com>> accessed 9 February 2014.

matter, since the State affected by another State's defective regulation may not be in a position to internalise the externalities.<sup>8</sup>

Financial stability may be understood as a public good, since achieving such stability may be beyond the means of private actors who may find it too expensive to coordinate and may not be able to reap its full benefits. At the same time, the consumption of one additional unit of financial stability by one private actor will not affect the amount available for the others. This may give rise to opportunistic conduct and thus jeopardise stability.<sup>9</sup>

To repeat, then, financial stability may be seen as a global public good. Such a good may be defined as a good that is usually under-provided by private parties because of its non-rivalry in consumption and its non-excludability in terms of its use.<sup>10</sup>

From a counterfactual perspective, it has been argued that financial instability is understood as a public evil. From this perspective, instability is a by-product of the securities business and usually this risk is priced by the market when volatility is normal. But volatility may create a negative externality if it were not priced because of a lack of coordination or information in the markets.<sup>11</sup>

This is a particularly serious issue in securities markets if there is an intermediation chain of securities holders in which the information available on each participant is scarce or inaccurate because registration systems differ in their requirements. Moreover, different legal systems may impose externalities on different countries, thereby affecting the comprehensive legal risk.

In such cases, it is common for supranational players to join forces (thereby involving two or more economies) so as to provide that global public good. The Geneva Securities Convention could be understood in this sense. The mitigation of legal risk in a globalised financial world cannot be achieved other than by a cooperative solution in which all parties are willing to cooperate, recognising that the benefit of harmonisation is greater than the cost of implementing it.<sup>12</sup>

What is worth mentioning is that harmonisation seems necessary given the great advantages that scope and scale economies have been shown to provide to international finance. Larger financial markets could be seen as a new financing source. Economies of scale in financial markets help to reduce the cost of financing. This is because where the amount of money in the financial system increases

<sup>8</sup> Joel Trachtman, 'The International Law of Financial Crisis, Spillovers, Subsidiarity, Fragmentation and Cooperation' in Thomas Cootier, John Jackson and Rosa Lastra *International Law in Financial Regulation and Monetary Affairs* (Oxford University Press 2012) 183.

<sup>9</sup> Charles Wyplosz, 'International Financial Instability' in Inge Kaul, Isabelle Grunberg and Marc Stern, *Global Public Goods* (Oxford University Press 1999) 156.

<sup>10</sup> Paul Samuelson, 'The Pure Theory of Public Expenditure' [1954] 36 *Review of Economics and Statistics* 384–87.

<sup>11</sup> Wyplosz (n 10) 157.

<sup>12</sup> For a revision of the problem of collective action in global public goods see Todd Sandler, 'Global and Regional Public Goods: a Prognosis for Collective Action' [1998] 19 *Fiscal Studies* 221–47.

and access possibilities to capital markets are higher too, the cost of capital (which is the interest rate) tends to decrease.<sup>13</sup>

This could be understood as an analogy of the Williamson Model which explains the optimal size of firms. As an analogy of this model it could be said that the existence of global intermediaries might help to enlarge the markets but only to a certain extent. Then, according to the basics of transaction cost economics, optimal numbers of financial intermediaries would be where the cost of intermediation equals the benefit of the size of the market.<sup>14</sup>

However, intermediation mechanisms are usually developed through financial legal regulation, which has not yet been subject to a greater level of convergence.

Due to the fact that economies of scale<sup>15</sup> have emerged, reducing the cost of divergence in regulation becomes a relevant issue. The reduction of the cost of capital and financing costs may be a powerful incentive to firms and countries alike. Economies of scale often require special skills and information technologies to allow new regulatory capacities to be used to the full.<sup>16</sup> Regulatory capacities vary per jurisdiction and political competition may lead to a preference for the jurisdiction of dominant market participants.<sup>17</sup> In addition, divergences in financial regulation may result in stricter or more lenient monitoring and capital requirements. UNIDROIT's efforts in seeking convergence of intermediated securities mechanisms could be regarded as a way of preventing negative externalities stemming from unexpected volatility in the intermediary system.

Using game theory terminology, the Geneva Securities Convention seeks to reach a cooperative solution in a non-cooperative game. Then, if transaction costs happened to be high harmonising the legal framework might be a good operative tool to reduce them.

From the public goods perspective, the question arises of why regulatory competition in intermediation of securities should not be allowed. One answer was provided by Trachtman.<sup>18</sup> He applied the Tiebout model of regulatory competition to securities markets, basically due to the negative externalities imposed on consumers due to financial instability. It should be noted that in order to apply this kind of analysis, full information of consumers in respect of financial services

<sup>13</sup> This is true only under certain economic assumptions. Charles Goodhart, *Money, Information and Uncertainty* (MIT press 1991) ch IX and XI.

<sup>14</sup> For an explanation strategic behavior in financial regulation and optimal size of markets see Stavros Gadinis, 'The Politics of Competition in International Financial Regulation' [2008] 49 *Harvard International Law Journal* 447–507.

<sup>15</sup> Economies of scale allow an increase in returns by raising the units produced through a reduction in production costs. See, Arthur O'Sullivan and Steven M. Sheffrin, *Economics: principles in action* (Pearson Prentice Hall 2003) 157.

<sup>16</sup> Trachtman (n 9) 185.

<sup>17</sup> Stavros Gadinis, 'The Politics in International Financial Regulation' [2008] 49 *Harvard International Law Journal* 447.

<sup>18</sup> Joel Trachtman, *Regulatory Competition and Regulatory Jurisdiction in International Securities Regulation* (November 1999). Available at <SSRN: <http://ssrn.com/abstract=193688>> accessed 9 February 2014.

would be a necessary condition, since this is an assumption underlying the model.<sup>19</sup>

Trachtman has stated that ‘the Tiebout model stands in opposition to the fundamental theorem of welfare economics and the theory of comparative advantage. Restraint of interjurisdictional competition sharpens inter-firm competition, by “leveling the playing field” and thereby allowing comparative advantage to work, satisfying the conditions of the fundamental theorem of welfare economics. Thus, accurate allocation in the “public” market is inconsistent with accurate allocation in the private market: a hard choice.’<sup>20</sup>

This is consistent with the idea of financial regulation, including in relation to intermediated securities, as a global and public issue with good/bad features, which needs some kind of coordination to prevent non-priced risk in financial systems.

In the intermediated securities scenario, it is hard to imagine consumers of financial services having the ability to consider the impact of different intermediate duties.<sup>21</sup> Therefore, a coordinated solution seems a good and necessary step to eliminate the effects of externalities.

Financial regulation is not usually based on treaties. Instead, it is developed by inter-governmental institutions setting agendas and objectives for cooperation, thus creating a kind of soft law. The status of such instruments is an issue that should be tackled not only from the point of view of enforceability, but also to avoid a gap between ‘the law in the books’ and the ‘law in practice’. Best practices, regulatory reports, and information-sharing agreements are a recurrent feature in the financial regulation landscape.<sup>22</sup>

I take the view that the Geneva Securities Convention could be regarded as a link between standard practices in international financial law and as hard law in practice.

Although it deals with substantive rules, the functional approach adopted by the Convention as well as the flexibilities contained in its different sections to some extent suggest a minimalist approach, since although the Convention includes a set of definitions it also allows great flexibility as to how the rules should be implemented.<sup>23</sup>

<sup>19</sup> The Tiebout model basically argues that if a free rider problem is faced then a political regulatory solution is needed.

<sup>20</sup> Trachtman (n 19).

<sup>21</sup> To see the equivalence of applying Tiebout’s Tax competition model just like the Tiebout model, and its critiques to the international area of Free Trade and other Services including financial services, see Joel Trachtman, ‘International Regulatory Competition, Externalization, and Jurisdiction’ [1993] 34 *Harvard International Law Journal* 47.

<sup>22</sup> Chris Brummer, ‘Why Soft Law Dominates International Finance - and Not Trade’ [2010] 13 *Journal of International Economic Law* 623–43.

<sup>23</sup> Luc Thévenoz pointed out that there have been certain criticisms about the neutrality of the Convention; see Luc Thévenoz, ‘Who Holds (Intermediated) Securities? Shareholders, Account Holders, and Nominees’, available at <<http://archive-ouverte.unige.ch/vital/access/manager/Repository/unige:15018>> accessed 9 February 2014, footnote 12.

While the minimalist approach might be seen as a clear advantage, it may also explain why the Convention has not yet been applied to solve many cases in certain regions of the world, such as Latin America.

Harmonisation processes may help to reduce transaction costs and to mitigate market failures such as information asymmetries. From the securities perspective, the functional approach adopted by the Convention may be said to allow the reduction of the risk of intermediation in the marketplace without interfering with the core issues of local substantive rules. This baseline harmonisation may be regarded as a way to reduce network externalities, which is one of the financial system's methods of avoiding a coordination failure.

Traditional public choice literature gives great importance to choice-of-law rules, since these enable firms to choose the law governing contracts in those jurisdictions that minimise risk. However, due to information asymmetries the choice of law solution to allocate intermediaries' risk may be less than efficient, since differences in legal systems may impose negative externalities at any level of the multi-tier system. In other words, this explains why further steps were needed besides the Hague Securities Convention on conflicts of law involving securities.<sup>24</sup>

Any harmonisation process implies the adaptation of the new rules. In this case, it is worth mentioning the importance of adapting the Convention's provisions to the local environment. Evolutionary studies have shown that choice of law in a complete freedom of choice environment might not be the optimal solution in terms of internalising externalities. Contrary to this view, formal models show that choice-of-law patterns are a function of the institutional environment at a given moment, and that these may change in an inter-temporal framework. Avoiding any hint of formalisation, it is safe to say that when the institutional environment is a low-risk one, freedom of choice of law affords the highest benefit to all parties; in high-risk environments, the harmonisation of substantive law, albeit with some degree of flexibility, would seem to be an alternative in the quest for risk mitigation and the establishment of basic standards allowing predictable outcomes in international transactions.<sup>25</sup>

The various references to non-convention law in the Geneva Securities Convention help to accelerate the process of adaptation, and this is one of the greatest advantages of the instrument. However, it may also turn out to be its greatest weakness if the local law does not help to mitigate legal risk.

The substantive rules contained in the Geneva Securities Convention are another tool that, together with the choice-of-law solution, may help to mitigate the risk of financial intermediation.

From an economic perspective, the Convention may be thought of as a fixed cost in the production of legal order. Lawmakers choose the level of specificity by allocating fixed capital in the production process. Upon adoption, a treaty will

<sup>24</sup> Emanuela Carbonara and Francesco Parisi, 'Choice of Law and Legal Evolution: rethinking the market of legal rules' [2009] 139 *Public Choice* 461–92.

<sup>25</sup> *Ibid* 483.

have a variable cost of adjudication.<sup>26</sup> From this point of view, flexible multilateral treaties with a low level of specificity are less at risk of obsolescence as well as the implementation and adaptation rates.

Last but not least, it is important to note the different ways in which countries are willing to cooperate, depending on the importance of the subject of securities in their own legal systems. Many Latin American and African countries may feel they have scant cause to participate in the harmonisation process, since their securities markets are not properly developed or securities are traded in small amounts (compared with the USA and the European Union). It is important to recognise that some of the ineffectiveness of the harmonisation process may be due to institutional myopia and macroeconomic weakness. Of course, the political economy of cooperation in international instruments exceeds the purpose of this article, yet it should be mentioned.

The following section will explain the two major trends in securities systems (direct and indirect systems) and the goals of the Geneva Securities Convention in order to solve some of the issues mentioned above.

## C. Securities systems and the goals of the Geneva Securities Convention

### A. Harmonisation in respect of securities. Direct and indirect holding systems

The development of securities clearing and settlement systems has facilitated the volume increase in cross-border securities transactions. Other factors that have contributed to this increase have been the process of immobilisation or dematerialisation of securities and the incorporation of electronic mechanisms in the securities transaction markets.<sup>27</sup>

Despite the rapid development of financial engineering in securities, legal structures have not kept pace with the evolution of the system.<sup>28</sup>

Two major systems for holding securities can be found around the world: direct holding systems and indirect holding systems.

Direct ownership jurisdictions recognise that when a custodian pools their securities, they modify the form of ownership without changing the identity of their owners as investors. In a direct ownership jurisdiction, the immobilisation or dematerialisation of securities does not alter the contractual or corporate

<sup>26</sup> Francesco Parisi and Fon Vinci, *The Economics of Lawmaking* (Oxford University Press 2009) 14.

<sup>27</sup> It should be noted that dematerialisation and immobilisation are two different concepts. While the latter refers, for example, to the immobilisation that takes place when the certificate is held by an intermediary, the former refers to the inexistence of certificates, therefore rights are exercised through book entries in other systems. For a more developed explanation see Luc Thévenoz 'New legal concepts regarding the holding of investment securities for a civil law jurisdiction' [2005] 10 *Unif Law Review* 301–37.

<sup>28</sup> Chun Changmin, *Cross Border Transactions of Intermediated Securities; a Comparative Analysis in Substantive Law and Private international Law* (Springer 2012) 20.

relations between investors and issuers.<sup>29</sup> One of the most important features of indirect holding systems is that there is no direct relationship between the issuer and the investor, which will have rights against the intermediary.

Direct holding systems imply that securities have been issued and that investors acquiring those securities are entitled to exercise the rights attached to those securities. It should be noted that Article 9 of the Convention deals with rights of the account holder independently of the kind of holding system in place.

Clearly, there is no direct relation as between the classical distinction between legal families (Common Law - Civil Law) and the direct – indirect ownership theme; all that may be said is that small capital markets usually operate direct ownership mechanisms. Small capital markets are usually associated with countries with weaker institutional frameworks and macroeconomic instability, especially in the field of currency exchange rates as well as in the restrictions they impose on the freedom to operate in the market. An indirect holding system may amplify these risks, so it seems a good adaptive model to the economic and political reality of those countries. In fact, some related literature on empirical finance has proposed that sovereign default risk prevents countries from risk sharing through endogenous constraints on borrowing, which is more difficult in bad times and more costly in terms of default.<sup>30</sup> Thus, high macro-risk countries may see their securities trade and the number of intermediaries reduced, because of the impossibility of transferring that risk.

This is an important feature that will be taken into consideration in further sections. However, many civil law jurisdictions use multi-tier systems for holding securities, such as Germany, Switzerland, Luxembourg, and many others.

An indirect holding system implies the existence of one or more intermediaries between the issuer and the investor where the intermediary has not only a custody function but also sometimes beneficial rights in those securities.<sup>31</sup>

Essentially, in indirect holding systems the intermediary might be at risk if it holds securities in which beneficial rights are shared. In other words, the question could be phrased thus: ‘what are those beneficial rights that the intermediary might hold?’<sup>32</sup>

A common feature of both direct and indirect holding systems is that it reduces the cost of physically transferring the securities. In fact, physical certificates may or may not exist and the existence of securities is determined by book entries systems.

<sup>29</sup> Luc Thévenoz (n 3) 23.

<sup>30</sup> A number of empirical studies have emerged from empirical finance literature. Bekaert Geert and Harvey Campbell, ‘Emerging Markets Finance’ [2003] 10 *Journal of Empirical Finance* 3–57; For a more recent literature which captures the idea of risk sharing by emerging markets because of financial integration, see Yan Bai and Jing Zhang, ‘Financial Integration and International Risk Sharing’ [2012] 86 *Journal of International Economics* 17–32.

<sup>31</sup> Steven Schwarcz, ‘Indirectly Held Securities and Intermediary Risk’ [2001] 2002 *Uniform Law Review* 285.

<sup>32</sup> Steven Schwarcz and Joanna Benjamin, ‘Articles and Comments: intermediary Risk in the Indirect Holding System for Securities’ [2002] 12 *Duke Journal of International and Comparative Law* 309–30.

## B. The goals of the Geneva Securities Convention

The aims of the Convention are set out in the preamble of the Official Commentary on the Geneva Securities Convention. Of special importance for the purpose of this article is the reference made to the reduction of legal risk.<sup>33</sup>

It has been argued that ‘in developed financial markets the control of securities by financial intermediaries is for the benefit of investors.’

There is no mistaking the goal pursued by UNIDROIT in developing the Convention:

UNIDROIT undertook its project on substantive rules regarding intermediated securities (Study LXXVIII) in order to create an international instrument for improving the legal framework for securities holding, transfer and collateralisation. The UNIDROIT Convention on Substantive Rules for Intermediated Securities intends to enhance the internal stability of national financial markets and their cross-border compatibility and, as such, to promote capital formation.

Over the past fifty years, the practice of holding and disposition of investment securities has changed considerably. Departing from the traditional concept of custody or deposit of physical certificates, a system of holding through intermediaries has been developed for reasons of efficiency, operational certainty and speed. In this system, the greater part of securities is immobilised with a central securities depository. The investor holds securities through a chain of intermediaries that are ultimately connected to the central securities depository. The transfer of securities and the creation of security and other limited interests therein are in practice commonly affected by way of book entries to the accounts concerned. The securities themselves are no longer physically moved.

However, the legal framework which underlies this modern system of holding through intermediaries in many countries still relies on traditional legal concepts first developed for the traditional method of holding and disposition relating to tangible assets held in physical custody. As a result, the legal risk in the area of securities holding and disposition is particularly high. This legal uncertainty is multiplied by the fact that securities are increasingly held and transferred across borders, since domestic legal frameworks are not necessarily compatible with each other. Legal risk can, in times of ‘stress’, even trigger systemic effects. Additionally, persistent legal risk affects the efficiency of the markets, as is easily illustrated by the example of increased transaction costs.<sup>34</sup>

Developed financial structures usually include some type of financial intermediation, such as a central securities depository or a bank, among other options.

Usually, investors as well as their advisors are somehow able to forecast the return of a specific asset or a portfolio asset by using quite sophisticated

<sup>33</sup> ‘Aware of the importance of reducing legal risk, systemic risk and associated costs in relation to domestic and cross-border transactions involving intermediated securities so as to facilitate the flow of capital and access to capital markets’ in Hideki Kanda and others (eds), *Official Commentary on the UNIDROIT Convention on Substantive Rules for Intermediated Securities* (Oxford University Press 2012).

<sup>34</sup> UNIDROIT available at <<http://www.unidroit.org/english/conventions/2009intermediatedsecurities/overview.html>> accessed 9 February 2014.

econometric tools, even micro microstructure market analysis. This is possible due to the information available about the different types of investment, including their institutional environment and political risk.

However, how much can be said about the legal risk in cross-border transactions and its effects on investors? The question becomes even more complicated if we consider, as has already been mentioned, a globalised scenario with different securities and banking regulations. This question is part of the risk assumed by the financial system, usually known as systemic risk. The risk of the intermediary is part of that risk.

Systemic risk has been defined in several ways. Some commentators define systemic risk as the probability that cumulative losses will occur from an event that ignites a series of successive losses along a chain of financial institutions or markets comprising a system. Other authors consider it as the potential for a modest economic shock to induce substantial volatility in asset pricing, significant reduction in corporate liquidity, potential bankruptcies and efficiency losses.<sup>35</sup>

Although definitions may show some inconsistencies (one refers to an event, the second refers to a modest economic shock) they have in common the existence of some kind of event that causes economic losses.<sup>36</sup>

Legal risk is one of the components of systemic risk. There are several definitions of legal risk. A quite comprehensive such definition was quoted by Luc Thévenoz from a working paper prepared by the International Bar Association in 2003, stating that

Legal risk is the risk of loss to an institution which is primarily caused by:– (a) a defective transaction; or (b) a claim (including a defense to a claim or a counterclaim) being made or some other event occurring which results in a liability for the institution or other loss (for example, as a result of the termination of a contract); or (c) failing to take appropriate measures to protect assets (for example, intellectual property) owned by the institution; or (d) change in law. The reference to a defective transaction in (a) above includes:– (i) entering into a transaction which does not allocate rights and obligations and associated risks in the manner intended; (ii) entering into a transaction which is or may be determined to be void or unenforceable in whole or with respect to a material part (for whatever reason); ... (vii) security arrangements that are, or may be, defective (for whatever reason).<sup>37</sup>

Another definition contained in the same document that is relevant to this article stated that

Legal risk might also refer to situations where the answer provided by the applicable law does not fit the market reality, or where the law unnecessarily complicates or burdens a transaction. Often, legal requirements that are rooted in traditional legal

<sup>35</sup> Steven Schwarcz, 'Systemic Risk' [2008] 97 *Georgetown Law Journal* 193–247.

<sup>36</sup> *Ibid.*

<sup>37</sup> Luc Thévenoz 'Intermediated Securities, Legal Risk, and the International Harmonisation of Commercial Law' [2007] *Duke Law School Legal Studies*. Vol 13, Paper No. 170 *Stanford Journal of Law, Business and Finance* 284. Available at SSRN: <<http://ssrn.com/abstract=1008859>> accessed 2 February 2014.

concepts and created to promote legal certainty lose their original purpose when applied to modern securities holding and transfer structures. The consequence of imposing requirements that complicate a transaction can be time consuming and costly. Furthermore, a complicated procedure makes each process of perfection of a transaction specifically vulnerable to mistakes. On the other hand, in other cases, the law provides for legal concepts that make the use of specific kinds of transaction that are used in or requested by the practice impossible and thereby creates a barrier.

Finally, intermediary risk might be seen as the risk that an economic shock, such as a market or institutional crisis, triggers either an increase in the cost of capital or a decrease in its availability.<sup>38</sup>

From this perspective, legal risk incurred by the intermediary affects both direct ownership systems and multi-tier systems. If we consider globalised capital markets, we need to explore the possibility of convergence of some basic rules aimed at mitigating that risk. However, the importance of the role of legal risk and intermediary risk may vary according to the size of the market; this issue will be considered in section D.

There are two possibilities of convergence. The first possibility is to return to the direct system of holding securities. The other is to maintain the intermediate holding system and reduce its risks. In a sense, the second option appears the more efficient, at least in Kaldor-Hicks terms.<sup>39</sup> The benefits of intermediation appear to be higher because they enable investment flows to access global levels, while the cost of the systems (the intermediary risk) could be reduced if a proper institutional framework were established.

It is a fact that the harmonisation of legal regimes is not keeping pace with the rapid unification of markets. Countries are attached to their legal traditions and legal culture, which are perceived to reflect the norms and accepted usages of their citizens, thus guaranteeing a stable environment in which economic agents can produce and trade with other domestic partners. Individual transactions are subject to domestic law. When the transaction has relevant points of connection with more than one legal system, conflict-of-law rules provide a basis for identifying the applicable law.

Issuer risk can be reduced through diversified portfolio investments. In that case, the question arises of how this affects the intermediary risk. Coasean solutions advocating the establishment of an institutional framework that reduces transaction costs might be a helpful approach to explain the rationale of the Geneva Securities Convention.<sup>40</sup>

<sup>38</sup> Steven Schwarcz (n 36) 196–98.

<sup>39</sup> Kaldor-Hicks efficiency establishes that a situation is efficient if benefits exceed cost and those suffering the cost can be at least hypothetically compensated. An explanation of this criteria as well as its critics might be found in James Buchanan, 'Positive Economics, Welfare Economics and Normative Economics' [1959] 2 *Journal of Law and Economics* 124–38.

<sup>40</sup> Normative Coasean approach states that if transaction costs happened to be high the institutional framework should help to reduce those transaction costs. Boudewijn Bouckaert and Gerrit De Geest (eds), *Encyclopedia of Law and Economics, Volume II: Civil Law and Economics* (Edward Elgar Publishing 2000) 807.

The Convention follows a functional approach that is typical not only at a theoretical comparative law level, but also in respect of its practical aspect such as the harmonisation of different legal regimes, which is the case of the Convention.

The functional approach provides an ideal way of achieving harmonisation without the need to harmonise ‘core law’ of different countries. In addition, the functional approach adopts ‘the solutions to problems’ point of view; therefore, solutions need not be identical in all countries.<sup>41</sup>

The basic characteristics of the Geneva Securities Convention including, are in particular:

- i. Improving the legal framework for securities holding and transfer with special emphasis on cross-border situations; ii Adapting the legal framework to the prevalent system of holding through intermediaries; iii overcoming the legal risk arising for the reliance.<sup>42</sup>

According to some authors, the Convention deals only with the substantive rules on three issues: (a) the effectiveness against third parties of a security interest in intermediated securities; (b) the priority of the security interest against competing claimants; and (c) the enforcement of the secured creditor’s rights.<sup>43</sup> However, this is only partially true. The Official Commentary to the Convention mentions several other issues covered by the Convention, such as outright transfers, the rights of accounts holders, including voting and income rights, and the integrity of the intermediated system.

The topics addressed by the Convention would appear to be appropriate since they deal with the substantive law of different countries with different legal traditions. Therefore, in order to be consistent with the minimalist approach, only the core issues that might be relevant to reducing the risk of the intermediary should be addressed.

In the wake of the dematerialisation process, the rights in respect of securities have become intangible assets. In cross-border transactions, the transfer of intangible rights often requires formalities that increase investor risk.<sup>44</sup> The heterogeneity of legal systems increases transaction costs, due to information problems and legal uncertainty. The harmonisation of legal rules might help to reduce the risk involved in the transfer and acquisition of investors’ security interests.<sup>45</sup>

<sup>41</sup> Charles Mooney Jr. and Kanda Hideki, ‘Core Issues under the UNIDROIT Convention on Intermediated Securities’, in Louise Gullifer and Jennifer Payne, *Intermediated Securities, Legal Problems and Practical Issues* (Hart Publishing 2010) 72.

<sup>42</sup> *Ibid* 77.

<sup>43</sup> Michel Deschamps, ‘The security interest provision of the UNIDROIT Convention on Intermediated Securities’ [2010] *Uniform Law Review* 337–45.

<sup>44</sup> Luc Thévenoz (n 38) 284.

<sup>45</sup> Charles Mooney Jr. and Hideki Kanda (n 42) 97–9.

Securities clearing and settlement systems are institutional arrangements for confirmation, clearance and settlement of securities. Although they are related, these two concepts should be distinguished from one another.

According to the Convention, a 'securities clearing system' means a system that: clears, but does not settle, securities transactions through a central counterparty or otherwise; (ii) is operated by a central bank or central banks or is subject to regulation, supervision or oversight by a governmental or public authority in relation to its rules; and (iii) has been identified as a securities clearing system in a declaration made by the Contracting State the law of which governs the system on the ground of the reduction of risk to the stability of the financial system.

On the other hand, a 'securities settlement system' means a system that:

(i) settles, or clears and settles, securities transactions; (ii) is operated by a central bank or central banks or is subject to regulation, supervision or oversight by a governmental or public authority in relation to its rules; and (iii) has been identified as a securities settlement system in a declaration made by the Contracting State the law of which governs the system on the ground of the reduction of risk to the stability of the financial system.<sup>46</sup>

Participants in clearing and settlement systems face a variety of risks, such as settlement risk and liquidity risk. Some risks are the result of control and information problems, such as custody risk or legal risk. All these risks constitute systemic risk, which is basically related to the risk faced by the financial scheme through which financial operations are made. Regulators have recognised the importance of legal certainty in international business.<sup>47</sup>

A number of different types of institution invest in large international investment securities portfolios. These include pension funds, insurance companies and equity funds. In recent decades, the size of these institutions and their portfolios has grown. Because of this increase in transaction volumes as well as the technological transformation that facilitates global transactions, a new concern has arisen related to the heterogeneity of legal regulations in respect of securities.

Investors make investment decisions in accordance with the projected cash flow of the assets in which they are investing, in calculating which the return of the investment risk is considered. An important part of these risks is known as 'legal risk'. This legal risk is related specifically to the losses that might be caused by a defective transaction or by an unexpected application of the law.<sup>48</sup>

In economic terms, legal uncertainty may increase the costs of monitoring. As a result, high transaction costs may be imposed on high-performance debtors due to an adverse selection problem resulting in a general increase in financing cost or in extreme cases, collapsing the entire system. Within this framework, the Geneva

<sup>46</sup> Hideki Kanda and others (n 34) 6.

<sup>47</sup> Alessandra Zanolotti, 'La Sécurité Juridique des Transactions Internationales dans un monde global' [2010] 15 *Uniform Law Review* 904.

<sup>48</sup> Luc Thévenoz (n 38) 8.

Securities Convention seeks to provide a solution to several legal issues involving legal risk.<sup>49</sup>

However, the minimal standard approach adopted by the Convention should be seen as a necessary, but not sufficient, requirement to improve the development of transactions in securities and capital markets. This is the case particularly in emerging markets, where the reduction of legal risk is not enough to mitigate other institutional factors, such as lack of enforcement, all of which may be the reason why capital markets in these areas are not sufficiently developed and prevented some countries that have signed the Final Act of the Convention from actually applying it.<sup>50</sup>

The following section analyses the Convention from an emerging markets perspective.

### **C. The intermediate securities mechanism in emerging markets**

#### **I. Some general comments on securities mechanisms from an emerging markets perspective**

As mentioned in the previous section, there may be other types of risk in small capital markets such as lack of enforcement of legal rules, a gap between the law in the books and the law in the practice, institutional myopia, macroeconomic instability, risk of takings or confiscations, which lead to a significant reduction of cross-border transactions and capital markets generally speaking. In such cases, the scope of application of the Geneva Securities Convention may be significantly reduced, and result in the symbolic adoption of the Convention—where a country is part of the Convention but does not fulfil the necessary factual conditions that will enable it to apply the instrument.<sup>51</sup>

The implementation of uniform laws in developing countries is complicated, since it is usually enmeshed with political and technical issues. Professor Bonell has stated that the absence of a supranational judicial body leaves room for different interpretations of the same international instruments. In the case of Africa and Latin America, the lack of participation in the development of harmonisation instruments has been pointed out. Technical difficulties are related to the lack of well-trained lawyers, policy-makers and judges who can cope with the technicalities of the international instrument. As a result, these factors should be considered in the harmonisation process, not least the question of how business circles perceive the issue.<sup>52</sup>

<sup>49</sup> Adverse selection is a kind of market failure and occurs because of information asymmetries and difficulties in identifying the quality of the product selected by a customer.

<sup>50</sup> A case to be mentioned is Argentina which has recently modified its capital markets regulation. It presented a unique opportunity to address issues dealt with by the Geneva Convention or related issues, such as close out netting. However, none of this happened.

<sup>51</sup> For the concept of symbolic adoption of law see Pier Giuseppe Monateri, *Methods of Comparative Law* (Edward Elgar Publishing 2012) 88.

<sup>52</sup> Michael Joachim Bonell (n 5) 865–88.

This seems to be happening in Argentina. Although the country signed the Final Act of the Geneva Securities Convention on 9 October 2009,<sup>53</sup> no-one seems aware of this even in legal practice. Empirical research indicates that the Convention is not mentioned even in the leading local legal research databases.<sup>54</sup>

In view of the above, institutional myopia prevents stable policy developments in the securities area. A clear case in Argentina would be capital markets. Since 2002, the default financial system has been virtually confined to local operations, and while there are several ways in which companies may be financed, these certainly do not have access to international capital markets (with rare exceptions). Therefore, any rule intended to develop financial structures as commonly used in the global financial system (such as intermediated securities) might go unnoticed by local operators.

That is not to say that being part of the harmonisation process in respect of securities is a waste of resources and effort for emerging economies. Adopting the Convention should be regarded as a necessary step for these countries to achieve harmonisation with developed markets and to enjoy the benefits of financial stability.

The Geneva Securities Convention may be seen as a necessary but not sufficient condition for the development of capital markets in emerging economies. One of the key arguments that persuaded the UNIDROIT Governing Council to embark on this project were calls from emerging markets for an international benchmark, but while the Convention could be a useful tool in modernising their financial regulations, it can by no means solve weak macroeconomic institutional frameworks that might affect financial intermediation and capital markets.

It seems important to keep in mind that the general purpose of the Convention is to reduce transaction costs generated by the lack of appropriate information in the financial system through an institutional framework. However, the cost of that harmonisation should not exceed the benefits, and those costs and benefits should be measured in accordance with each country's financial structure as well as its legal tradition.

Since the Convention leaves many important concerns to the non-convention law such as certain rights to be fulfilled by the intermediary, a guide to implementation for emerging economies may in some ways be a useful tool to ensure that the Convention becomes law in practice rather than just law in the books.<sup>55</sup>

In the following section, we look at the transformation and modernisation of the Argentinian security system and assess the Argentinian position on the Convention. It will be shown that the Convention is fully applicable under

<sup>53</sup> See <<http://www.unidroit.org/english/conventions/2009intermediatedsecurities/conference/main.htm>> accessed 9 February 2014.

<sup>54</sup> I am making reference to the most important Argentinean legal database (La Ley - Abeledo Perrot belonging to Thomson Reugters, El Derecho among others) where there is no document of judicial precedent up to now referring to the use of the Convention. This is at least up to the moment of this research (July 2013).

<sup>55</sup> See Art. 28 i of the Geneva Convention.

Argentinian regulations. However, institutional limitations have kept application at a minimum to date.

## II. An Argentinian perspective on securities regulation

### a) The dematerialisation process

The Argentinian legal literature has traditionally followed the Italian doctrine on negotiable instruments (*títulos de crédito* in Spanish), according to which physical possession of the securities is necessary in order to exercise the rights in the content conferred by them. This structure began to change in Argentina with the ‘paper crunch crises’ in the mid-1980s.<sup>56</sup> As the economy dematerialised, the conditions for the registration and transfer of securities had to be set in place. A new kind of rights was recognised in different statutes.

The easiest way to understand the dematerialisation phenomenon is to identify it with the computer revolution and the capital market. In this regard, dematerialisation of securities can be defined as the phenomenon by which the document is omitted as material support, preserving its autonomous rights based on the information contained in computer or book records. It has also been defined as the process of dematerialisation of paper documents in a digital context of electronic transfer.<sup>57</sup>

The dematerialisation process has been a gradual one. It began with the decline of the requirement of physical possession to exercise the rights in the content. This was the case, for example, of the book entry shares that came with Law 22.093 which amended Law 19.550 (Argentinian Company Act). Physical possession of the title as a typifying element was abandoned with the new reform of section 208 of the ‘Ley de Sociedades Comerciales’ (Argentinian Company Act). The share as physical title has been replaced by an entry in a special account in a register kept for that purpose. Thus, the legislative adoption of book entry shares represented the first case of dematerialisation of Argentine positive law. A second case of dematerialisation is contained in the law on corporate bonds. A large number of notes were placed in international markets mainly by means of so-called global notes. To facilitate trading on international markets, the global securities were admitted to collective deposit systems. In the terms of issue, it can be agreed that the notes are not represented by certificates, in which case accounts must be recorded in a register in the name of the owner. The company must submit the bondholder proof of opening of the account and records of the account balance and bear the cost of this operation.

In Argentina, the values can be represented both by physical evidence (called ‘certificated’) and as a book-entry (book-entry or ‘written’), at the option of the issuer. Additionally, securities may be issued represented in Global Certificates

<sup>56</sup> Alfredo Musitani, ‘Desmaterialización de Títulos Valores’, *Revista Argentina de Derecho Empresario*, Buenos Aires, 2006, Ed. Ad-Hoc No 5, 289.

<sup>57</sup> *Ibid.*

(or 'Jumbo Certificates'), which are deposited in the CSD and then dematerialised in entries. The entity known as *Caja de Valores (CV)* (Argentinian CSD) is the central depository and must keep separate records to identify the rights of each depositor and principal at all times. In the case of securities represented by book entries or 'written', the law provides that the issuer is responsible for the registration of the securities issued, but may delegate this function in certain cases; if the CV is chosen as Registrar, the securities are issued by means of instructions issued by the issuer to the CV. The securities represented by book entries are deposited in the CV, maintaining joint ownership with the same class and issuer. Physical securities represent less than 0.5% of the total securities traded, the rest are all book-entries.

It has been argued that these new kinds of securities in which no physical support is required do not imply a new category of rights. The idea of '*derechos sobre valores*' (which would be the equivalent of security) does not imply a new conception of rights, although some adjustments may need to be made.<sup>58</sup>

Nor, however, does it imply that the investor may not exercise their rights directly against the issuer. It remains in a direct holding system with some degree of intermediation.

Other important improvements in the intermediation of securities are contained in the Private Debt Securities Law (or *Ley de obligaciones negociables*), according to which a trustee may act on behalf of the beneficiary and exercise some rights, but the pool of securities constitutes a kind of co-ownership.

With regard to acquisition in good faith, some modernisation of securities markets is now taking place. On the one hand, section 130 of the new Law 26.831, which has regulated capital markets in Argentina since December 2012, establishes that:

The third party purchaser for value consideration of securities entered in an account or in book-entry form, that according to the entries of the relevant record, is entitled to transfer them is not subject to claim except if it acted in bad faith or with wilful misconduct at the time of the purchase.<sup>59</sup>

On the other hand, Article 18 of the Geneva Securities Convention establishes:

- (a) the right or interest of the acquirer is not subject to the interest of that other person; (b) the acquirer is not liable to that other person; and (c) the credit, designating entry or interest granted is not rendered invalid,

<sup>58</sup> Villegas, Carlos; '*Los valores no cartulares y su ejecución. Títulos escriturales o representados mediante anotaciones en cuenta o certificados globales*' LA LEY2004-A, 905 - Derecho Comercial Doctrinas Esenciales Tomo IV, 01/01/2009, p. 1033.

<sup>59</sup> The English text of the norm is the official translation made by the CNV (Comisión Nacional de Valores) available at <[http://www.cnv.gob.ar/LeyesReg/marco\\_regulatorio3.asp?Lang=0&item=1](http://www.cnv.gob.ar/LeyesReg/marco_regulatorio3.asp?Lang=0&item=1)> accessed 9 February 2014.

- ineffective against third parties or liable to be reversed on the ground that the credit, designating entry or interest granted violates the rights of that other person.
2. Unless an acquirer actually knows or ought to know, at the relevant time, of an earlier defective entry:
    - (a) the credit, designating entry or interest is not rendered invalid, ineffective against third parties or liable to be reversed as a result of that defective entry; and
    - (b) the acquirer is not liable to anyone who would benefit from the invalidity or reversal of that defective entry.
  3. Paragraphs 1 and 2 do not apply to an acquisition of intermediated securities, other than the grant of a security interest, made by way of gift or otherwise gratuitously.
  4. If an acquirer is not protected by paragraph 1 or paragraph 2, the applicable law determines the rights and liabilities, if any, of the acquirer.
  5. To the extent permitted by the non-Convention law, paragraph 2 is subject to any provision of the uniform rules of a securities settlement system or of the account agreement.
  6. This Article does not modify the priorities determined by Article 19 or Article 20(2).

A comparison of the two provisions shows a strong similarity in good faith acquisition by third parties.

The new unification project in respect of the Argentinian Civil and Commercial Code contains new concepts on securities, but it is not clear whether it will help to develop a multi-tier security system. Section 1820 of the project provides for freedom to create any kind of securities provided they specify the rights contained in them. However, this is still different from the idea of ‘derecho sobre valor’ and the relation between intermediaries.

#### b) The Argentinian position on the Geneva Securities Convention

As has already been stated, Argentina belongs to the group of countries with a transparent system.

According to the preparatory papers of the Geneva Securities Convention, Argentina’s seems to be a type II transparent system in which ‘the upper level (the CSD) maintains accounts in the name of the “middle entity” but these accounts are divided into sub-accounts for each account holder (client) of the “middle entity” reflecting each client’s holdings.’<sup>60</sup>

Article 7 of the Geneva Securities Convention requires a declaration in order to specify the person other than the intermediary who may perform functions

<sup>60</sup> UNIDROIT Study Group LXXVIII Doc N° 70 available at <<http://www.unidroit.org/english/documents/2007/study78/s-78-070-e.pdf>> accessed 9 February 2014.

including the applicability of the rights granted to the account holders and the measures allowing them to exercise those rights.

Specifically, with respect to Argentina's transparent system, 'Some doubt was expressed that, in the Argentinian system, account operators seemed not to be included within the category of "relevant intermediary" as defined in Article 1(g), since they did not *maintain* a securities account but the CSD did, who could also be directly asked, by the ultimate account holders, to make credits or debits to their sub-accounts.'<sup>61</sup>

It is worth mentioning that some changes may be expected in this area due to the new capital markets regulation enacted in December 2012, mainly because the *Comisión Nacional de Valores* - CNV (the local capital markets authority) is due to increase its powers of monitoring, surveillance, and legislation in regard to capital markets issues. However, as these lines are being written, no modification has been made.

In the preparatory work for the Geneva Securities Convention, the Argentinian delegation made some important points relevant to emerging markets, most of which dealt with transparent systems with Registrar requirements that differed from one jurisdiction to another. It was noted that this appeared to be a difficult issue to harmonise in the Convention.

For instance, the Argentinian system recognises co-property rights to account holders by means of credits and debits in CSD's accounts. The Argentinian delegation also mooted the idea of including the notion of account operator, even though the French delegation was concerned that this might create legal uncertainty. Another observation made was that the relevant intermediary maintains the account, but not the securities which are usually held by the CSD (*Caja de Valores* in the Argentinian regulation); therefore, the question arose as to who would be considered the relevant intermediary in accordance with Article 1 (g) of the Convention, since the text refers to those acting as account holders, but not holding the securities.<sup>62</sup>

However, in my view, the most important comments made from the Argentinian perspective were those related to: (i) the fact that in transparent systems, substantive rules should be related to the way of interacting with non-transparent systems in order to facilitate financial integration; (ii) the prohibition of upper-tier attachment. According to the Argentinian delegation, this might contradict some basic domestic laws in that it might create a defence against creditors.<sup>63</sup>

The functional approach adopted by the Convention is expressed in a modification of the original Article 22 (Article 17 of the draft Convention).

<sup>61</sup> UNIDROIT Study Group LXXVIII Doc N° 44 available at <<http://www.unidroit.org/english/documents/2006/study78/s-78-044-e.pdf>> accessed 2 December 2013.

<sup>62</sup> UNIDROIT Study Group LXXVIII Doc N° 78 available at <<http://www.unidroit.org/english/documents/2007/study78/s-78-078-e.pdf>> accessed 9 February 2014.

<sup>63</sup> *Ibid.*

The original Article 17 stated that:

- No attachment of or in respect of intermediated securities of an account holder shall be granted or made against the issuer of the relevant securities or against any intermediary other than the relevant intermediary.

2. - In this Article “attachment” means any judicial, administrative or other act or process for enforcing or satisfying a judgment, award or other judicial, arbitral, administrative or other decision against or in respect of the account holder or for freezing, restricting or impounding property of the account holder in order to ensure its availability to enforce or satisfy any future such judgment, award or decision.<sup>64</sup>

Finally, the definitive Article 22 states that:

Prohibition of upper-tier attachment

1. Subject to paragraph 3, no attachment of intermediated securities of an account holder shall be made against, or so as to affect:

- (a) a securities account of any person other than that account holder;
- (b) the issuer of any securities credited to a securities account of that account holder; or
- (c) a person other than the account holder and the relevant intermediary.

2. In this Article, “attachment of intermediated securities of an account holder” means any judicial, administrative or other act or process to freeze,

1. - No attachment of or in respect of intermediated securities of an account holder shall be granted or made against the issuer of the relevant securities or against any intermediary other than the relevant intermediary.

2. - In this Article “attachment” means any judicial, administrative or other act or process for enforcing or satisfying a judgment, award or other judicial, arbitral, administrative or other decision against or in respect of the account holder or for freezing, restricting or impounding property of the account holder in order to ensure its availability to enforce or satisfy any future such judgment, award or decision.

Restrict or impound intermediated securities of that account holder in order to enforce or satisfy a judgment, award or other judicial, arbitral, administrative or other decision or in order to ensure the availability of such intermediated securities to enforce or satisfy any future judgment, award or decision.

3. A Contracting State may declare that under its non-Convention law an attachment of Intermediated securities of an account holder made against or so as to affect a person other than the relevant intermediary has effect also against the relevant intermediary. Any such declaration shall identify that other person by name or description and shall specify the time at

<sup>64</sup> Preliminary draft Convention available at <<http://www.unidroit.org/english/documents/2006/study78/s-78-057-e.pdf>> accessed 9 February 2014.

which such an attachment becomes effective against the relevant intermediary.

The clear distinction between the two articles lies in their references to the non-convention law allowing upper tier attachment. This is another clear example of the minimalist approach adopted by the Convention suggested, among others, by emerging market countries.

Having dealt with some aspects of the Argentinian securities regulation and the opinions expressed by Argentinian delegates during the preparatory stage, the time has come to explore some prospective topics that are likely to arise in the harmonisation process with regard to securities.

#### **D. Harmonisation and implementation of securities regulation – the Argentine perspective**

As already mentioned with regard to indirect holding systems, an issuer of securities generally records ownership of their securities as belonging to one or more depository intermediaries. These intermediaries record the identity of other intermediaries, such as brokerage firms or banks purchasing interests in the securities. This indirect holding system is widely used in global trading, in which international capital market transactions are a common way of investing and securing financing.<sup>65</sup>

It is clear that in this globalised mechanism, the problem of legal risk must be addressed. This is actually the main purpose of the Geneva Securities Convention in including domestic transactions where the Convention might be applied.<sup>66</sup>

In some jurisdictions in which a high level of financial integration has been achieved (eg the European Community) or where the market is highly sophisticated (eg the US), reducing legal risk might be a legitimate aim, since investors take a legal risk when engaging in cross-border transactions owing to the difference in legal regimes faced by financial intermediaries.

The Geneva Securities Convention, in its different sections, deals with a variety of issues in its bid to mitigate legal risk in cross-border transactions. However, it should be noted that the Convention refers not only to cross-border transactions but may also be applicable to local transactions.<sup>67</sup>

Yet I see the applicability of the Geneva Securities Convention to local transactions as a direct function of the size of the local market; on the other hand, its applicability to international transactions may depend on the level of international integration of the relevant country, ie on its degree of participation in cross-border transactions.

<sup>65</sup> Steven Schwarcz (n 32) 285.

<sup>66</sup> *Explanatory Notes to the Preliminary Draft Convention*, UNIDROIT STUDY LXVIII Doc. 19 (Dec. 2004), at 7. Available at <[www.unidroit.org](http://www.unidroit.org)> accessed 9 February 2014.

<sup>67</sup> Available at <<http://www.unidroit.org/english/conventions/2009intermediatedsecurities/main.htm>> accessed 9 February 2014.

Another point that should be mentioned is that legal risk is only one kind of risk, one of a variety of financial obstacles faced by emerging economies in capital markets. A case in point is Argentina's exit of from global capital markets and the cost to the country of its sovereign debt default.<sup>68</sup>

In less developed economies, legal risk should be considered only among several other risks that investors must consider. In this respect, two main points need to be made.

- a) The volume of traded securities is significantly smaller compared to that of developed economies mainly because of macroeconomic factors. Moreover, the scope of application of the harmonisation of intermediated securities may be smaller either because no cases involving the relevant issues arise or, more importantly from the point of view of legal convergence, because of a lack of proper legal tools to improve securities trading and capital markets.
- b) In commercial law, the rules usually follow the economic structure within which trade is taking place. Any trade implies risk. Among those risks is legal risk, including the intermediary risk, which is specifically contemplated by the Geneva Securities Convention. Although this assertion is true for any kind of economy, it is of particular relevance in emerging and less developed economies where risk ratios tend to be higher due to macroeconomic volatility.

Some limitation to the implementation of harmonisation in respect of securities in emerging economies may rise from the existence of a multiplicity of regulation on securities. In Argentina, there is no unified legal concept of security like Article 8 of the UCC. Although the theory of 'títulos valores' contains the same roots, this type of security is regulated by a different type of instrument (eg debt instruments, equity instruments, checks, among other negotiable instruments).

On the other hand, there may be some overlapping regulation, for example between corporate law statutes and capital markets statutes and negotiable instrument statutes. This generates fragmentation of the securities regulation. Although sometimes these different statutes might expand the assets that can be given in securities, they also increase transaction costs.<sup>69</sup>

Given the special characteristics of securities systems in emerging markets, the harmonisation process is at risk of idling. This tends to happen when a convention is adopted and enforced in a host country where the necessary structures are not all in place so that it is never fully implemented.

The Argentine system is of the transparent kind, in which a CSD maintains an account in each investor's name which is subject to local company law rules

<sup>68</sup> From an empirical explanation of the the correlation between default and the integration in capital markets see Ugo Panizza, Federico Sturzenegger and Jeormin Zettelmeyer, 'The Economics of Sovereign Debt and Default' [2009] 47 *Journal of Economic Literature* 651–98.

<sup>69</sup> Nicholas Foster, 'Comparative Commercial Law' in Esin Örüçü and David Nelken, *Comparative Law: a Handbook* (Hart Publishing 2007) 277.

allowing the final shareholder to be identified.<sup>70</sup> This is the case of CSD - Caja de Valores S. A., regulated by Law N° 20643.

The Argentinian system relies on proprietary law applied to securities. This should not be confused with the idea of autonomy in respect of 'títulos de crédito'. In the Argentinian proprietary law system, the investor may exercise its rights directly against the issuer of the security.

The previous paragraph outlined the usual way of trading securities. However, there are cases where, according to Argentinian law, investors may not exercise their rights directly but have to go through an intermediary such as an investment funds or a pension fund. However, the share of such players in the market dropped significantly after the 2001 financial crisis,<sup>71</sup> as did the volume of transactions in Argentinian capital markets.

The Convention deals with the transparent system scenario in its Article 7, establishing that:

A Contracting State may declare that under its non-Convention law a person other than the relevant intermediary is responsible for the performance of a function or functions (but not all functions) of the relevant intermediary under this Convention, either generally or in relation to intermediated securities, or securities accounts, of any category or description.

This is a clear case of the functional approach adopted by the Convention that allows different legal systems to retain control of certain sensitive issues proper to each Contracting State, such as company law. However, by deciding not to use company law terminology, the Convention has excluded certain kinds of relationship and hence, certain types of securities structure. Professor Thévenoz makes a clear point in stating that it would be impossible to adopt the functional approach allowing each Contracting Party to adapt the Convention to its own reality while omitting to address the rights of investors, which in my own view would have been a harmonisation nightmare.<sup>72</sup> Elsewhere, the same author explains that in adopting the functional approach, the study group was aiming at an intermediate position in order to avoid excessive intrusion in domestic laws by formulating rules only in terms of results.<sup>73</sup>

A point to be considered perhaps is that critics overlook the simple fact that not all the interests of the players involved can be dealt with at the same level in a harmonisation process. It seems reasonable that a first step had to be to deal with common problems in jurisdictions in which intermediated securities transactions are the common standard. The topic of transparent systems did not feature in the

<sup>70</sup> Luc Thévenoz (n 24) 845 59.

<sup>71</sup> In 2001, Argentina defaulted on its external debt; a taking from the bank deposits took place combined with severe devaluation of the Argentine Peso. This affected almost every industry in the country and led to a series of trials in International courts, such as The New York Court. Since then, Argentina has not regained the trust of international capital markets.

<sup>72</sup> Luc Thévenoz (n 24). It should be considered that If investors happened to be bank customers in some jurisdictions consumer law might be applied while this seems quite impossible in others.

<sup>73</sup> Luc Thévenoz Luc (n 3) 30, referring the Explanatory notes to the November 2004 draft.

preparatory work until Brazil, China and South Africa, among other countries, brought it up. I believe it is no coincidence that these countries belong to the group of BRIC countries where empirical research shows that financial flows have been increasing over the past decade. The same empirical research also evidences a direct correlation between macroeconomic stability and the volatility of stock markets.<sup>74</sup>

As a result, it is natural to expect an international instrument geared to reducing legal risk to be of extreme importance to emerging economies where financial flows have become a key factor of economic growth.

On the other hand, countries such as Argentina may have more difficulty applying the Convention because of high country systemic risk, which results in a reduced transaction volume and a low number of intermediaries. This may simply be because there is as yet no clear solution to the problem of debt restructuring and currency restrictions, among other macroeconomic factors.

It therefore makes sense for the Convention to concentrate primarily on improving the legal risk of the intermediary, which arises in sophisticated capital markets. As stated previously, intermediate securities are an efficient mechanism to promote new financial architecture. However, this is bound to cause divergent adaptation patterns in the Contracting States.

If we accept that a harmonisation instrument is successful if it solves an existing problem, the speed of adaptation will vary in jurisdictions where that problem may not yet have arisen. There, we will have a gap between the law in the books and the law in practice.

Although there may be some intermediation in respect of securities, the benefits of the intermediary by no means reach the multi-tier systems of developed economies. In that case, the scope for solving problems under the Geneva Securities Convention rules will be reduced.

Leaving aside criticism of the functional approach adopted by the Convention and the fact that so many issues are left to non-convention law, it would seem that any attempt to achieve harmonisation of commercial norms is a direct function of certain macroeconomic variables and of the cultural values of different legal systems. Therefore, although from the 'law in the books' perspective the Geneva Securities Convention is in tune with Argentinian rules, the economic structure of capital markets seems to preclude its application to a significant extent.<sup>75</sup>

This suggests that the existence of a set of rules that provides better solutions in a given situation, including a harmonised structure for intermediated securities, while a necessary condition may not be sufficient of itself to guarantee the success

<sup>74</sup> Robert Gay, 'Effect of macroeconomic variables on stock market returns for four emerging economies: Brazil, Russia, India, and China' [2008] 7 *Business and Economics Research Journal* 11.

<sup>75</sup> For some critics of the minimalist approach adopted by the Convention see: Chngming Chun (n 39) 34, arguing that the final text of the Convention seems to be too minimalist in order to reach its goal: legal certainty. It should be noticed that the functional approach does not necessarily mean leaving topics to non-conventional law. The functional approach should also be distinguished from the functional method in comparative Law. For an explanation of each different aspect see Thévenoz, (n 3) 30–4.

of the harmonisation process. This is due, in my view, to the evolutionary adaptability of the system in which harmonisation is being attempted. The evolutionary process implies that the preferences of legal operators (including, of course, judges and policy-makers in particular), in each legal culture may speed up or slow down the adaptation rate of foreign legal constructs.<sup>76</sup> The Geneva Securities Convention could be said to provide the legal structure of a certain type of financial system even though it leaves several topics to local law. From the law and economics point of view, this implies a strategic process of transplantation of certain types of principle to non-developed financial markets.<sup>77</sup> The application of the principles of the Convention would be harmonised with the non-convention law mostly through judicial interpretation. As a result, if the content of a legal system is assumed to be shaped by the application of the different norms handed down by the judiciary, the real reception of the Convention will be determined in concrete cases by the courts; otherwise, although we may have law in the books, we will not have law in practice.

Therefore, it is worth mentioning the evolutionary economics perspective on legal rules according to which the replacement process of a rule of inferior quality by a superior one is skewed by the adaptive stage of the norm, as an evolutionary product. This generates a certain genetic inheritance or path dependence that prevents the transfer from taking place purely on the basis of the innate quality of the borrowed norm. In other words, the efficiency of an institution (eg a convention) is independent from its effectiveness in a certain legal environment.<sup>78</sup>

However apparently pessimistic the setting, there are nevertheless clear opportunities for further work in the harmonisation process. In fact, UNIDROIT has recognised the challenges facing emerging economies by developing the accession toolkit for the Geneva Securities Convention and creating a task force for emerging markets.<sup>79</sup>

## Conclusions

The convergence of securities regulation in the wake of the globalisation of capital markets is an incontrovertible fact.

The Geneva Securities Convention is a clear step towards the convergence of securities regulation. However, the minimalist approach that can be extremely useful for developed countries due to the similarity of their macroeconomic structures, may be less so for developing economies, where the lack of proper

<sup>76</sup> Larry Samuelson, *Evolutionary Games and Equilibrium Selection* (MIT Press 1997) 34.

<sup>77</sup> Anthony Ogus and Nuno Garoupa, 'A Strategic Interpretation of Legal Transplants' [2006] 35 *Journal of Legal Studies* 339–63.

<sup>78</sup> Francesco Parisi and Fon Vinci, *The Economics of Law Making* (Oxford University Press 2009). In particular, see the equilibrium 257–64.

<sup>79</sup> This task force will develop several research activities in order to facilitate the implementation of the Geneva Convention in Emerging Markets. The scope of the research as well as its progress can be seen at <<http://www.unidroit.org/work-in-progress-studies/current-studies/emerging-markets>> accessed 18 February 2014.

internal conditions, such as efficient regulations, well-trained civil servants, and a clear and stable institutional design, may result in the Convention being applied in a lukewarm fashion.

If we measure the success of the harmonisation process in terms of the instrument's rate of use by ratifying Contracting States, then further steps must be taken before developing economies can implement it. The accession toolkit provided by UNIDROIT may prove extremely helpful for further analysis and for use by the taskforces that may be set up to develop regional guidelines.<sup>80</sup>

An important task is to analyse the nature of securities and possible links with corporate law, as well as the possibility of determining the efficiency in the reception of the Convention, given different kinds of corporate law and securities law statutes.

In any case, the legal framework must be seen as a necessary but not sufficient condition for the development of a multi-tier system of intermediated securities. The legal structure is the means to an end, ie a more developed capital market, which allows faster growth at lower cost, thus reaping the benefits of financial globalisation. In other words, the quality of the international instrument by no means guarantees its efficient application.

On the one hand, harmonisation must take into consideration issues of legal culture and path dependence, as well as political bias in different regions. Topics for further research on these issues might include interdisciplinary work between economists and lawyers to assess the impact of the application of the Convention on securities systems.

In so far as multi-tier systems are related to the possibility of incorporating this type of relationship in integrated markets in Latin America, such as *Mercosur* or *Comunidad Andina*, this might be a case to be explored, since some countries in Latin America seem to have reached some institutional and economic stability.

Finally, the proposal made by the Argentinian representative about how harmonisation relates to transparent and non-transparent systems would seem to be an extremely important task for further research.

All things considered, the Geneva Securities Convention is an extremely important instrument for developed economies with a view to mitigating legal risk. It should be a great opportunity for emerging economies too, especially in that it can open the way to collaboration with, and participation in, the global economy by harmonising legislation essential to the development of stronger and risk-free capital markets.

<sup>80</sup> See <<http://www.unidroit.org/english/studies/study78b/main.htm>> accessed 9 February 2014.