

## COMMENTS

### THE TRANSFER OF INTERMEDIATED SECURITIES AND OF THE CORRESPONDENT RUSSIAN LAW TERM

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*The recent reform of the Russian Civil Code (hereinafter RCC) has also considerably touched the regulation of uncertificated securities. Such issues as the legal nature, the protection of a bona fide purchaser and the transfer, including the creation of security interests were precised by the legislator in the Code. As for the transfer, we may affirm that this was one of the main points of the reform in respect of those securities.*

*What about the Swiss legislation, we can also affirm that the disposition of the intermediated securities was one of the key elements of the Federal Intermediated Securities Act, also known as FISA.*

*In this article we intend to analyze precisely the methods of transfer applicable to intermediated securities under Swiss law and compare them with those which are governed by the modified dispositions of the RCC. In order to finalize our analysis on that subject we will also touch some points raised in the previous article. Thus, the present work will be the consequent continuation of the discussion started in my previous article.*

*Keywords: Russian law; securities; UNIDROIT; legal reform; Geneva Securities Convention; intermediated security; uncertificated security; Russian Civil Code (RCC); Federal Intermediated Securities Act (FISA).*

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## Introduction

The definition of security has neither been clarified by the life,  
nor by the legal science, nor by the legislation.<sup>1</sup>

*Professor Gabriel Shershenevich*

As you may have already noticed, I have recently written a comparative research devoted to the issue of the legal nature of intermediated securities and the correspondent term under Russian law.<sup>2</sup> In order to understand the context of the reform, I kindly refer you to my previous article published in the BRICS Law Journal.<sup>3</sup> I would like to continue the discussion started at that article. However, this time I would like to concentrate specifically on the question of the transfer of intermediated securities and of the correspondent term under Russian law. The present article is not intended to give a general description of the methods but has the purpose to give the precise analysis of each method in the chosen jurisdictions. *Firstly*, we are going to summarize our notes regarding the recent reform of the relevant provisions of the Russian Civil Code (hereinafter RCC). In this chapter we will somehow continue the discussion raised in my previous article. I will discuss in the beginning such questions as the legal nature of those securities, the problem of vindication in relation to uncertificated securities under Russian law and compare the results of the reforms in Switzerland and in the Russian Federation. *Secondly*, we will examine the methods of transfer applicable to intermediated securities. We are going to analyze the one under Art. XI of the Geneva Securities Convention which is called "*debts and credits*." In particular we will analyze and compare the legal nature of the instruction [*передаточное распоряжение*] under the chosen legal orders. *Finally*, we are going to analyze "*other methods of transfer*" governed by Art. XII of the Geneva Securities Convention. They are usually used to create a security interest upon intermediated securities. Those methods are: the designating entry, the control agreement and the creation of an interest in favour of the relevant intermediary. In this Chapter we will also present our conclusions on the usage of abstraction and causality principles in relation to the transfer of securities held in a dematerialized form.

Before we start to analyze the methods of transfer under the respective legal orders, I would like to return to the issues raised in my previous article and discuss the results of the reforms in Switzerland and in Russia in relation to those securities. As our reader might notice, the terms employed by the two legal orders are not

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<sup>1</sup> Шершеневич Г.Ф. Курс торгового права. Т. II: Товар. Торговые сделки [Gabriel F. Shershenevich, *The Course of Commercial Law. Vol. II: Merchandise. Commercial Transactions*] (4<sup>th</sup> ed., St. Petersburg: Izdanie Bratiev Bashmakovykh, 1908) (Aug. 17, 2017), also available at <http://base.garant.ru/6185553/>.

<sup>2</sup> Mikhail Botvinov, *Geneva Securities Convention and Russian Civil Legislation Reform: Comparative Perspectives*, 4(1) BRICS Law Journal 26 (2017).

<sup>3</sup> *Id.*

the same. From time to time we will use such denominations as “*securities held in a dematerialized form*,” “*electronic securities*” or “*dematerialized securities*” in order to designate both legal institutions.

## **1. Comparative Remarks on the Reform of the Provisions Governing the Regime of the Uncertificated Securities under the Modified RCC**

### **1.1. The Legal Definition and the Meaning of the Dematerialization in Relation to Securities**

As an epigraph to our research we have decided to quote the statement of the professor Gabriel Shershenevich.<sup>4</sup> Later, in 1929, another brilliant Russian legal scholar Mikhail Agarkov has said that

the general theory of securities and the doctrine covering particular types of securities relates to one of the most complex sections of the legal science.<sup>5</sup>

In this respect we cannot but mention that this scholar has referred in his work to the notable Swiss lawyer Eugen Huber and his project that had a specific chapter (chapter IV) devoted to securities.<sup>6</sup> Somehow, the professor Mikhail Agarkov has set us the direction for our research. In the present work we also refer to the Swiss legislation in order to find proper solutions for our Russian legal system. The above quoted statements have been said when securities existed only in a paper form. Nowadays, we have dematerialized them. However, the number of legal problems we face has increased significantly since that time. It appears that traditional legal concepts that match perfectly to securities paper form cannot always be applied in relation to those that exist in dematerialized form. This statement applies in particular to the question of vindication. The security in a dematerialized form is not a chattel. Thus, it cannot be vindicated. This postulate has been apprehended by the Swiss legislator which decided to introduce into its' legal order a new legal object: the intermediated security.<sup>7</sup> It combines the features of a claim and a chattel.<sup>8</sup> As for the

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<sup>4</sup> The statement of the professor Gabriel Shershenevich was personally translated by the author. In Russian this statement is: “...*Само понятие о ценных бумагах не успело до сих пор выясниться ни в жизни, ни в науке, ни в законодательстве...*”

<sup>5</sup> *Агарков М.М. Основы банковского права. Учение о ценных бумагах* [Mikhail M. Agarkov, *The Essentials of Banking Law. The Doctrine of Securities*] 218 (3<sup>rd</sup> ed., Moscow: Wolters Kluwer, 2005).

<sup>6</sup> *Id.*

<sup>7</sup> Message relatif à la loi fédérale sur les titres intermédiés et à la Convention de La Haye sur les titres intermédiés du 15 novembre 2006, at 8841 (Aug. 31, 2017), available at <https://www.admin.ch/opc/fr/federal-gazette/2006/8817.pdf>. In this work we will name it as follows: “Explanatory Report.”

<sup>8</sup> *Id.*

Russian legislator, the problem is quite complex. We will discuss it later. We would like also to note in this respect that tangible property concepts still apply in relation to those securities. For instance, this is the case of France.

Before we proceed further in our analysis it seems important for us to explain the meaning of the term “*dematerialization*.” We find the answer in the Glossary prepared by the Basel Committee.<sup>9</sup> The Glossary defines dematerialization as

The elimination of physical certificates or documents of title that represent ownership of securities so that securities exist only as accounting records.<sup>10</sup>

The institutions at the international level such as the Basel Committee and the International Organization of Securities Commissions (IOSCO) have also highly recommended to national legislators to immobilize and dematerialize the securities “*to the greatest extent possible*.” We refer to the recommendation number VI of the Recommendations for Securities Settlement Systems prepared by the Committee on Payment and Settlement Systems and the Technical Committee of the International Organization of Securities Commissions in November 2001.<sup>11</sup> According to that document, the dematerialization allows to eliminate the risk of loss, manual errors, lowers costs and provides investors with safety during the transactions. The key question that we ask is whether this phenomenon requires new legal approaches from a legislator? Secondly, one may demand us what should be those approaches? The answer to the first question is certainly positive. As our reader may understand, it seems impossible to apply rules on chattels concepts in relation to intangible assets that exist in electronic form. As for the second question, the answer has been given by the Swiss legal doctrine and by the legislator. For instance, the professor Paul-Henri Steinauer considers that

the developments in a business sphere and in the possibilities offered by the informatics have led the banking circles to search for more flexible legal approaches. The purpose is to conserve the legal security comparable to those provided by a paper-form security and to remove the restraint resulting from the presence of a chattel to which a right is linked.<sup>12</sup>

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<sup>9</sup> See A glossary of terms used in payments and settlement systems elaborated by the Committee on Payment and Settlement Systems (Aug. 7, 2017), available at <http://www.bis.org/cpmi/publ/d00b.htm>.

<sup>10</sup> *Id.*

<sup>11</sup> See Recommendations for Securities Settlement Systems prepared by the Committee on Payment and Settlement Systems and the Technical Committee of the International Organization of Securities Commissions (November 2001) (Aug. 28, 2017), available at <http://www.bis.org/cpmi/publ/d46.pdf>.

<sup>12</sup> Paul-Henri Steinauer, *Les droits réels face à la dématérialisation des papiers-valeurs in Le centenaire du Code civil suisse. Colloque du 5 avril 2007* 145 (Paris: Association franco-suisse de Paris II, 2008).

This statement perfectly reflects the methods used by the Swiss legislator during the preparation of the FISA. We underline once again that the application of this approach resulted in the appearance of the new legal object: “intermediated security.”

In some countries, the legislator does not resort to these flexible approaches. This is the case of the French Republic. Some scholars consider that dematerialization in France has been done only within the technical meaning of that term.<sup>13</sup> For example, reputable French scholars affirm that dematerialization in France was only “*a technical measure which does not bring any legal consequences*” [*mesure d’ordre technique qui n’emporte pas les conséquences juridiques*].<sup>14</sup> Mr. Antoine Maffei has expressed even more radically on that problem. He affirmed that the Cassation Court in France has not even dematerialized those securities<sup>15</sup> [*n’a pas dématérialisé les valeurs mobilières; elle les a détitrisées*]. According to French scholars, the dematerialization supposes that the provisions relating to tangible property shall not be applied to those securities.<sup>16</sup> French scholars affirm in this respect that the dematerialization supposes to exclude “*traditio*” [*la dématérialisation semble exclure le don manuel*].<sup>17</sup> We absolutely agree with this statement. However, the courts have chosen a different approach. According to the decision of the Cassation Court, the record at the relevant account “*imitates and substitutes for the ‘traditio’*”<sup>18</sup> [*imite et substitue à la tradition*]. We agree with French scholars that the dematerialization in France is perceived only as a technical measure.

As for the Russian Federation, the situation is more delicate. In 2013, the RCC has been amended by the legislator. According to modified Art. 142 RCC securities are considered to be documents and claims against the issuer. The paper-form securities are documents while those uncertificated are claims (Art. 142, para. 1 RCC). The legislator has introduced the new rules on the protection of the titleholder deprived from his securities. Art. 149.3 uses the term “*restitution of the same quantity of the correspondent securities*” [*возврат такого же количества соответствующих ценных бумаг*]. What does it practically mean? The doctrine is not anonymous. The question is perplex. We will later develop this point in the specific paragraph.

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<sup>13</sup> See Luc Thévenoz, *Intermediated Securities, Legal Risk, and the International Harmonization of Commercial Law*, 13 *Stanford Journal of Law, Business, and Finance* 384, 396 (2008); Antoine Maffei, *De la nature juridique des titres dématérialisés intermédiaires en droit français*, 10(1/2) *Uniform Law Review* 237, 248 (2005).

<sup>14</sup> Hubert de Vauplane & Jean-Pierre Bornet, *Droit des marchés financiers* 49 (Paris: LITEC, 1998).

<sup>15</sup> Maffei 2005, at 248.

<sup>16</sup> Christian Cavaldà & Jean Stoufflet, *Droit bancaire. Institutions – Comptes – Opérations – Services* 406 (5<sup>th</sup> ed., Paris: LITEC, 2002).

<sup>17</sup> *Id.*

<sup>18</sup> De Vauplane & Bornet 1998, at 48.

We have decided to explain the situation in France in order to illustrate possible solutions to the problem. At this stage we affirm that the modified RCC is somehow between the French and the Swiss approaches. In our opinion it would obviously be better to follow the Swiss legislator who has successfully managed to perceive the legal nature of those securities.

Thus, the statement of the professor Gabriel Shershenevich remains relevant even for the current moment. Modern Russian scholars recognize and develop that point of view.<sup>19</sup> For instance, the docent of the Saint Petersburg University, Andrei Bushev [доц. А. Бушев] affirms that in relation to securities which exist in an electronic form the accent has made on the “*substance*” while the definition of securities in paper form focuses on the “*form*.”<sup>20</sup> According to the opinion of Andrei Bushev, the formal approach [*формальный подход*] encompasses the external expression of the security: the documentary form. As for the substantial approach [*содержательный подход*], it relies on the rights that a security represents. The docent Andrei Bushev affirms that this approach focuses on the substance which means that a security is a special right with specific features.<sup>21</sup> He adds that this approach has in particular touched the investment securities.<sup>22</sup> We decided to refer to the article of Mr. Bushev because he has underlined the essence of the problem we are trying to analyze:

the competition between form and substance for gaining the priority in the definition of security has not ended yet [*Можно предположить, что конкуренция между формой и содержанием в борьбе за приоритетность при определении понятия ценной бумаги не завершена*].

As we see, the above made statement is absolutely true and relevant in relation to uncertificated securities under Russian law. If we apply the approach of the docent Andrei Bushev to the securities under the chosen legal orders, we may allege that intermediated securities under Swiss law base mainly on the substantial approach [*содержательный подход*] while in France the correspondent legal term relies basically

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<sup>19</sup> Бушев А.Ю. Об экономическом и юридическом значении родового понятия ценной бумаги // Закон. 2006. № 7. С. 14–23 [Andrei Yu. Bushev, *On an Economic and Legal Meaning of the Generic Term of Security*, 7 Law 14 (2006)] (Aug. 15, 2017), also available at <http://base.garant.ru/5281640/>. See also Кирилловых А.А. Понятие ценной бумаги: теория, практика и современные законодательные новации // Законодательство и экономика. 2014. № 12. С. 43–55 [Andrei A. Kirillovykh, *The Definition of Security: Theory, Practice and Modern Legislative Novelties*, 12 Legislation and Economics 43 (2014)] (Sep. 4, 2017), also available at <http://base.garant.ru/57480437/>.

<sup>20</sup> *Id.*

<sup>21</sup> The statement of the docent Andrei Bushev in Russian is as follows: “Для электронных ценных бумаг акцент был теперь сделан не на форму, а на содержание. Ценная бумага – это особое право, обладающее специфическими свойствами. В наибольшей степени такой подход коснулся инвестиционных ценных бумаг.”

<sup>22</sup> *Id.*

on the traditional tangible property concept and thus on the “formal approach” [“*формальный подход*”]. Why do we qualify the approach of the Swiss legislator as the substantial one? The answer is quite clear. Art. 3, para. 1, let. “a” and “b” of the FISA (Federal Intermediated Securities Act) defines intermediated securities as

personal and corporate rights of a fungible nature against the issuer which are credited to the securities account; and may be disposed of by the account holder in accordance with the provisions of this Act.

Hence, we may assert that the Swiss legislator has followed so called the “substantial approach.”

What about the modified RCC, we consider that for the current moment the legislator has chosen the “substantial approach” while before 2013, the relevant provisions of the RCC were based on the formal one. The modified RCC (Art. 149) sets forth that a security constitute not only a document but also a right against the issuer. Thus, the situation has significantly changed. Although, in my previous article I have criticized heavily the reform, I should recognize that the legislator has achieved a certain progress in such issues as: defining the legal nature of those securities, the transfer including the creation of interest, the protection of the holder of those securities, etc.

### **1.2. The Problem of Vindication in Respect of Uncertificated Securities under Russian Law**

The application of vindication was heavily criticized by the legal doctrine in Russia. The Concept of Development of Civil Legislation of the Russian Federation mentioned (para. 1.1.9) that the application of vindication in relation to uncertificated securities is inappropriate.<sup>23</sup> The authors of the Concept propose to replace vindication by the claim filed by a former titleholder to a person who is legitimized by the record on the account.<sup>24</sup> According to the Concept, taking into account the particular features of the rights constituting the substance of those securities, *the conditions of satisfaction and the burden of proof necessary for filing that lawsuit shall be the same as for the classic securities in paper form*. The key question is whether the legislator in Russia has renounced from vindication? The second question is how can we qualify the claim applicable to “uncertificated securities” under Art. 149.3 RCC? The legal doctrine is not unanimous. In order to simplify, we divide the relevant doctrine in several groups. *The*

<sup>23</sup> Концепция развития гражданского законодательства Российской Федерации (одобрена Советом при Президенте РФ по кодификации и совершенствованию гражданского законодательства 7 октября 2009 г.), Вестник ВАС РФ, 2009, № 11 [Concept of Development of Civil Legislation of the Russian Federation of 7 October 2009, Bulletin of the Supreme Arbitration Court of the Russian Federation, 2009, No. 11] (Jan. 11, 2017), also available at <http://base.garant.ru/12176781/>.

<sup>24</sup> *Id.* at Chapter VI, para. 1.1.9.

*first group of scholars* consider that the vindication governing paper form securities is not applicable to those in an electronic form. This group is represented by the docent Sergei Grishaev [доц. С.П. Гришаев]. He asserts that the titleholder under Art. 149.3 RCC may claim for the restitution of the same quantity of securities and not the same securities [“*истребовать возврата такого же количества ценных бумаг, а не тех же самых*”].<sup>25</sup> This scholar also affirms that the terms “restitution” and “to restitute” [“*истребовать*”] cannot be applied to uncertificated securities because they do not have tangible form.<sup>26</sup>

*Another group of scholars* prudently affirms that the conditions of the restitution of uncertificated securities under Art. 149.3 RCC are similar to those applicable to the vindication of paper form securities to a named person.<sup>27</sup> However, the method under Art. 149.3 RCC has specific features resulting from the nature of uncertificated securities.<sup>28</sup>

*The third group of scholars* also believes that the traditional vindication does not apply to electronic securities. However, they analyze that question deeper: they estimate that the legislator has precised the conditions of vindication regarding the object of the restitution. According to this group, the method under Art. 149.3 RCC has become closer to the rules on the unjust enrichment or in Latin “*condictio*.”

As for the case law, in one of the recent decisions in relation to uncertificated securities under Art. 149.3 RCC, the judges of the Supreme Court of the Russian Federation state that

Art. 149.3 RCC has established a distinct regulation in order to protect the titleholders deprived from their securities whereas before the adoption of this Article, the rights of those persons were protected in compliance with the similar rules fixed by Arts. 301 and 302 RCC using the method of analogy.<sup>29</sup>

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<sup>25</sup> Гришаев С.П. Ценные бумаги: виды и практика применения // Редакция “Российской газеты”. 2016. № 2. С. 3–175 [Sergei P. Grishaev, *Securities: The Types and the Application Practice*, 2 Library of the Russian Newspaper 3 (2016)] (Sep. 2, 2017), also available at <http://base.garant.ru/57320384/>. See also Гришаев С.П. Эволюция законодательства об объектах гражданских прав [Sergei P. Grishaev, *Evolution of the Legislation Governing the Objects of Civil Law*] (SPS “Garant,” 2015).

<sup>26</sup> *Id.*

<sup>27</sup> See Агешкина Н.А., Баринов Н.А., Бевзюк Е.А., Беляев М.А., Бирюкова Т.А., Вахрушева Ю.Н., Гришина Я.С., Закиров Р.Ю., Кожевников О.А., Копьёв А.В., Кухаренко Т.А., Морозов А.П., Морозов С.Ю., Серебреников М.М., Шадрин Е.Г., Юдина А.Б. Комментарий Гражданскому кодексу Российской Федерации. Часть первая от 30 ноября 1994 г. № 51-ФЗ [Natalya A. Ageshkina et al., *Commentary of the Civil Code of the Russian Federation. Chapter I of 30 November 1994 No. 51-FZ*] (SPS “Garant,” 2014) (Jan. 11, 2017), also available at <http://base.garant.ru/57518292/>.

<sup>28</sup> *Id.*

<sup>29</sup> Определение Верховного Суда РФ от 22 января 2015 г. № 301-ЭС14-7093 [Decision of the Supreme Court of the Russian Federation No. 301-ES14-7093 of 22 January 2015] (Sep.1, 2017), available at [www.garant.ru](http://www.garant.ru).

In other decisions based on the relevant provisions of the modified RCC, the lower courts have stated that from the moment of a relevant account record at the account, a person becomes “*proprietor of uncertificated securities*.”<sup>30</sup> The plaintiff argued for the restitution of uncertificated securities from the possession of the defendant. The objections of the defendant regarding the undue method of protection were rejected. The higher court confirmed that decision.<sup>31</sup>

After having analyzed the relevant doctrine with the case law, it seems to us that the vindication has not completely disappeared in relation to uncertificated securities. As we have already mentioned the question is perplex. From our point of view, the second group of scholars should be followed. However we should note that the claim we face is not a pure vindication claim. The object is not a chattel. Thus, in relation to uncertificated securities under Russian law the expression quasi-vindication also seems correct to us.<sup>32</sup>

As we have seen in my previous article, in Switzerland the Federal Tribunal ruled that vindication is not applicable to the correspondent term: “intermediated securities.”<sup>33</sup> The rules on the unjust enrichment apply. In this respect we note that it would certainly be better to apply the rules on the unjust enrichment in the Russian legal order. This will terminate the discussion. It is interesting to mention that Art. 149.3 RCC repeats word to word the formulation prescribed by Art. 29, para. 2 FISA. Indeed, the wording in Russian [возврат такого же количества соответствующих ценных бумаг] perfectly correlates to the one in French [restituer des titres intermédies en même nombre et de même genre]. Despite terminological similarity, the solutions chosen by the legal orders in question are different from the legal point of view. In my opinion, the Swiss approach should be followed. The legal doctrine in Russia has recently started the discussion on the application of the rules upon the unjust enrichment to uncertificated securities.

In order to summarize the discussion on that point, we allege, the following conclusions:

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<sup>30</sup> Постановление Пятого арбитражного апелляционного суда от 28 октября 2014 г. № 05АП-12170/2014 по делу № А51-8705/2014 [Resolution of the Fifth Arbitration Court of Appeal No. 05AP-12170/2014 with Regard to Case No. A51-8705/2014 of 28 October 2014] (Sep. 1, 2017), available at [www.garant.ru](http://www.garant.ru).

<sup>31</sup> Постановление Арбитражного суда Дальневосточного округа от 24 февраля 2015 г. № Ф03-6296/14 по делу № А51-8705/2014 [Resolution of the Arbitration Court of the Far Eastern District No. F03-6296/14 with Regard to Case No. A51-8705/2014 of 24 February 2015] (Sep.1, 2017), available at [www.garant.ru](http://www.garant.ru).

<sup>32</sup> Селивановский А.С., Сенюк Г.В. Ценные бумаги в Гражданском кодексе РФ: изменения правового регулирования // *Хозяйство и право*. 2014. № 10. С. 20–36 [Anton S. Selivanovsky & Georgy V. Seniuk, *The Securities under the Civil Code of the Russian Federation: The Modifications of the Legal Regulation*, 10 *Economy and Law* 20 (2014)] (Sep. 11, 2017), also available at <http://www.hozpravo.ru/ru/e-version/1995-2014>.

<sup>33</sup> ATF 138 III 137 consid. 5.2.1.

1) Firstly, the modified RCC (Art. 149) and the FISA (Art. 3, para. 1, let. “a” and “b”) are based mostly on so called the “substantial approach.”

2) Secondly, we came to the conclusion that it is impossible to renounce completely from traditional tangible property concepts in respect of the securities held in dematerialized form. In Switzerland the legislator has defined those securities as a *sui generis* or independent legal object that constitutes neither claim nor chattel. I have widely discussed that point in my previous article. As we have analyzed, the situation in the Russian Federation is more delicate. Some legal practitioners, for example, Viktor Petrov [В. Петров] estimate that vindication of uncertificated securities to a named person according to the case law remains the most efficient method to protect the holder who was deprived from his securities against his own will.<sup>34</sup> The doctrine is not unanimous. The RCC defines the securities as the rights against the issuer according to Art. 149 RCC. Can we vindicate rights? The answer is certainly no. One may ask what is the best solution in this case? In my opinion the courts and the legislator should declare those securities as a *sui generis* legal object which combines the features of a claim and a chattel and apply the rules upon the unjust enrichment to those securities. This solution will allow us to eliminate all previously raised contradictions.

3) Thirdly, I still insist that an awkward term “*бездокументарная ценная бумага*” or “uncertificated security” should be replaced by the new one: “intermediated security.”

4) Finally, I suggest to the Russian legislator to ratify the UNIDROIT Convention on Substantive Rules for Intermediated Securities also known as “Geneva Securities Convention.” I also suggest this ratification to the Swiss legislator.

## **2. The Transfer of Intermediated Securities and of the Correspondent Russian Law Term: The FISA, the RCC and under the “Geneva Securities Convention”**

### **2.1. General Overview of All Methods of Transfer**

In chapter 2 of our previous article, we have discussed the methods transfer chosen by the respective legislators.<sup>35</sup> I kindly refer you to that previous article.<sup>36</sup> Those methods are: “debits and credits,” designating entry, control agreement and a grant of an interest to the relevant intermediary. The method pursuant to Art. XI

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<sup>34</sup> *Петров В.* Защита прав владельцев бездокументарных именных ценных бумаг путем предъявления виндикационного иска // Рынок ценных бумаг. 2016. № 2. С. 69 [Viktor Petrov, *The Protection of the Titleholder of the Uncertificated Securities to a Named Person by Means of Filing a Vindication Lawsuit*, 2 The Securities Market 69 (2016)], also available at [https://www.vegaslex.ru/analytics/publications/\\_the\\_inspectors\\_are\\_unable\\_to\\_get\\_to\\_the\\_warehouse\\_and\\_counted\\_us\\_all\\_vat\\_is\\_it\\_legal/](https://www.vegaslex.ru/analytics/publications/_the_inspectors_are_unable_to_get_to_the_warehouse_and_counted_us_all_vat_is_it_legal/).

<sup>35</sup> Botvinov 2017, at 34.

<sup>36</sup> *Id.*

of the Geneva Securities Convention called “*debits and credits*” is used mainly for transferring the securities while methods under Art. XII are used to create a security interest upon securities. The method under Art. XI is universally recognized and called by the professor Luc Thévenoz “*the golden standard of the holding pattern worldwide*.”<sup>37</sup> In order to refresh the results of our previous research on this subject we present the following scheme:

**Scheme I: Methods of Disposition under Russian Law, Swiss Law and Pursuant to the Geneva Securities Convention**

<b>Methods of Disposition</b>	<b>Swiss Law</b>	<b>Russian Law</b>	<b>Geneva Securities Convention</b>
Debits and credits	+	+	+
Control Agreement	+	–	+
Designating entry	–	+	+
Security interest in favor of the relevant intermediary	+	–	+

## **2.2. Debits and Credits**

This method is mainly used to transfer securities. It could also be used to create an interest on intermediated securities according to the Official Commentary of the Geneva Securities Convention<sup>38</sup>. The transfer of the respective securities requires in both legal orders the following pillars: an instruction, a debit at the account of the transferor and the credit at the account of the transferee. We are going to analyze in this chapter the above mentioned institutions within the scope of the two chosen legal orders.

### *2.2.1. The Legal Nature of the Instruction*

Under the modified RCC (Art. 149.2) and the FISA (Art. 24, paras. 1 and 2) the transfer of intermediated securities requires an instruction from the titleholder to the relevant intermediary and the records at the accounts of the transferor and the

<sup>37</sup> *Intermediated Securities: The Impact of the Geneva Securities Convention and the Future European Legislation* 138 (P.-H. Conac et al. (eds.), Cambridge: Cambridge University Press, 2013).

<sup>38</sup> Hideki Kanda et al., *Official Commentary on the UNIDROIT Convention on Substantive Rules for Intermediated Securities* 68 (Oxford: Oxford University Press, 2012).

transferee. The conclusion of the contract is not enough. This rule applies not only in relation to transfer but also regarding to the constitution of an interest (Art. 149, para. 3 RCC). However, we should precise the application of this rule in Switzerland. As we have mentioned earlier, the Swiss legislator has chosen different methods: the control agreement (Art. 25<sup>1</sup> FISA) and the grant of an interest in favor of the relevant intermediary (Art. 26<sup>1</sup> FISA). According to Art. 26<sup>1</sup> FISA, the grant of an interest in favor of the relevant intermediary becomes valid from the conclusion of the contract. As for the control agreement, the rule is the same.

Article 149.2, para. 4 RCC grants the right to the person in favor of whom the transfer should be affected or an interest created, the right to claim in courts for the making of the relevant records at the accounts in case the transferor avoids presenting an instruction to an intermediary. In Switzerland, the doctrine also considers that an acquirer is protected by the same type of legal action, called in French: "*action en inscription*."<sup>39</sup>

As we have seen, in both legal orders one cannot transfer the respective securities without an instruction to an intermediary. The Explanatory Report prepared by the Swiss legislator qualifies the instruction as "*a unilateral act of the titleholder...*"<sup>40</sup> Swiss law distinguishes an act of disposition [*acte de disposition; распорядительная сделка*] from the underlying contract, while the Russian legal order did not follow that approach for quite a long time.<sup>41</sup> We will explain this problem below.

What about Russian law, we shall note that the attitude to that problem was controversial. It has seriously evolved in the recent time. In 2001, the Court ruled that an instruction constitute a unilateral legal act.<sup>42</sup> In 2002, the Court has qualified the instruction as a

dispositive action serving to execute the underlying contract. The instruction is not an independent act. Hence, we cannot recognize it invalid.<sup>43</sup>

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<sup>39</sup> Denis Plotet, *Titres intermédies: ruptures avec les principes généraux de la codification in Placements collectifs et titres intermédies: le renouveau de la place financière suisse: travaux de la journée d'étude organisée à l'Université de Lausanne le 7 novembre 2007* 107, 115 (J.-T. Michel (ed.), Lausanne: CEDIDAC, 2008).

<sup>40</sup> *Id.* The statement in French is the following: "*acte juridique unilatéral du titulaire du compte, c'est-à-dire une déclaration de volonté sujette à réception par le dépositaire et qui tend au transfert de titres à un acquéreur.*"

<sup>41</sup> Explanatory Report, at 8859.

<sup>42</sup> Постановление Федерального арбитражного суда Московского округа от 24 июля 2001 г. № КФ-А40/3720-01 [Resolution of the Federal Arbitration Court of the Moscow District No. KG-A40/3720-01 of 24 July 2001] (Feb. 11, 2016), available at [www.garant.ru](http://www.garant.ru).

<sup>43</sup> Постановление Федерального арбитражного суда Северо-Западного округа от 19 августа 2002 г. № А05-1233/02-52/17 [Resolution of the Federal Arbitration Court of the Northwestern District No. A05-1233/02-52/17 of 19 August 2002] (Feb. 11, 2016), available at [www.garant.ru](http://www.garant.ru). In Russian the extract from the resolution is as follows: "*передаточное распоряжение является*

In 2006 another court has ruled that it erroneous to consider the instruction as a unilateral act.<sup>44</sup> It constitutes according to the court

a notification of the titleholder regarding the accomplishment of the transaction.

This approach has been maintained by the courts in the Russian Federation for quite a long time.<sup>45</sup> The situation has improved significantly. The courts have recognized that the instruction constitute a unilateral act.<sup>46</sup> In particular, the courts have ruled that an instruction constitute a

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*распорядительным действием, совершенным во исполнение обязательств, вытекающих из договора купли-продажи акций, а не самостоятельной сделкой, следовательно, не может быть признано недействительным."*

<sup>44</sup> Постановление Федерального арбитражного суда Московского округа от 2 октября 2006 г. № КГ-А40/9109-06-П-2,3 [Resolution of the Federal Arbitration Court of the Moscow District No. KG-A40/9109-06-P-2,3 of 2 October 2006] (Feb. 11, 2016), available at [www.garant.ru](http://www.garant.ru). In Russian the conclusion of the judges is as follows: "Анализ указанной нормы позволяет сделать вывод, что передаточное распоряжение само по себе не является документом, на основании которого осуществляется переход прав на ценные бумаги, а является лишь уведомлением владельца о состоявшейся сделке и содержит его требование о внесении изменений в систему ведения реестра с обязательным указанием основания перехода права собственности на ценные бумаги."

<sup>45</sup> Постановление Федерального арбитражного суда Восточно-Сибирского округа от 10 марта 2011 г. по делу № А10-1026/08 [Resolution of the Federal Arbitration Court of the East-Siberian District with Regard to Case No. A10-1026/08 of 10 March 2011] (Sep. 7, 2017), available at [www.consultant.ru](http://www.consultant.ru). In this case the court has come to the conclusion that an instruction is not act and thus cannot be contested. In Russian the argumentation of the Arbitration Court is as follows: "...что передаточное распоряжение не влечет, само по себе, перехода права собственности на бездокументарные ценные бумаги, сделкой не является, в связи с чем недействительным признано быть не может..." This resolution was later uphold by the Presidency of the Supreme Arbitration Court of the Russian Federation. See Постановление Президиума Высшего Арбитражного Суда РФ от 17 ноября 2011 г. № 7994/11 по делу № А10-1026/08 [Resolution of the Presidium of the Supreme Arbitration Court of the Russian Federation No. 7994/11 with Regard to Case No. A10-1026/08 of 17 November 2011] (Sep. 8, 2017), available at [www.consultant.ru](http://www.consultant.ru). See also Постановление Федерального арбитражного суда Поволжского округа от 16 ноября 2011 г. № Ф06-9153/11 по делу № А57-9198/2010 [Resolution of the Federal Arbitration Court of the Volga District No. F06-9153/11 with Regard to Case No. A57-9198/2010 of 16 November 2011] (Feb. 11, 2016), available at [www.garant.ru](http://www.garant.ru). The Court have decided that an instruction is a "dispositive action which is made for executing the contact of sale." The conclusion of the Court is as follows: "передаточное распоряжение – это распорядительное действие, совершаемое во исполнение договора купли-продажи акций, являющееся по своей правовой природе уведомлением владельца акций о состоявшейся сделке и содержащее его требование о внесении изменений в систему ведения реестра с обязательным указанием основания перехода права собственности на ценные бумаги."

<sup>46</sup> Постановление Четвертого арбитражного апелляционного суда от 24 мая 2017 г. № 04АП-7366/2015 по делу № А58-4275/2015 [Resolution of the Fourth Arbitration Court of Appeal No. 04AP-7366/2015 with Regard to Case No. A58-4275/2015 of 24 May 2017] (Sep. 5, 2017), available at [www.consultant.ru](http://www.consultant.ru). In this case the Court has come to the conclusion the instruction is an act within the meaning of Art. 153 RCC. Thus it could be challenged. In Russian the arguments of the Court are as follows: "Соответственно, передаточное распоряжение не только содержит в себе обращение

dispositive act by virtue of which the re-registration of the securities holder is affected, i.e. it entails the legal consequences of an act.<sup>47</sup>

Derogative decisions are quite rare.<sup>48</sup> For instance, the Sixteenth Arbitration Court of Appeal has ruled that the instruction does not entail itself the transfer of property rights. It constitute only the dispositive action [*распорядительное действие*]. Thus,

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*к регистрирующему органу на переход права собственности на бездокументарные ценные бумаги, но и непосредственно является актом (действием) по передаче бездокументарных ценных бумаг от продавца к приобретателю таких бумаг. Следовательно, по смыслу ст. 153 Гражданского кодекса Российской Федерации передаточное распоряжение фактически отвечает критериям сделки, которой признается, в частности, действие юридического лица, направленное на установление, изменение или прекращение гражданских прав и обязанностей."* Other courts also follow that argumentation. See *in particular* Постановление Девятнадцатого арбитражного апелляционного суда от 8 февраля 2017 г. № 19АП-3945/2016 по делу № А14-14020/2015 [Resolution of the Nineteenth Arbitration Court of Appeal No. 19AP-3945/2016 with Regard to Case No. A14-14020/2015 of 8 February 2017] (Sep. 5, 2017), available at [www.consultant.ru](http://www.consultant.ru). In this case the appellant argued that instructions do not constitute acts. According to his position they do not imply the creation, modification or termination of the rights and obligations. The court has rejected those arguments and recognized instructions as acts (the term act means in Russian: "сделка"). The Court has ruled that the appellant has interpreted the provisions of the material law incorrectly. The instruction according to the Court confirms the accomplishment of the transfer for value of shares from one person to another. In Russian the extract from the ruling is as follows: "Данный довод заявителя подлежит отклонению как основанный на ошибочном толковании норм материального права, так как передаточное распоряжение является документом, подтверждающим совершение сделки по возмездной передаче акций от одного лица к другому, поскольку передаточное распоряжение не только содержит в себе обращение к регистрирующему органу на переход права собственности на бездокументарные ценные бумаги, но и непосредственно является актом (действием) по передаче бездокументарных ценных бумаг от продавца к приобретателю таких бумаг." Постановление Двенадцатого арбитражного апелляционного суда от 26 сентября 2016 г. № 12АП-6691/2016 по делу № А12-6026/2016 [Resolution of the Twelfth Arbitration Court of Appeal No. 12AP-6691/2016 with Regard to Case No. A12-6026/2016 of 26 September 2016] (Sep. 5, 2017), available at [www.consultant.ru](http://www.consultant.ru).

<sup>47</sup> See Постановление Девятого арбитражного апелляционного суда от 14 июля 2017 г. № 09АП-19873/2017-ГК по делу № А40-215838/14-87-1139 [Resolution of the Ninth Arbitration Court of Appeal No. 09AP-19873/2017-GK with Regard to Case No. A40-215838/14-87-1139 of 14 July 2017] (Sep. 10, 2017), available at [www.consultant.ru](http://www.consultant.ru). In Russian the conclusion of the Arbitration Court is as follows: "Передаточное распоряжение даже при отсутствии договора является распорядительным документом, на основании которого производится переоформление владельца акций, то есть влечет юридически значимые правовые последствия сделки." Practically identical conclusion was retained in another resolution. See Постановление Арбитражного суда Поволжского округа от 5 июня 2017 г. № Ф06-21239/2017 по делу № А12-33476/2016 [Resolution of the Arbitration Court of the Volga District No. F06-21239/2017 with Regard to Case No. A12-33476/2016 of 5 June 2017] (Sep. 5, 2017) available at [www.consultant.ru](http://www.consultant.ru).

<sup>48</sup> Постановление Шестнадцатого арбитражного апелляционного суда от 7 августа 2017 г. № 16АП-1867/2016 по делу № А20-1584/2014 [Resolution of the Sixteenth Arbitration Court of Appeal No. 16AP-1867/2016 with Regard to Case No. A20-1584/2014 of 7 August 2017] (Sep. 11, 2017), available at [www.consultant.ru](http://www.consultant.ru). In Russian the conclusion of the Arbitration Court is as follows: "Из названных положений закона следует, что передаточное распоряжение само по себе не влечет перехода права собственности на бездокументарные ценные бумаги и, следовательно, по смыслу статьи 153 ГК РФ не является сделкой, которой признается действие гражданина или юридического лица, направленное на установление, изменение или прекращение гражданских прав и обязанностей."

it cannot be considered as an act within the meaning of Art. 153 RCC.<sup>49</sup> The judges refer in this respect to Federal Securities Market Act and the relevant legislation governing the transfer of uncertificated securities.<sup>50</sup> In my opinion, these arguments retained in this decision are not persuasive. These conclusions are absolutely different to the one which figure in the other recent decisions.

The doctrine in Russia was not unanimous at that point. On the one hand, some scholars criticize the approach retained by the courts and consider that an instruction constitute a unilateral legal act. This group is represented by Dimitriy Murzin and Roman Bevzenko.<sup>51</sup> On the other hand, other scholars, for example Konstantin Lebedev [доц. К.К. Лебедев], the docent of the Saint-Petersburg University estimate that an instruction under Russian law cannot be qualified as a unilateral act.<sup>52</sup> In particular, Konstantin Lebedev affirms that an instruction under Russian law cannot be distinguished from the underlying contract.<sup>53</sup> The instruction according to the docent Konstantin Lebedev cannot be compared with a banking guarantee which constitute a unilateral and abstract act.<sup>54</sup> He also affirms that the transfer of uncertificated securities cannot be made without the consent of the transferee.<sup>55</sup> We do not share this opinion.

According to the first group, the instruction under Russian law is a legal act. In this respect Roman Bevzenko [доц. Р. Бевзенко] refers to the Resolution of the Federal Arbitration Court of the Moscow District of 24 February 2004 No. KG-A40/556-04.<sup>56</sup> In that case the Court had to examine the substance of the instruction due to the absence of the written contract between the parties. The judges have come to the conclusion that

<sup>49</sup> Resolution of the Sixteenth Arbitration Court of Appeal No. 16АП-1867/2016, *supra* note 48.

<sup>50</sup> Федеральный закон от 22 апреля 1996 г. № 39-ФЗ “О рынке ценных бумаг,” Собрание законодательства РФ, 1996, № 17, ст. 1918 [Federal law No. 39-FZ of 22 April 1996. On the Securities Market, Legislation Bulletin of the Russian Federation, 1996, No. 17, Art. 1918].

<sup>51</sup> See Бабкин С.А., Бевзенко Р.С., Белов В.А., Блинковский К.А., Григораш И.В., Субботин М.В., Тарасенко Ю.А., Шевцов П.В. Корпоративное право. Актуальные проблемы теории и практики [Sergei A. Babkin et al., *Corporate Law. The Actual Problems of Theory and Practice*] (V.A. Belov (ed.), Moscow: Urait, 2015) (Feb. 17, 2016), also available at <http://base.garant.ru/57354462/>.

<sup>52</sup> Лебедев К.К. Защита прав обладателей бездокументарных ценных бумаг (материально- и процессуально-правовые аспекты разрешения споров, связанных с отчуждением бездокументарных ценных бумаг) [Konstantin K. Lebedev, *The Protection of the Rights of the Titleholders of Uncertificated Securities (Material and Procedural Aspects of Claims Regarding the Alienation of Uncertificated Securities)*] 59 (Moscow: Wolters Kluwer, 2007).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> Постановление Федерального арбитражного суда Московского округа от 24 февраля 2004 г. № КГ-А40/556-04 [Resolution of the Federal Arbitration Court of the Moscow District No. KG-A40/556-04 of 24 February 2004] (Sep. 5, 2017), available at <http://www.consultant.ru/>.

the circumstances linked with the draft and the signature of the instruction and its presentation to the intermediary have changed the civil rights and obligations. Thus, it may be regarded as the part of the transaction, which resulted into the transfer of the property rights upon the securities.<sup>57</sup>

As we have said, we share the position of the first group of scholars on that question.

What about Swiss law, we have already mentioned earlier that the instruction constitute a unilateral act. The legislator distinguishes the underlying contract from the act of disposition.<sup>58</sup>

The question whether those acts are unilateral or bilateral is controversial. The doctrine in Switzerland is not unanimous at this point. The FISA contains three acts of disposition that we are going to analyze separately: the first one under Art. 24 FISA, another one under Art. 25<sup>1</sup> FISA and the last one according to Art. 26<sup>1</sup> FISA. The first group of scholars consider that the act of disposition under Art. 24 FISA is an abstract and unilateral act while those under Arts. 25<sup>1</sup> and 26<sup>1</sup> FISA are bilateral. This group is represented by the professors of the University of Geneva Luc Thévenoz and Bénédicte Foex.<sup>59</sup> The professor Bénédicte Foex considers that the instruction is act of disposition *stricto sensu* for the act under Art. 24 FISA. Contrary to the first group, Joël Leibenson believes that the act under Art. 24 FISA is bilateral.<sup>60</sup> Joël Leibenson argues that from the point of view of the Property Law and from the point of view of the intermediate holding system.<sup>61</sup> As for the Property Law, he invokes that the acts of disposition under Property Law are usually bilateral.<sup>62</sup> The consent of another party for the transfer according to Joël Leibenson is necessary.<sup>63</sup> What about the arguments based on the intermediate holding system, he argues that the act of disposition requires the consent of the transferee which is manifested

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<sup>57</sup> Resolution of the Federal Arbitration Court of the Moscow District No. KG-À40/556-04, *supra* note 56. The formulation in Russian is as follows: "По данному делу суд апелляционной инстанции не учел, что в отсутствие письменного договора обстоятельства, связанные с составлением и подписанием передаточного распоряжения, а также с его представлением реестродержателю, повлекли за собой изменение гражданских прав и обязанностей и поэтому могут рассматриваться как часть сделки, результатом которой стал переход прав собственности на ценные бумаги."

<sup>58</sup> Explanatory Report, at 8860.

<sup>59</sup> Luc Thévenoz, *Du dépôt collectif des valeurs mobilières aux titres intermédies: un saut épistémologique in Wirtschaftsrecht zu Beginn des 21 Jahrhunderts. Festschrift für Peter Nobel zum 60. Geburtstag* 708 (R. Waldburger et al. (eds.), Bern: Stämpfli, 2005). See also Bénédicte Foex, *Les actes de disposition sur les titres intermédies in Placements collectifs et titres intermédies*, *supra* note 39, at 83, 90.

<sup>60</sup> Joël Leibenson, *Les actes de disposition sur les titres intermédies* 200 (Zurich: Schulthess, 2013).

<sup>61</sup> *Id.* at 202.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 203.

in the contract. He affirms again that the transfer of securities cannot be affected without the consent for the acquisition. In our opinion, this argumentation is not persuasive. It seems that Joël Leibenson confuses the underlying contract with the act of disposition. This is contrary to the Explanatory Report prepared by the Swiss Legislator. The reasoning given by Joël Leibenson is quite similar to the one presented by the docent Konstantin Lebedev. Thus, we conclude that the act of disposition under Art. 24 FISA is unilateral.

### 2.2.2. *The Definition of the Debit and the Credit*

Pursuant to Art. 149.2 RCC the transfer of rights upon uncertificated securities is affected by means of debit at the account of the transferor and the credit at the account of the transferee in virtue of the instruction of the transferor. Apart from the instruction, the transfer under the modified RCC requires the debit and the credit at the relevant accounts.

In Switzerland, the act of disposition upon intermediated securities also requires an instruction of the transferor to a relevant intermediary and the “credit” at the account of the transferee (Art. 24, para. 1 FISA). The doctrine in Switzerland qualifies those institutions as accounting operations.<sup>64</sup>

The UNIDROIT Convention on Substantive Rules for Intermediated Securities adopted on the 9 October 2009 in Geneva does not prescribe the definitions of those terms. In the Convention we find the definition of the “securities account” which means an *account maintained by an intermediary to which securities may be debited and credited* (Art. 1(c)). The authors of the Official Commentary deduct from that definition that the “credit” is an entry in a securities account.<sup>65</sup> The authors state that the definition of the credit is governed by the Non-Convention law<sup>66</sup>. As for the “debit”, the authors of the Official Commentary refer to the comments on the “credit” which apply *mutatis mutandis*.<sup>67</sup> The Convention prescribes that subject to Art. 16, intermediated securities are acquired by an account holder by the credit of securities to that account holder’s securities account (Art. 11, para. 1). The same Article states in para. 2 that no further step is necessary, or may be required by the Non-Convention law or any other rule of law applicable in an insolvency proceeding, to render the acquisition of intermediated securities effective against third parties. This paragraph according to the authors of the Official Commentary addresses the effectiveness of a credit against third parties.<sup>68</sup> As we see, our two

<sup>64</sup> *The Federal Intermediated Securities Act (FISA) and the Hague Securities Convention (HSC)* 377 (H. Kuhn et al. (eds.), Berne: Stämpfli, 2010).

<sup>65</sup> Kanda et al. 2012, at 70.

<sup>66</sup> *Id.* at 71.

<sup>67</sup> *Id.* at 74.

<sup>68</sup> *Id.* at 73.

chosen legal orders are in full compliance with the Convention at this point. The credit constitutes the key moment for the creation of the effectiveness against third parties.

### **2.3. Other Methods of Transfer**

As for other methods of transfer, we note that the choice of the two legislators is different. The Russian legislator has chosen the designating entry within the meaning of Art. 1, let. "l" of the UNIDROIT Convention on Substantive Rules for Intermediated Securities. We have already discussed this topic in our previous article.<sup>69</sup> As for the Swiss legislator, the FISA contains apart from debits and credits also two other methods. They are the control agreement (Art. 25<sup>1</sup> FISA) and the constitution of an interest in favor of a relevant intermediary (Art. 26<sup>1</sup> FISA). One may find a lot of works dedicated to the general description of those methods.<sup>70</sup> Contrary to "debits and credits" under Art. 24 FISA, the control agreement and the constitution of interest in favor of the relevant intermediary do not require an entry at the account. They base on contractual mechanisms. The conclusion of the contract is enough and no entry is required.<sup>71</sup> The authors of the Official Commentary on the Convention note that a Contracting State is free to choose one, two or three methods available.<sup>72</sup> However, some delegations expressed the idea that the designating entry is superior to other methods.<sup>73</sup> I share this point of view. Indeed, the entry at the account certainly creates more security to the grantee than other methods. It is interesting to mention in this respect that Swiss scholars also recognize weak points of the control agreement and suggest having always a writing form.<sup>74</sup> For the present moment Swiss law does not require the control agreement to be in a written form.<sup>75</sup>

The Convention distinguishes between positive and negative control (Art. 1, lit. "k" and "l"). Positive control enables the grantee to give instructions to the relevant intermediary without the consent of the account holder while the latter means that the relevant intermediary is not entitled to comply with the instructions from

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<sup>69</sup> Botvinov 2017, at 36.

<sup>70</sup> See *The Federal Intermediated Securities Act (FISA)*, *supra* note 64; *Intermediated Securities*, *supra* note 37; Denise Brügger, *La nouvelle loi fédérale sur les titres intermédiés in Perspectives et risques de nouveautés juridiques 2008/2009* 23 (D. Lengauer & G. Rezzonico (eds.), Zurich: Schulthess Verlag AG, 2009); Martin Hess & Katja Stöckli, *Bestellung von Sicherheiten an Bucheffekten*, 106 *Schweizerische Juristen-Zeitung* 153 (2010).

<sup>71</sup> Kanda et al. 2012, at 79.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 84.

<sup>74</sup> *The Federal Intermediated Securities Act (FISA)*, *supra* note 64, at 388.

<sup>75</sup> *Id.*

the account holder without the consent of the grantee.<sup>76</sup> The Russian legislator has chosen the designating entry as a method for the creation of interests. We deduct this from the provisions of Art. 149.2, para. 3 RCC. The creation of an interest such as a pledge requires according to that article a relevant entry at the account of the titleholder. The control established by means of the designating entry under the Russian legislation is negative. We refer in this respect to Art. 51.6, para. 4 FSMA. This Article states that the grantor is not entitled to dispose of the pledged securities without the consent of the grantee unless otherwise provided by the agreement or by the Federal law.

As for the Swiss legal order, we note that Art. 25<sup>1</sup> FISA prescribes that an account holder may conclude an agreement with an intermediary by virtue of which the intermediary obliges to execute irrevocably the instructions of the grantee without any further consent or cooperation of the account holder. The Explanatory Report prepared by the Swiss legislator states that the account holder is deprived of the control over the securities.<sup>77</sup> This allows us to conclude that the control over securities is positive.

The third option available under Swiss law is the grant of an interest in favor of the relevant intermediary under Art. 26<sup>1</sup> FISA. It is done by means of agreement. The security interest becomes effective against third parties from the conclusion of agreement (Art. 26<sup>1</sup> FISA).

In this paragraph we would like to continue the discussion started previously regarding the unilateral or bilateral nature of the acts of disposition under the FISA. We have concluded that the act under Art. 24 FISA is unilateral. What about the acts pursuant to Arts. 25<sup>1</sup> and 26<sup>1</sup> FISA, we affirm that they are bilateral. As we have established earlier, the Swiss legislator distinguishes the underlying contract from the act of disposition.<sup>78</sup> Apart from the conclusion of the control agreement and the agreement with the relevant intermediary under the relevant articles of the FISA, the parties need to have an underlying contract. For instance, pledge agreement. The conclusion of a pledge agreement is not sufficient to create an interest upon intermediated securities. In two cases we have agreement as an act of disposition which is distinguished from an underlying contract. Thus, the acts of disposition pursuant to Arts. 25<sup>1</sup> and 26<sup>1</sup> FISA are bilateral. We illustrate our conclusions on this subject as follows:

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<sup>76</sup> Kanda et al. 2012, at 83.

<sup>77</sup> Explanatory Report, at 8870. The text in French is as follows: "*Bien que les titres intermédies gagés restent comptabilisés sur son compte, le constituant, du fait même de la constitution de la sûreté, renonce à exercer une maîtrise exclusive sur ces titres.*"

<sup>78</sup> Explanatory Report, at 8859.

### Scheme II: The Acts of Dispositions under the FISA

	<b>Debits and Credits under Art. 24</b>	<b>The Control Agreement under Art. 25<sup>1</sup></b>	<b>The Grant of an Interest in Favor of the Relevant Intermediary Within the Meaning of Art. 26<sup>1</sup></b>
<b>Acts of disposition</b>	Unilateral	Bilateral	Bilateral

#### **2.4. The Battle Between Causality and Abstraction in Relation to the Act of Disposition upon Securities Held in a Dematerialized Form**

This question is quite controversial. In civil law countries, the doctrine distinguishes abstract and casual acts [*абстрактные и казуальные сделки*]. The abstractedness [abstraction] is defined as a relation between two economically linked legal reports engaging different parties which means that the objections relating to the first report cannot be invoked regarding the second one. The opposite institution to this is the causality.<sup>79</sup> An abstract act is independent from its cause contrary to the causal act.<sup>80</sup> As for the transfer, the causality principle means that the validity of the act of disposition relies on the one of the underlying contract.<sup>81</sup> The abstraction principle has an opposite meaning.<sup>82</sup>

As we have said the problem is complex and the legal doctrine in Switzerland is not unanimous. On the one hand a group of legal scholars believe that the acts of disposition upon intermediated securities under the FISA rely on the causality principle; on the other hand another group of scholars consider that these acts of disposition have an abstract nature.<sup>83</sup> In order to solve this problem, we have to analyze again each act separately. Among various doctrinal opinions, we believe that the one presented by Joël Leibenson is correct. He thinks that all acts of disposition upon intermediated securities under Chapter V FISA have causal nature. I share his point of view. He argues that the Explanatory Report is quite contradictory in relation to the act governed by Art. 24 FISA<sup>84</sup>. One cannot exclusively rely on Art. 15 FISA.

<sup>79</sup> Christine Chappuis & Sylvan Marchand, *Du jargon et de la raison en droit des obligations: définitions et prétentions* 6 (Genève: Université de Genève, Faculté de droit, 2010).

<sup>80</sup> *Id.* at 7.

<sup>81</sup> Leibenson 2013, at 139.

<sup>82</sup> *Id.*

<sup>83</sup> Antoine Eigenmann, *Projet de loi sur le dépôt et le transfert des titres intermédiés, aspects choisis* in *Revue suisse de droit des affaires et du marché financier* 104 (P. Nobel et al. (eds.), Zurich: Schulthess Juristische Medien AG, 2006); Leibenson 2013, at 172; Bénédicte Foex, at 87.

<sup>84</sup> Leibenson 2013, at 173.

In this respect, he asserts that the fact that an intermediary is not entitled to verify the legal grounds for the instruction does not mean that the instruction is valid.<sup>85</sup> Hence, Joël Leibenson concludes that the legislator has not decided whether the act in question is abstract or causal. This is the first point he mentioned. Secondly, he affirms that causality principle grants more legal security. The introduction of the regime protecting the *bona fide* purchaser constitute according to Joël Leibenson the sign that the act of disposition should base on a valid contract.<sup>86</sup> He argues that the application of the abstractedness allows to the acquirer in bad faith to get a title upon the securities without cause.<sup>87</sup> I absolutely agree with this point of view.

As for the acts of disposition which base on contractual mechanisms (Arts. 25<sup>1</sup> and 26<sup>1</sup> FISA), we affirm that they are also causal. Contrary to the act under Art. 24 FISA, we cannot invoke Art. 15, para. 2 FISA regarding the execution of the instruction by the intermediary without verifying the cause.

### **Scheme III: The Application of Causality Principle Regarding the Acts of Disposition on Intermediated Securities under the FISA**

	<b>Debits and Credits under Art. 24</b>	<b>The Control Agreement under Art. 25<sup>1</sup></b>	<b>The Grant of an Interest in Favor of the Relevant Intermediary Within the Meaning of Art. 26<sup>1</sup></b>
<b>Acts of disposition</b>	Causal	Causal	Causal

In the Russian Federation, the courts have ruled that the validity of an instruction relies on the one of the underlying contract.<sup>88</sup> If the underlying contract is invalid, the

<sup>85</sup> Leibenson 2013, at 173.

<sup>86</sup> *Id.* at 177.

<sup>87</sup> *Id.* at 176.

<sup>88</sup> Постановление Восьмого арбитражного апелляционного суда от 27 июня 2016 г. № 08АП-4837/2016 по делу № А46-13527/2014 [Resolution of the Eighth Arbitration Court of Appeal No. 08AP-4837/2016 with Regard to Case No. A46-13527/2014 of 27 June 2016] (Sep. 5, 2017), available at [www.consultant.ru](http://www.consultant.ru). In that Resolution the Court has ruled that the invalidity of the contract implies also the invalidity of the instruction. In Russian the text is as follows: "Поскольку недействительная сделка – договор № 02-12/ГТ от 20.07.2012, послужила основанием для составления передаточного распоряжения от 18.03.2013, указанное передаточное распоряжение также является недействительным." Постановление Девятого арбитражного апелляционного суда от 2 апреля 2015 г. № 09АП-8847/2015 по делу № А40-56112/13 [Resolution of the Ninth Arbitration Court of Appeal No. 09AP-8847/2015 with Regard to Case No. A40-56112/13 of 2 April 2015] (Sep. 7, 2017), available at [www.consultant.ru](http://www.consultant.ru). The ruling of the Court is given in Russian as follows: "Таким образом, признание недействительными действий по передаче паев в соответствии со статьей 167 ГК РФ повлекло недействительность передаточных распоряжений."

instruction is also invalid. Hence, the instruction under Russian law is a casual act. In recent decisions arbitration courts have ruled that the instruction not only addresses to the intermediary regarding the transfer of property rights upon securities but also constitutes an act (action) of transfer of uncertificated securities from the buyer to the acquirer of those securities [*“Соответственно, передаточное распоряжение не только содержит в себе обращение к регистрирующему органу на переход права собственности на бездокументарные ценные бумаги, но и непосредственно является актом (действием) по передаче бездокументарных ценных бумаг от продавца к приобретателю таких бумаг”*<sup>89</sup>]. The similar conclusion was retained in other decisions.<sup>90</sup>

### Conclusion

Although we have heavily criticized the Russian legislator for the reform, the significant progress has been achieved in such areas as the transfer, the protection of the titleholder including the *bona fide* purchaser, the definition of the securities. We present our conclusions as follows:

1) Firstly, the modified RCC (Art. 149) and the FISA (Art. 3, para. 1, let. “a” and “b”) are based mostly on so called the “substantial approach.”

2) Secondly, we came to the conclusion that it is impossible to renounce completely from traditional tangible property concepts in respect of the securities held in dematerialized form. In Switzerland the legislator has defined those securities as a *sui generis* or independent legal object that constitutes neither claim nor chattel. In my opinion the Russian courts and the legislator should declare those securities the *sui generis* legal object which combines the features of a claim and a chattel. This solution will allow us to eliminate all previously raised contradictions.

3) Thirdly, the Russian legislator has not renounced completely from the principle of vindication. The doctrine calls the method under Art. 149.3 RCC as quasi-vindication. I agree with this statement. However I suggest to replace it and to apply the rules upon the unjust enrichment to those securities in order to protect the titleholder. This solution has been retained by the Swiss legislator.

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<sup>89</sup> Постановление Девятнадцатого арбитражного апелляционного суда от 8 февраля 2017 г. № 19АП-3945/2016 по делу № А14-14020/2015 [Resolution of the Nineteenth Arbitration Court of Appeal No. 19AP-3945/2016 with Regard to Case No. A14-14020/2015 of 8 February 2017] (Sep. 5, 2017), available at [www.consultant.ru](http://www.consultant.ru).

<sup>90</sup> Постановление Четвертого арбитражного апелляционного суда от 24 мая 2017 г. № 04АП-7366/2015 по делу № А58-4275/2015 [Resolution of the Fourth Arbitration Court of Appeal No. 04AP-7366/2015 with Regard to Case No. A58-4275/2015 of 24 May 2017] (Sep. 5, 2017), available at [www.consultant.ru](http://www.consultant.ru). See also Постановление Двенадцатого арбитражного апелляционного суда от 26 сентября 2016 г. № 12АП-6691/2016 по делу № А12-6026/2016 [Resolution of the Twelfth Arbitration Court of Appeal No. 12AP-6691/2016 with Regard to Case No. A12-6026/2016 of 26 September 2016] (Sep. 5, 2017), available at [www.consultant.ru](http://www.consultant.ru).

4) I still insist that an awkward term “бездокументарная ценная бумага” or “uncertificated security” should be replaced by the new one: “intermediated security.”

5) I suggest to the Russian legislator to ratify the UNIDROIT Convention on Substantive Rules for Intermediated Securities also known as “Geneva Securities Convention.” I also suggest this ratification to the Swiss legislator.

6) In relation to transfer of the securities, the two legislators in question have chosen different solutions. Apart from the method under Art. XI of the UNIDROIT Convention on Substantive Rules for Intermediated Securities, there are three options available under Art. XII: the designating entry, the control agreement and the grant of an interest in favor of the relevant intermediary. The Russian legislator has chosen the designating entry while his Swiss colleague has decided to choose the control agreement and the grant of an interest in favor of the relevant intermediary.

7) The Swiss legal order distinguishes the act of disposition from the underlying contract [*titre d'acquisition*]. In our opinion the act of disposition under Art. 24 FISA is unilateral and causal, while the remaining two (Arts. 25<sup>1</sup> and 26<sup>1</sup> FISA) are bilateral and also causal. As for the Russian Federation, arbitration courts qualify the instruction as a unilateral and causal act. Previously, arbitration courts in the Russian Federation refused to consider the instruction as a unilateral act.

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