

## **Federal Law on Book Entry Securities**

**(Book Entry Securities Act, BESA),**

dated October 3, 2008

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### **Chapter 1: Objective, Scope and Definitions**

#### **Art. 1** Object and Purpose

- 1 This law governs the custody of securities and uncertificated securities by custodians and the transfer.
- 2 It assures the protection of ownership interests of the investors. It contributes to legal certainty in international relations, to an efficient settlement of security dealings and to the stability of the financial system.

#### **Art. 2** Scope

- 1 This law applies to book entry securities credited by a custodian to a securities account.
- 2 The rules and regulations governing the entry of registered shares in the shareholders register remain unaffected.

#### **Art. 3** Book Entry Securities

- 1 Book entry securities within the meaning of this law are fungible pecuniary or membership rights against the issuer:
  - a. which are credited to a securities account; and
  - b. over which rights the account owner can dispose of in accordance with this law.
- 2 A book entry security is enforceable against the custodian and any third party; it is not subject to any attachment by the custodian's other creditors.

#### **Art. 4** Custodian

- 1 A custodian within the meaning of this law maintains securities accounts in the name of persons or associations of persons.

- 2 Custodians are:
- a. banks in accordance with the Federal Banking Law of November 8, 1934;
  - b. securities dealer in accordance with the Stock Exchange Law of March 24, 1995;
  - c. fund management in accordance with the Federal Law on Collective Investment Schemes of June 23, 2006, to the extent they maintain accounts for unit holders;
  - d. operators of securities clearing and settlement systems within the meaning of Art. 20 para. 2 Federal Law on National Bank of October 3, 2003, which are of relevance for the stability of the financial system;
  - e. Swiss National Bank pursuant to the Federal Law on the National Bank of October 3, 2003; and
  - f. Schweizerische Post in accordance with the Federal Law on the Organization of the Schweizerische Post of April 30, 1997.
- 3 Foreign banks, security dealers, central custodians and other financial intermediaries are deemed to be custodians, to the extent they maintain security accounts in the conduct of their business.

**Art. 5** Definitions

- 1 Within the meaning of this law:
- a. *third party custodian*: a custodian maintaining securities accounts for other custodians;
  - b. *account owner*: a person or association of person in whose name the custodian maintains a securities account;
  - c. *investor*: an account owner who is not a custodian or a custodian who maintains book entry securities for its own account;
  - d. *qualified investor*: a custodian, an insurance enterprise under supervision; a public law entity, pension fund or enterprise with a professional treasury;
  - e. *collective custody securities*: securities in the sense of Art. 973 a Swiss Code of Obligations;
  - f. *global certificate*: security in the sense of Art. 973 b Swiss Code of Obligations;
  - g. *uncertificated securities*: entitlements in the sense of Art. 973 c Swiss Code of Obligations.

## **Chapter 2: Creation, Conversion and Loss of Book Entry Securities**

### **Art. 6**            Creation

- 1 Book entry securities are created through:
  - a. the deposit of securities for collective custody with a custodian and the credit to one or more securities accounts;
  - b. the deposit of global certificates with a custodian and the credit to one or more securities accounts; or
  - c. the entry of uncertificated securities in the master register of a custodian and the credit to one or more securities accounts.
- 2 A master register is maintained by one single custodian for each issue of uncertificated securities. It contains details of the issue, the number as well as the split of the issued uncertificated securities; it is public.

### **Art. 7**            Conversion

- 1 To the extent the issue conditions or the articles of association do not provide otherwise, the issuer may convert collective custody securities, global certificates or uncertificated securities, which are deposited or registered as the basis for book entry securities, into one of the other forms without consent of the account owner. The costs are borne by the issuer.
- 2 To the extent the issue conditions or articles of association so provide, the account owner may at any time request from the issuer, for book entry securities which came into existence by depositing a global certificate or the entry of uncertificated securities in the master register, to issue certificated securities of the same number and kind. Such costs are borne by the account owner, unless the issue conditions or articles of association provide otherwise.
- 3 The custodian shall procure that the conversion does not change the total number of the pecuniary and membership rights issued.

### **Art. 8**            Delivery and Destruction

- 1 At any time, the account owner may request the custodian to deliver certificated securities of the same kind and number as are credited to its securities account, provided
  - a. certificated securities are deposited with a custodian or third party custodian; or
  - b. the account owner is entitled to receive certificated securities pursuant to Art. 7 para. 2.
- 2 The account owner is entitled to the delivery of the certificated securities, which correspond to the custom of the market on which these securities are traded.

- 3 The custodian shall assure that securities are delivered only if and when book entry securities of the same kind and number are debited to the corresponding securities account.

### **Chapter 3: Third Party Custody and Disposal over Book Entry Securities**

#### **Art. 9 Authorization for Third Party Custody**

- 1 The custodian may deposit book entry securities, certificated securities or uncertificated securities with a third party custodian in Switzerland or abroad. The consent of the account owner is not required.
- 2 The deposit with the third party custodian abroad, however, requires the explicit consent of the account owner, if the foreign custodian is not under supervision adequate to its activity.

#### **Art. 10 Effects**

- 1 The custodian credits the securities account of the account owner with the book entry securities which the third party custodian has credited to its securities account.
- 2 To the extent the third party custodian is not subject to this law, upon credit, the account owner acquires rights at least equal to the rights which the custodian acquires from the third party custody.

#### **Art. 11 Disposable Book Entry Securities**

- 1 Each custodian maintains itself or with a third party custodian disposable book entry securities of the number and kind at least equal to the aggregate number of book entry securities credited to the securities account of its account owners.
- 2 If the number of disposable book entry securities is less than the aggregate number of book entry securities credited, the custodian will have to acquire book entry securities for the shortfall without delay.
- 3 The following book entry securities are deemed disposable:
  - a. book entry securities credited to a securities account of the custodian with a third party custodian;
  - b. collective deposit securities and global certificates deposited with the custodian, or uncertificated securities registered in its main register; and
  - c. freely disposable claims for delivery of book entry securities against other custodians within the time prescribed for or which is customary in the respective market for ordinary settlement, but in any event no longer than 8 days.

**Art. 12** Own and Customer Assets

- 1 If the custodian maintains own and customer assets with a third party custodian on segregated securities accounts, the book entry securities and delivery entitlements of the account owners will not be affected by:
  - a. a netting agreement between the custodian and the third party custodian , to which the account owner has not become a party;
  - b. pledge, rights of retention and liquidation rights of the third party custodian or third parties which have not been agreed upon by the account owner.
- 2 A custodian may dispose over book entry securities of the account owner only if transferred to the custodian's own securities account in accordance with its right of use.
- 3 Deviant agreements are nil.

**Chapter 4: Rights from Custody of Book Entry Securities**

**Part 1:  
General Rights of Account Owners**

**Art. 13** Principle

- 1 The creation of book entry securities does not affect the investor's rights against the issuer.
- 2 The account owners may exercise their rights to book entry securities exclusively via their custodian, except where this law provides otherwise.

**Art. 14** Pledge and Attachment

- 1 A pledge, attachment or other preliminary measures against an account owner concerning book entry securities, may only be enforced at the custodian maintaining the securities account to which the book entry securities are credited for the account owner.
- 2 A pledge, attachment or other preliminary measure against an account owner enforced against a third party custodian is null and void.

**Art. 15** Instructions

- 1 The custodian is required to honour the account owner's instructions regarding the disposal of book entry securities in accordance with the agreement with the account owner.

- 2 It is neither entitled nor required to verify the legal basis for the instructions.
- 3 The account owner may revoke its instruction until the time determined by the agreement with the custodian or determined by the applicable securities clearings and settlement system. Instructions become irrevocable in any event with the debit of the securities account by the custodian.

**Art. 16** Certification

- 1 At any time, the account owner may request from the custodian a certification over the book entry securities credited to its securities account. Such certification is not a security.

**Part 2:**  
**Rights of Account Owners in Case of Liquidation of a Custodian**

**Art. 17** Segregation

- 1 In case of a forced liquidation over a custodian with the purpose of a general liquidation, the liquidator shall segregate ex officio the book entry securities which are credited to account owners:
  - a. book entry securities credited to the custodian's securities account with a third party custodian;
  - b. collective deposit securities, global certificates with the custodian and uncertificated securities which are entered into its main register; and
  - c. freely disposable rights of the custodian against third parties for the delivery of book entry securities from cash transactions, expired future contracts, hedging transactions or from issues for the account of the account owners.
- 2 To the extent the custodian maintains own and customer assets co-mingled on a single securities account with a third party custodian, it will be presumed that the book entry securities belong to the account owners.
- 3 Whoever liquidates a custodian will have to fulfil the respective obligation against the third party custodian, which have accrued from the third party custody of book entry securities or free deliveries of the third party custodian for the acquisition of book entry securities.
- 4 The segregated book entry securities and claims for delivery of book entry securities will:
  - a. be transferred to the custodian designated by the account owner; or
  - b. delivered in the form of certificated securities to the account owner.

- 5 Claims of the custodian in accordance with Art. 21 remain reserved.

**Art. 18** Segregation in the Case of Liquidation of Third Party Custodian

In the case of a forced liquidation of a third party custodian leading to a general liquidation, the custodian will have to request segregation of the book entry securities of its account owners with the third party custodian.

**Art. 19** Shortfall

- 1 Should the segregated book entry securities not suffice to fully satisfy the account owners' entitlements, book entry securities of the same number and kind of the shortfall held by the custodian in its own name will be segregated in their favour, even though they may have been kept segregated from the account owners' book entry securities.
- 2 Should the entitlements of the account owners still not be satisfied in full, the account owners will share in such shortfalls in proportion to their respective entitlements. To the extent of such shortfall, each account owner will have a claim for replacement against the custodian.

**Art. 20** Finality of Instructions

The instructions of a custodian participating in a settlement and clearing system are final also in case of insolvency proceedings against such custodian and valid against third parties, provided:

- a. they have been entered into the system prior to the commencement of the proceeding; or
- b. they have been entered into the system after the commencement of the proceedings and executed on the day of the commencement of the proceedings, provided the system's operator had or should have had no knowledge about the opening of the proceedings.

**Part 3:**  
**Custodian Rights to Book Entry Securities**

**Art. 21** Right of Retention and Liquidation

- 1 A custodian may retain and liquidate book entry securities credited to a securities account provided it has a claim against the account owner, which is due and which relates to the custody of book entry securities or to free deliveries made by the custodian for the acquisition of book entry securities.

- 2 The custodian's retention and liquidation right shall cease, upon such book entry securities having been credited to a securities account of another account owner.

**Art. 22** Right of Use

- 1 The account owner may authorize the custodian to dispose over the book entry securities in its own name and for its own account, namely to rehypothecate the book entry securities.
- 2 If the account owner is neither a custodian nor qualified investor, the authorization must be given in writing. The authorization may not be contained in the general terms and conditions.

**Art. 23** Restitution of Collateral

- 1 If the account owner has transferred book entry securities to the custodian as collateral and the custodian rehypothecates such book entry securities, the custodian will have to reconstitute to the account owner book entry securities of the same number and kind no later than upon maturity of the secured claim.
- 2 Such book entry securities are subject to the same security interests as the original security interest and shall be deemed to have been granted at the time of the original security interest.
- 3 To the extent the agreement providing for the security interest with the account owner so provides, the custodian may liquidate the book entry securities in accordance with Art. 31 instead of returning them.

**Chapter 5: Disposition of Book Entry Securities and Effects against Third Parties**

**Part 1:  
Disposition of Book Entry Securities**

**Art. 24** Disposition via Credit

- 1 Book entry securities are disposed of by:
  - a. instructions of the account owner to the custodian to transfer the book entry securities; and
  - b. credit of the book entry securities to the securities account of the acquirer.

- 2 The disposition is perfected with the completion of the respective credit. At the same time, the account owner disposing of the securities loses its right to the book entry securities.
- 3 The rules and regulations regarding acquisition by way of universal succession and forced liquidation remain reserved.
- 4 Restrictions on the transferability of registered shares remain reserved. Other restrictions regarding the transferability have no effect against the acquiror or third party.

**Art. 25** Creation of Security Interests

- 1 Except as set out in Art. 24, a security interest in book entry securities may be created with effect against third parties by irrevocable agreement between the account owner and the custodian that the custodian will honour the instructions of the secured party without further consent or action of the account owner.
- 2 The security interest may cover:
  - a. particular book entry securities;
  - b. all book entry securities credited to a securities account; or
  - c. a quota determined by a monetary amount of book entry securities credited to a securities account.
- 3 For the creation of a usufructuary right in book entry securities, para. 1 applies by analogy.

**Art. 26** Security Interest in Favour of Custodian

- 1 A security interest of the custodian in book entry securities of the account owner becomes effective and is valid against third party upon the entering into of a respective agreement.
- 2 It shall become void with the credit of the book entry securities to a securities account of another account owner.

**Part 2:  
Cancellation**

**Art. 27** Debit Cancellation

- 1 The debit of book entry securities to a securities account must be cancelled, if
  - a. it has been made without instructions;
  - b. is based upon instructions which were
    1. nil,
    2. not given by the account owner or its agent,
    3. timely revoked by the account owner, or
    4. challenged due to an error in declaration or transmission, intentional deceit or fear; Art. 26 Swiss Code of Obligations remains reserved;
  - c. the credit of book entry securities to the securities account of the acquiror does not conform to the instructions or was not made during the usual period for execution.
- 2 In the case of para. 1 letter a, the account owner must demonstrate that its instructions were defective. There is no right to cancellation, if the custodian demonstrates that it was unaware of the defect and could not have known the defect, despite using reasonable measures and procedures.
- 3 The cancellation shall put the account owner into a position as if no debit has been made. Damage claims in accordance with the Swiss Code of Obligations remain reserved.
- 4 Claims under this article are time barred one year from the discovery of the defect, in any case, five years from the date of the debit.
- 5 Account owners, who are custodians or qualified investors, may agree upon otherwise with the custodian.

**Art. 28** Credit Cancellation

- 1 A custodian may cancel a credit of book entry securities to the securities account, if:
  - a. the corresponding debit was cancelled; or
  - b. the credit does not conform to the instructions.
- 2 The cancellation must be notified to the account owner.

- 3 Cancellation is excluded, if the securities account does no longer contain any corresponding book entry securities or if third parties have acquired in good faith rights to such book entry securities. In the latter case, the custodian is entitled to replacement, unless the account owner acted in good faith in disposing of such book entry securities and must not have taken into account a restitution.
- 4 Claims under this article are time barred one year from the discovery of the defect, in any case, five years from the date of the credit.
- 5 Account owners, who are custodians or qualified investors, may agree upon otherwise.

**Part 3:**  
**Effect Against Third Parties**

**Art. 29** Protection of Good Faith Acquisition

- 1 Whoever, in good faith, acquires against consideration book entry securities or rights to book entry securities in accordance with Art. 24, 25 or 26 shall be protected in the acquisition, even though:
  - a. the seller was not entitled to dispose over the book entry securities; or
  - b. the credit of the book entry securities to the securities account of the seller has been cancelled.
- 2 To the extent the acquisition is not protected, the acquiror will have to reconstitute book entry securities of the same kind and number in accordance with the rules of unjustified enrichment of the Swiss Code of Obligations. Third party rights remain unaffected. Further claims in accordance with the provisions of the Swiss Code of Obligations remain reserved.
- 3 If the acquiror, who is required to reconstitute the book entry securities, is subject to forced liquidation leading to general execution, the person entitled may segregate book entry securities of the same number and kind if such book entry securities form part of the estate.
- 4 Claims in accordance with para. 2 shall be time barred one year from the date on which the person entitled has received knowledge of its claim and of the debtor, in any event, ten years from the date of the debit. Art. 60 para. 2 Swiss Code of Obligations remains reserved.
- 5 If the pre-conditions for a cancellation in accordance with Art. 28 are fulfilled, the acquiror shall have no rights of objection against the cancellation in accordance with this article.

**Art. 30** Priority

- 1 To the extent book entry securities or rights to book entry securities are disposed of in accordance with this law, first in time shall govern.
- 2 To the extent the custodian enters into an agreement with the account owner in accordance with Art. 25 para. 1, without informing the secured party explicitly of its prior security interest, the security interest of the custodian shall be subordinated to the right of the secured party.
- 3 Should book entry securities or rights to book entry securities be assigned, the rights of the persons who have acquired rights in accordance with this agreement shall prevail over the rights of the assignees irrespective of the time of the assignment.
- 4 The parties may agree otherwise, such agreement, however, has only effect among such parties.

**Chapter 6: Liquidation of Collateral**

**Art. 31** Authorization to Liquidate

- 1 If a security interest has been created over book entry securities which are traded on a representative market, the secured party may, under the conditions set out in the security agreement, liquidate the collateral by:
  - a. disposing of the book entry securities and offset the proceeds against the secured claim; or
  - b. right of self entry and offset the value of the book entry securities to the secured claim.
- 2 This right remains unaffected by forced liquidation proceedings against the collateral provider as well as in case of restructuring and protective measures of any kind and nature.
- 3 The custodian is neither entitled nor required to verify whether or not the pre-conditions for the liquidation of the collateral of the book entry securities are met.
- 4 To the extent the secured party proceeds with the liquidation of book entry securities without being entitled to do so, it shall become liable towards the collateral provider for the damage caused.

## **Art. 32** Notification and Accounting

- 1 The liquidation of the collateral must be notified to the collateral provider. The collateral provider, who is a custodian or qualified investor, may waive the right to be notified.
- 2 The secured party is required to render an accounting and remit a surplus to the collateral provider.

## **Chapter 7: Liability**

### **Art. 33**

- 1 For damages arising from the custody or transfer of book entry securities, the custodian shall be liable towards the account owner in accordance with the provisions of the Swiss Code of Obligations, unless this article provides otherwise.
- 2 If the custodian is permitted to deposit book entry securities with a third party custodian, it is liable for exercising due care in the selection and instruction of the third party custodian as well as in the continuing supervision of the selection criteria.
- 3 The custodian can exclude its liability under para. 2 if book entry securities are deposited at the account owner's explicit instructions with the third party custodian who was not recommended by the custodian.
- 4 The custodian shall be liable for the fault of the third party custodian as if it was its own, provided it:
  - a. administers independently and continuously the entire book entry securities and the settlement for the custodian; or
  - b. forms an economic unit with the custodian.
- 5 Agreements deviating from the above are valid only amongst custodians or to the benefit of the investors.

## **Chapter 8: Final Provisions**

### **Art. 34** Changes to Existing Laws

The changes to existing law will be dealt with in the appendix.

**Art. 35**      Transitory Provision

- 1 Issuers of uncertificated securities which are credited to a securities account with a custodian must establish a master register with a custodian and register the uncertificated securities within 6 months from the entry into force of this law.
- 2 If prior to the entering into force of this law, collective deposit securities, global certificates or uncertificated securities have been disposed of, which is not in compliance with this act, the right of the first acquiror shall prevail over the right of any other person, provided the acquiror causes the registrations in accordance with this law within 12 months from the entering into force.

**Art. 36**      Referendum and Entering into Law

- 1 This law is subject to the facultative referendum.
- 2 The Federal Council determines the entering into force.

## Amendments of Existing Law

The following changes shall be made:

### 1. Swiss Civil Code

*Art. 901 para. 3*

- 3 The pledge of book entry securities shall be governed exclusively by the Book Entry Securities Act of October 3, 2008.

### 2. Federal Law on Mortgage Bonds of June 25, 1930

*Art. 7*

- |                   |   |   |
|-------------------|---|---|
| I. Mortgage Bonds | 1 | Mortgage bonds may be issued in the form of securities, global certificates, uncertificated securities. Mortgage bonds are made out as bearer or registered bonds.  |
| a. Form           | 2 | Mortgage bonds may also be issued in the form of written loan agreements.   |
|                   | 3 | In the case of registered mortgage bonds, the mortgage bond clearing house shall maintain a register in which the names and addresses of the owners and usufructuaries are entered. The register is not public. |
|                   | 4 | Registration in the register can only be made upon due evidence of title or usufructuary right.   |
|                   | 5 | In relation to the mortgage bond clearing house, the registered owner is deemed to be entitled.   |

*Art. 8*

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|------------|--|
| b. Content | The Federal Council may issue rules regarding the content of mortgage bonds. |
|------------|--|

*Art. 9*

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|--|--|
| c. Certification of coverage required by law | Prior to the issue of mortgage bonds, the responsible bodies shall certify the coverage required by law. |
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### 3. Swiss Code of Obligations

#### *Art. 470 para. 2<sup>bis</sup>*

- 2<sup>bis</sup> To the extent the rules of a payment system do not provide otherwise, book money transfer instructions become irrevocable upon the debit of the instructing party's account.

#### *Art. 622 para. 1*

- 1 Shares are made out in registered or bearer form. Book entry securities for shares within the meaning of the Book Entry Securities Act are made out as registered or bearer shares for corporate law purposes.

#### *Art. 627 section 14*

In order to be valid, the following provisions must be contained in the articles of association:

14. The option to convert shares issued in one form into another form as well the allocation of the respective costs to the extent the allocation deviates from the rules of the Book Entry Securities Act of October 3, 2008.

#### *Art. 973a*

G. Collective custody, global certificates and uncertificated securities

- 1 The custodian is entitled to a collective deposit of fungible securities of the various depositors, unless the depositor explicitly requests segregation of its securities.

I. Collective custody of securities

- 2 If fungible securities are entrusted to a custodian for collective deposit, the depositor acquires a pro rata co-ownership interest in the collective pool of fungible securities of the same kind upon delivery to the custodian. The par value and for securities without par value the number of securities determines the pro rata share in the collective pool.

- 3 The depositor has a claim for delivery of his pro rata share of securities from the collective pool, which does not depend upon the assistance or consent of the other depositors.

#### *Art. 973b*

II. Global certificate

- 1 A debtor may issue global certificates or replace individual securities entrusted to a single custodian by a global certificate, provided the terms of the issue or articles of association so provide or with the consent of the depositors.

- 2 A global certificate is a security of the same kind as the individual rights evidenced thereby. The depositors concerned have a co-ownership interest in the global certificate in proportion to their respective participations. For the rights of the co-ownership interest, Art. 973a para. 2 shall apply by analogy.

#### *Art. 973c*

A debtor may issue rights with the same function as a certificated security (uncertificated securities) or convert fungible certificated securities or global certificates entrusted to a single custodian into uncertificated securities, provided the terms of the issue or articles of association so provide or with the consent of the depositors.

- 2 The debtor maintains a register of the uncertificated securities issued in which the number, split and creditor is entered. The register is not public.
- 3 Uncertificated securities come into existence upon and only in accordance with the registration in the book.
- 4 Uncertificated securities are transferred by way of an assignment in writing. The pledge is governed by the rules of pledge for claims.

#### **4. Insolvency Law**

*Art. 287 para. 3*

- 3 The challenge is in particular excluded where a security interest over securities and book entry securities or other financial instruments traded on a representative market has been created and the debtor already:
  1. was required to provide additional collateral in case of a fluctuation of the value of the collateral or of the secured claim;
  2. had the right to replace existing collateral by collateral of same value.

#### **5. Banking Law**

*Art. 17 (repealed)*

*Art 37d (segregation of deposits)*

Securities on deposit according to Art. 16 shall be segregated pursuant to Articles 17 and 18 of the Book Entry Securities Act of October 3, 2008. In the case of a shortfall, Art. 19 of the Book Entry Securities Act governs.

## 6. Hague Convention

### *Art. 1*

The Hague Convention of July 5, 2005, on the law applicable to certain rights in respect of securities held with an intermediary is approved.

The Federal Council is authorized to ratify the Convention.

### *Art. 2*

The Federal law of December 18, 1987, on the International Private Law will be amended as follows:

Art. 108 para. 2 lit. c (repealed)

## **Chapter 7a (new) Indirectly Held Securities**

### *Art. 108a*

I. Definition Indirectly held securities are securities, held in custody with an intermediary within the meaning of the Hague Convention on the law applicable to certain rights in respect of securities held with an intermediary of July 5, 2005.

### *Art. 108b*

- II. Jurisdiction
- 1 Claims regarding indirectly held securities are to be brought at the Swiss domicile of the defendant, or, in case there is no Swiss domicile, at the place of the defendants ordinary residence.
  - 2 Claims regarding indirectly held securities based upon the activity of a branch in Switzerland may be brought at the court at the place of the branch.

### *Art. 108c*

III. Applicable Law The Hague Convention of July 5, 2005 on the law applicable to certain rights in respect of securities held with an intermediary applies.

### *Art. 108d*

- IV. Foreign Decisions Foreign decisions regarding indirectly held securities will be recognised in Switzerland if:
- a. rendered in the country at the place of domicile or ordinary residence of the defendant; or
  - b. rendered in the country, in which the defendant has a branch and the claim relates to the business conducted by such branch.