

September 2007 -

## Securities

Switzerland is about to enact a new Book Entry Securities Act (BESA) and has signed the Hague Convention on the Law Applicable to Certain Rights Held with an Intermediary, concluded on July 5 2006 (the Hague Securities Convention).

According to Swiss law a security is a certificated instrument in that the right it evidences can only be exercised or transferred together with the certificated instrument (Article 965 of the Swiss Code of Obligations). Today, however, most securities are immobilized and deposited with a central custodian and both the transfer and exercise of the rights evidenced by the securities no longer require possession or physical transfer of the certificate from one person to the other. So there is an obvious gap between the requirements of Swiss law and practice, which inevitably leads to legal uncertainty.

To overcome this unsatisfying situation, Switzerland has drafted BESA governing the custody of securities and uncertificated securities through custodians and their transfer. BESA will introduce the book entry security as a new and distinct legal subject.

The creation of a book entry security is subject to: (i) depositing a security (for example, global certificate or certificated fungible security) with a custodian or the entry of an uncertificated security in a custodian's main register; and (ii) crediting the book entry security to the account holder's security account. A book entry security is transferred: (i) by instruction of the account holder to the custodian to transfer the book entry security; and (ii) based on crediting the book entry security in the security account of the acquirer. BESA also contains provisions regarding the account holder's rights, including in the event of liquidation of the custodian, and the custodian's rights in respect of the securities it holds.

The *lex rei sitae* rule commonly applied in the international context of securities does not fit the needs of the participants in a multi-tier holding pattern. Switzerland has therefore signed, together with the US, the Hague Securities Convention, which determines the law applicable to various issues in respect of securities held with an intermediary. The Convention will enter into force with the ratification of at least three signatory states. As part of the BESA, Switzerland will also amend its Swiss Private International Law Act (SPILA) and include the provisions of the Hague Securities Convention into national law, so the provisions of the Hague Securities Convention will govern the applicable law, irrespective of its entry into force.

BESA, the Hague Securities Convention and the amendments in SPILA will be discussed and most likely passed in the parliamentary debates later this year. Little opposition is expected. However, they would not enter into force any earlier than January 2009.

*Michael Bösch*