

Summary of the panel on “A Supplement to the Guide covering certain types of securities not covered by the Unidroit Convention on Substantive Rules for Intermediated Securities” by Ed Smith

There is a hole in the Secured Transactions Guide (the Guide), because the Guide does not address security rights in securities at all. As a result, under the Guide there may be important financing transactions for which securities are the core encumbered assets and for which the Guide provides no guidance.

The Geneva Securities Convention (the Convention) partially fills the hole. It at least deals with third party effectiveness and priority issues for a security right in securities held in a securities account with an intermediary. However, the Convention does not address security rights in securities that are not held in a securities account with an intermediary. Moreover, even for security rights in securities held in a securities account with an intermediary, the Convention leaves to national law such issues as how the security right is created and whether it can be made effective against third parties by registration.

If a project were to address security rights in securities, the project would need to deal with a number of issues:

1. It would need to define what a security is in contrast to a receivable or a negotiable instrument.
2. It would need to address whether to fill the remaining hole partially (e.g., just address rules for security rights in directly held securities or, more narrowly, directly held securities that are not publicly traded) or to fill it entirely (e.g., providing a set of national law recommendations for security rights in all securities in areas not addressed by the Convention).
3. It would need take in account some systems in which the dividing line between securities held in a securities account and directly held securities may not be that clear.
4. It should not provide rules that conflict with the rules or policies of the Convention.
5. It would need to develop appropriate creation, third party effectiveness, priority, enforcement and private international law rules for security rights in securities that, to the maximum extent possible, are consistent with the recommendations in the Guide. For example, the recommendations in the Guide for security rights in negotiable instruments may be instructive in developing the recommendations for security rights in securities evidenced by certificates and not held in a securities account with an intermediary, and the recommendations in the Guide for security rights in bank accounts may be instructive in developing the recommendations for security rights in securities held in a securities account with an intermediary consistent with the Convention.

If a project is to proceed, there are questions as to what organization or organizations should lead the project. UNIDROIT has already developed two conventions in the area and has a good deal of expertise. However, UNCITRAL would have an interest in making sure the recommendations for security rights in securities are consistent, to the maximum extent possible, with the recommendations in the Guide for security rights in other encumbered assets.

There is also a question of timing. The commentary to the Convention is not yet finalized, and an accession kit for States wishing to implement the Convention is still being developed. However, the accession kit could be problematic if it makes recommendations to States as to what rules for security rights in securities to provide in their national law to complement the Convention and those recommendations are inconsistent with the recommendations in the Guide for security rights in other assets.