

GENEVA SECURITIES CONVENTION AND RUSSIAN CIVIL LEGISLATION REFORM: COMPARATIVE PERSPECTIVES

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DOI: 10.21684/2412-2343-2017-4-1-26-39

The Russian Parliament has modified the Civil Code recently. This reform has also covered the regime of uncertificated securities. Under the modified Civil Code (RCC) uncertificated securities do not constitute chattels but claims and other rights against the issuer. The legislator has also precised such issues as the methods of transfer and the creation of an interest upon those securities (Art. 149.2 of the RCC), the protection of the titleholder including the rights of a bona fide purchaser (Art. 149.3 of the RCC) and the liability of an intermediary resulting from the loss of the records (Art. 149.5 of the RCC).

In 2008, in Switzerland, the Parliament has adopted the Federal Intermediated Securities Act (FISA). The present Act has introduced a new object to the Swiss legal order: an intermediated security. The intermediated securities are distinguished from those in paper form and from the immobilized securities. The Swiss delegation has participated actively in the preparatory works that resulted later in the adoption of the UNIDROIT Convention on Substantive Rules for Intermediated Securities, also known as Geneva Securities Convention. However, this Convention has not been ratified by Switzerland.

The author analyzes the key issues of the reform in relation to uncertificated securities. We examine in particular whether the provisions governing the regime of uncertificated securities under the modified Civil Code of the Russian Federation have become more compatible with Geneva Securities Convention. Finally, we will try to explain why this Convention is not in force and whether the Russian Federation and Switzerland could ratify it.

Keywords: Russian law; uncertificated securities; intermediated securities; Swiss law; Geneva Securities Convention; legal reform; comparative law; security; UNIDROIT.

Recommended citation: Mikhail Botvinov, *Geneva Securities Convention and Russian Civil Legislation Reform: Comparative Perspectives*, 4(1) BRICS Law Journal 26–39 (2017).

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Introduction

In 2013 the Russian Parliament has completely revised the provisions governing the regime of uncertificated securities. The legislator had several purposes. Firstly, it was necessary to determine the legal regime of those securities. The judicial authorities considered them as chattels while some legal scholars estimated that uncertificated securities constitute claims against the issuer. Pursuant to the Explanation Report prepared by the Russian Parliament, the second purpose was to clarify the methods of disposition.¹ Finally, the legislator intended to accord a better protection to a bona fide purchaser of those securities.

In 2008, the Swiss Parliament has adopted the Federal Intermediated Securities Act (FISA). This act introduced a new object in the Swiss legal system: an intermediated security.

At the international level, UNIDROIT has drafted the Convention on Substantive Rules for Intermediated Securities, also known as Geneva Securities Convention.² Although this Convention tried to harmonize the regime of intermediated securities at the international level, it is not in force currently. It is important to mention in this respect that neither Russia nor Switzerland have ratified this Convention.

We are going to analyze the questions raised above in this paper profoundly. In particular we are going to explain why the “uncertificated security” under Russian law corresponds to those that figure in Swiss law: “intermediated security.” Secondly

¹ Пояснительная записка к проекту федерального закона № 47538-6 “О внесении изменений в части первую, вторую, третью и четвертую Гражданского кодекса Российской Федерации, а также в отдельные законодательные акты Российской Федерации” [Explanatory Report of the Draft Federal Law No. 47538-6 “On Modification of Chapters I, II, III and IV of the Civil Code of the Russian Federation and other Laws”] (Jan. 11, 2017), available at <http://base.garant.ru/58024598/>.

² UNIDROIT Convention on Substantive Rules for Intermediated Securities, adopted by the Conference on October 9, 2009 (Jan. 11, 2017), available at <http://www.unidroit.org/english/conventions/2009inintermediatedsecurities/convention.pdf>.

we intend to check the compatibility of the Geneva Securities Convention with the relevant provisions of the modified Civil Code of the Russian Federation (RCC). Finally, we will try to explain why the Geneva Securities Convention is not in force at the moment and discuss the future perspectives of this Convention.

1. Intermediated Security vs Uncertificated Security under Russian Law

Intermediated securities constitute a legal and linguistic novelty. One should distinguish intermediated securities, which are held by the licensed financial intermediaries at the proper accounts from those in paper form. Intermediated securities do not have physical form. They are transferred by means of book entries at the accounts. The Geneva Securities Convention defines intermediated securities as “*securities credited to a securities account or rights or interests in securities resulting from the credit of securities to a securities account*” (Art. 1(b)). The drafters of this Convention tried to unify two different approaches: the first part of this definition (“*securities credited to a securities account*”) is quite common for civil law countries while the second one (“*rights or interests in securities*”) reflects common law tradition. The Convention does not explain the legal nature of these securities.

We estimate that despite terminological differences, the term “uncertificated securities” which exist under Russian law, perfectly match the term “intermediated securities” which figure in the Geneva Securities Convention. In fact, uncertificated securities constitute claims which are transferred by means of assignment. Under Russian law it is not the case. The term “uncertificated security” was imported to Russian legal system from the Uniform Commercial Code (UCC).³

As for the legal doctrine, we should mention that the majority of legal scholars considered that such securities are claims [“*обязательственные права*”].⁴ Thus we cannot apply the principle of vindication to those securities. However, we should mention that some lawyers (for example, former judge Vladislav Dobrovolsky) estimate that uncertificated securities could be vindicated.⁵

³ Суханов Е.А. О понятии и видах вещных прав в российском гражданском праве, 12 Журнал российского права 42–50 (2006) [Evgeny A. Sukhanov, *The Definition and the Types of Rights in Rem in Russian Civil Law*, 12 Journal of Russian Law 42–50 (2006)] (Jan. 11, 2017), also available at <http://base.garant.ru/5332987/>.

⁴ *See in particular* Российское гражданское право: Учебник. В 2 т. Т. I: Общая часть. Вещное право. Наследственное право. Интеллектуальные права. Личные неимущественные права [Russian Civil Law: Textbook. In 2 vol. Vol. I: General Part. Property Law. Inheritance Law. Intellectual Rights. Personal Non-Property Rights] 330 (E.A. Sukhanov, ed., Moscow: Statut, 2010).

⁵ Добровольский В. О практической ценности дискуссии по вопросу о виндикации акций, 8–9 Акционерный вестник 31–41 (2007) [Vladislav Dobrovolsky, *On the Question of Vindication of Shares in Uncertificated Form*, 8–9 Shareholder’s Review 31–41 (2007)] (Jan. 11, 2017), also available at <http://base.garant.ru/5409077/>.

It is important to indicate that there are two different opinions in Russia on the problem of uncertificated securities. This problem comprises two main questions. Firstly, we should determine what constitute the term security or in Russian [“Что следует понимать под термином “ценные бумаги”?]. Secondly, do we apply the principle of vindication to uncertificated securities? [Применим ли принцип виндикации к бездокументарным ценным бумагам?]. Unfortunately Russian courts have replied positively to the second question. What about the first one, we remind that in Russia there are two main groups of scholars: those who estimate that we should distinguish paper from securities from uncertificated (in other words, uncertificated security is a not a security *stricto sensu*) and those who consider that the term “security” comprises also “uncertificated securities.” The first group of scholars consider that the term “security” [“ценная бумага”] comprises only paper form securities. This group is represented by professors: Evgeny Sukhanov and Vadim Belov.⁶ The opposite opinion is expressed by Dmitry Murzin.⁷ Experts belonging to the documentary concept consider that we cannot apply the principle of vindication to uncertificated securities while the second group which is known as (“uncertificated theory” [“бездокументарная концепция”]) estimates the contrary.

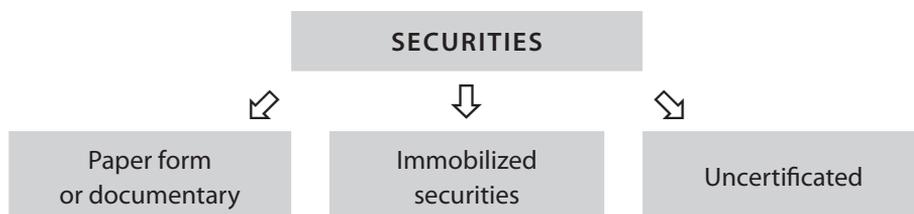
The Russian legislator has followed the second approach in the reformed RCC. Pursuant to Art. 142 of the RCC the term security comprises both paper form and uncertificated securities. The modified RCC (Art. 142) states that: “*Securities are documents which respect the relevant legal requirements... also considered to be securities: claims and other rights*” [“Ценными бумагами являются документы, соответствующие установленным законом требованиям и удостоверяющие обязательственные и иные права...”]. Thus, the RCC follows the second approach (“uncertificated theory”) and establishes one single definition of security for both in paper-form and for those which are dematerialized. The same time, the courts have unfortunately continued to apply the principle of vindication concerning the uncertificated securities (Art. 149.3, para. 1).⁸ We could illustrate the above mentioned as follows:

⁶ Шевченко О.М. Правовое регулирование деятельности по организации торговли на рынке ценных бумаг. Новации российского законодательства и актуальные проблемы: Монография [Olga M. Schevchenko, *Legal Regulation of Activities Organizing the Commerce at the Securities Market. The Novelities in Russian Legislation and Actual Problems: Monography*] (Moscow: Prospekt, 2015) (Jan. 11, 2017), also available at <http://base.garant.ru/57354204/>.

⁷ *Id.*

⁸ Постановление Арбитражного суда Московского округа от 29 февраля 2016 г. по делу № А41-8897/2011 [Decision of the Commercial District Court of the Moscow Region with Regard to Case No. A41-8897/2011 of February 29, 2016] (Jan. 11, 2017), available at www.garant.ru.

Scheme I. Securities under the modified RCC



In Switzerland, the Parliament has introduced a new object into its legal system: an intermediated security. This object in question combines pursuant to the Explanatory Report [“Message relatif à la loi fédérale sur les titres intermédiés et à la Convention de La Haye sur les titres intermédiés”] the features of a chattel and a claim.⁹ It is a *sui generis* object.¹⁰ It is neither a claim nor a chattel. Swiss law distinguishes a paper-form security [papier-valeur] (Art. 965 of the Swiss Code of Obligations) from an uncertificated one [droit-valeur; Wertrecht] (Art. 973c of the Swiss Code of Obligations) which is transferred by means of assignment.¹¹ Finally, Swiss law distinguishes intermediated security which is regulated by the special legislative act: FISA. The Federal Tribunal has ruled that one could not claim for the vindication of intermediated securities.¹² The principles of the Law of obligations apply.¹³

In 2015 the FISA was modified. In particular, Art. 3 was completed by the substantial para. 1^{bis} that prescribes the following:

Any Financial Instrument or any right in Financial Instrument the conservation of which is governed by foreign Law attributing them the comparable function, are also considered as intermediated securities within the meaning of the present Act.¹⁴

⁹ 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 (Jan. 11, 2017), available at <https://www.admin.ch/opc/fr/federal-gazette/2006/8817.pdf>.

¹⁰ *Id.*

¹¹ See Loi fédérale complétant le Code civil suisse (Livre cinquième : Droit des obligations) du 30 mars 1911 (RS 220) (Jan. 11, 2017), available at <https://www.admin.ch/opc/fr/classified-compilation/19110009/index.html>.

¹² ATF 138 III 137 consid. 5.2.1.

¹³ *Id.*

¹⁴ Art. III, para. 1^{bis} of the FISA in French: “*Sont également considérés comme des titres intermédiés au sens de la présente loi tout instrument financier et tout droit sur un instrument financier dont la conservation est soumise à un droit étranger qui lui reconnaît une fonction comparable.*”

It seems important for us to mention at this stage, that this provision was prescribed by the Preliminary Project [Avant-Projet].¹⁵ It was not included in the Final draft. In 2015 the Swiss legislator has modified the FISA. Some Swiss scholars consider that the absence of this provision did not previously hamper to recognize instruments governed by foreign Law as intermediated securities.¹⁶ The above mentioned provision establishes three conditions: 1) Financial Instrument or any right in this Instrument, 2) Conservation is governed by foreign Law, 3) Foreign Law should attribute to this Instrument or right in it the comparable Function. One could ask the question whether Russian uncertificated securities could be considered as intermediated under Swiss law? In our opinion the answer is positive. For instance, we have securities issued by a Russian Issuer and held at the account within a Russian financial intermediary. In that case we automatically satisfy the second requirement as the relationship between the holder and the intermediary is usually governed by the Russian law. As for the first criterion, we should look for the definition of financial instrument in the Project of the Federal Law on Financial services [Loi sur les services financiers (LSFin)]. The Project provides that the term financial instrument includes intermediated securities and uncertificated securities [droits-valeurs] (Art. 3(c)). We estimate that uncertificated securities certainly fulfill the first requirement. Finally, we should analyze whether uncertificated securities under Russian law fulfill the “comparable function.” One may ask what constitute “comparable function” within the meaning of Art. 3 of the FISA?

For the moment there is neither official nor doctrinal interpretation of this term. In order to answer this question, we should examine the definition of intermediated securities pursuant to Art. 3 of the present Act. Under the FISA the definition of intermediated securities have the following elements: (1) personal or corporate rights against an issuer which (2) are of a fungible nature, (3) have been credited to a securities account, and (4) may be disposed of by the account holder in accordance with the provisions of the Act.¹⁷ As for the uncertificated securities under Russian law, the RCC (Art. 142, para. 1) defines them as “*claims and other rights which are fixed in the decision of issue or in another act of the person who issued those securities according to the legal requirements. The execution and transfer of those rights and claims is possible only pursuant to Article 149 of the present Code.*”¹⁸ As we see, there are

¹⁵ Joël Leibenson, *Les actes de disposition sur les titres intermédies* 93 (Zurich: Schulthess, 2013).

¹⁶ *Id.*

¹⁷ Hans Kuhn et al., *The Federal Intermediated Securities Act (FISA) and the Hague Securities Convention (HSC)* 164 (Berne: Stämpfli, 2010).

¹⁸ Art. 142, para. 1 in Russian: “...Ценными бумагами признаются также обязательственные и иные права, которые закреплены в решении о выпуске или ином акте лица, выпустившего ценные бумаги в соответствии с требованиями закона, и осуществление и передача которых возможны только с соблюдением правил учета этих прав в соответствии со статьей 149 настоящего Кодекса (бездокументарные ценные бумаги).”

at least two common criteria: rights and claims against the issuer and the methods of transfer. We are going to analyze the latter criterion in the next Chapter of the present paper. Despite the remained requirements (fungibility and credit to the securities account) are not expressly mentioned in the above quoted definition, in our opinion, they are completely fulfilled. Russian uncertificated securities are held at accounts “depo.” In order to transfer, the holder should always apply to the relevant duly licensed intermediary (Arts. 29 and 51.6 of the Federal Securities Market Act¹⁹ (FSMA)). As for the fungibility, we remind that this concept was developed by the law of obligations.²⁰ For example, the goods are fungible if they are characterised by quantity, weight, etc.²¹ Some Swiss scholars consider that the concept of fungibility in relation to intermediated securities leans on those that applies to chattels.²² In the Geneva Securities Convention we find the following term: “securities of the same description” [“titres de même nombre de même genre”] (Art. 1(j)). This term was defined as

(j) securities are “of the same description” as other securities if they are issued by the same issuer and:

- (i) they are of the same class of shares or stock; or
- (ii) in the case of securities other than shares or stock, they are of the same currency and denomination and are treated as forming part of the same issue.

As we see, the concept of fungibility is also adopted by the Geneva Securities Convention. Finally we should answer whether this concept covers Russian uncertificated securities? In our opinion, the answer is positive. According to Art. 149.3, para. 1 of the RCC the holder which was illegally deprived of his uncertificated securities may claim for the restitution of the securities of the same description and of the same quantity from the person at the account of whom those securities were credited [возврат такого же количества соответствующих ценных бумаг]. For the moment there is no official interpretation of this provision. In our opinion the legislator followed the concept of fungibility.

Finally, uncertificated securities governed by Russian law could be recognized as intermediated under Swiss law pursuant to Art. 3, para. 1^{bis} of the FISA and

¹⁹ 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 April 22, 1996. On the Securities Market, Legislation Bulletin of the Russian Federation, 1996, No. 17, Art. 1918].

²⁰ Kuhn et al. 2010, at. 166.

²¹ Lucia Gomez-Richa & Joël Philippe Gérard Veuve, *Les titres intermédiés et leurs instruments financiers sous-jacents*, 1 Gesellschafts- und Kapitalmarktrecht 8 (2010).

²² *Id.*

according to Art. 1(b) of the Geneva Securities Convention. We do not see any obstacles in this respect. The above mentioned analysis is also applicable in relation to immobilized securities within the meaning of Art. 148.1 of the RCC. This Article prescribes that pursuant to the Law or in compliance with the order established by the Law, documentary or paper-form securities may be immobilized, i.e. deposited for a consignment to the person who is entitled by the Law to affect the consignment of documentary securities or (and) the registration of rights upon securities. The transfer of rights upon immobilized securities and the exercise of rights attested by those securities are regulated by Arts. 149–149.5 of the present Code unless otherwise provided by the Law.

It is important to mention that apart from the definition under the FISA, the Swiss legal order contains another one in the Private International Law Act (PIL).²³ This definition is provided by Art. 108a. The above mentioned Article prescribes that intermediated securities constitute securities held with an intermediary within the meaning of the Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary (Hague Securities Convention).²⁴ The Convention defines securities held with an intermediary as “*means the rights of an account holder resulting from a credit of securities to a securities account*” (Art. 1(f)). Swiss scholars explain that the definition in “Hague Securities Convention” is broader than in the FISA.²⁵ Do uncertificated securities under the modified RCC satisfy that definition? We answer affirmatively. We support this conclusion by making reference to the professor Florence Guillaume who explains that: “*In order for a security to be held with an intermediary, it must be entered in an indirect holding system by being credit to a securities account held with an intermediary*”.²⁶ Secondly, we refer to the Explanatory Report on the Hague Securities Convention: “*The Convention applies only to securities credited to securities account; it does not apply to the rights held directly from the issuer by a person who is a registered holder of securities in records maintained by or for the issuer or who is in physical possession of certificates representing the securities. So until securities are first credited to a securities account, thereby entering the intermediated system, the Convention does not apply in relation to them.*”²⁷ We could deduct from the

²³ See Loi fédérale du 18 décembre 1987 sur le droit international privé (LDIP) (RS291) (Jan. 11, 2017), available in French or German at <https://www.admin.ch/opc/fr/classified-compilation/19870312/index.html>.

²⁴ See Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary of July 5, 2006, Hague Conference on Private International Law (Jan. 11, 2017), available at <https://assets.hcch.net/docs/3afb8418-7eb7-4a0c-af85-c4f35995bb8a.pdf>.

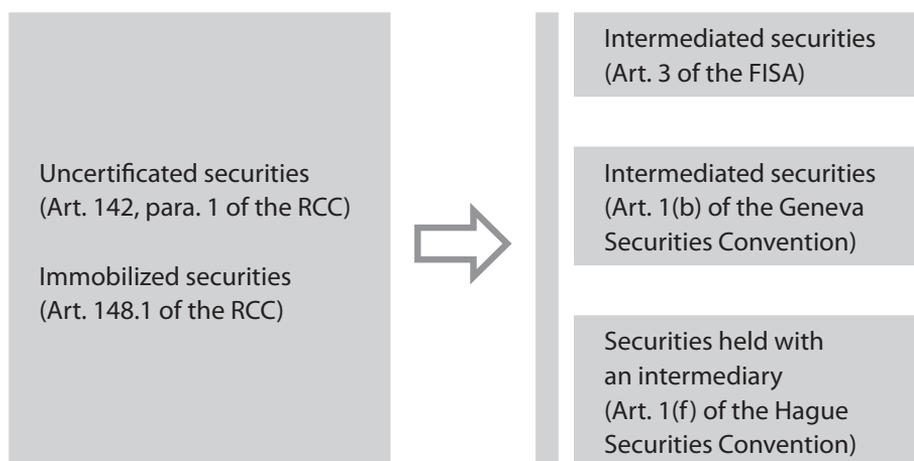
²⁵ Kuhn et al. 2010, at 12.

²⁶ *Id.* at 36.

²⁷ See Explanatory Report on the Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary of July 5, 2006 (Jan. 11, 2017), available at <https://www.hcch.net>.

above mentioned several conditions that uncertificated security under the RCC to satisfy. First, our Russian law uncertificated security should be credited to a securities account. Secondly it should function within the intermediated system or an indirect system. We find the confirmation of those arguments in the RCC (Art. 149, para. 2 and Art. 149.2, paras. 1 & 2). Issuers do not hold those securities themselves. It is made by mean of dully licensed intermediaries. The constitutive moment of transfer pursuant to the RCC is the credit of the uncertificated securities at the account. From the moment of the credit the acquirer enjoys all the rights in relation to those securities. Thus we affirm that uncertificated securities under the RCC respect the requirements of Art. 1(f) of the Hague Securities Convention. The same affirmation is also true in relation to immobilized securities under Art. 148.1 of the RCC. The definition that figure in the Hague Securities Convention was inserted in the Geneva Securities Convention (Art. 1(b)). We represent our conclusions as follows:

**Scheme II. Russian law correspondent term within
the meaning of Art. 3, para. 1^{bis} of the FISA**



**2. Transfer of Intermediated Securities: Russian Law, Swiss Law,
and the Geneva Securities Convention**

Uncertificated securities according to Art. 149.2 of the RCC are transferred by debits and credits. The intermediary makes proper entries [écritures] at the accounts. In fact he debits the securities from the account of the seller and credits them to the account of the buyer. As we see, Russian legislator is in compliance with the requirements of Art. 9 of the Geneva Securities Convention. This method of disposition is called by the professor Luc Thévenoz "the golden standard of the holding

*pattern worldwide.*²⁸ It means that this method should be available in all countries which are going to ratify the present Convention. We mention in this respect that Russian and Swiss legal orders are in compliance with the Convention.

As for other methods we should mention that they are used mainly for creation of interests. The State is entitled to choose among three existing options pursuant to Art. 12 of the Geneva Securities Convention: a designating entry, a control agreement and a grant of an interest in favor of the relevant intermediary. In order to represent the methods chosen, we decided to draft the following scheme:

Scheme III. Methods of disposition under Russian law, Swiss law, and pursuant to the Geneva Securities Convention

	Methods of disposition	Swiss Law	Russian Law	Geneva Securities Convention
1	Debits and credits	+	+	+
2	Control agreement	+	–	+
3	Designating entry	–	+	+
4	Security interest in favor of the relevant intermediary	+	–	+

As we see Russian legislator decided to choose only one option among three available: the designating entry. According to Official Commentary on the Geneva Securities Convention a designating entry is described as an “*entry in a securities account whereby specific intermediated securities (or the securities account as a whole) are ‘earmarked’ for the purpose of signaling the existence of an interest in favor of someone other than the account holder.*”²⁹ The Commentary distinguishes between two types of control available under this option: the positive and the negative. The latter means that the relevant intermediary may not comply with the instructions of the account holder regarding the securities in question without the consent of the grantee.³⁰ The modified RCC and the FSMA (Art. 51.6, para. 4) indicate us that the legislator has followed the latter approach. According to the FSMA (Art. 51.6, para. 4), 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.

²⁸ *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).

²⁹ Hideki Kanda et al., *Official Commentary on the UNIDROIT Convention on Substantive Rules for Intermediated Securities* 83 (Oxford: Oxford University Press, 2012).

³⁰ *Id.*

Art. 149.2, para. 3 of the RCC prescribes that *“the pledge or any other interest in uncertificated securities or limitation of the use of those securities enters into force after the person responsible for registration of those rights [that means relevant intermediary] makes an entry of pledge, of interest or of any other limitation at the account of the holder or at other account under operation of law.”* The above mentioned provision confirms our statement that Russian legislator has chosen designating entry as a method of granting interests. The modified RCC allows also to grant an interest by means of debits and credits. The modified legislation prescribes that the interest could enter into force by means of credit of securities to the relevant account if the Law so provides.

As for the Swiss law, the FISA has been recently modified due to the adoption of the Financial Market Infrastructure Act.³¹ Swiss legislator has replaced the previous term: the constitution of interests [constitution de sûretés] by the new one: «disposition» (Arts. 25 & 26). As we see, the two legislators have chosen different methods for creation of interests. However we should indicate that it is possible under Swiss and Russian legislations to create an interest in securities by means of debits and credits. Contrary to the previous version (former Art. 25 of the FISA), the modified FISA does not expressly prescribe that possibility. The modified RCC provides (Art. 149.2, para. 3 of the RCC and Art. 51.6, para. 2 of the FSMA) that the interest may also be created by means of credit of those securities on the account if the Law so provides.

3. Other Important Issues of the Reform

In the previous Chapters we have analyzed why Russian uncertificated securities could be qualified as intermediated under Swiss law. We have discussed the methods of disposition and concluded that the modified RCC has become more compatible with the Geneva Securities Convention in this respect. There are also other issues that we would like to touch in the present paper. They are: the protection of the titleholder and the problem of bona fide acquisition.

3.1. Protection of a Titleholder under the Modified RCC

As we have already mentioned, till 2013 uncertificated securities were considered to be chattels. Thus, the principles of vindication applied. The Concept of Development of Civil Legislation of the Russian Federation³² mentioned (para. 1.1.9) that the application

³¹ Loi fédérale sur les infrastructures des marchés financiers et le comportement sur le marché en matière de négociation de valeurs mobilières et de dérivés du 19 juin 2015 (LIMF) (RO2015) (Jan. 11, 2017), available at <https://www.admin.ch/opc/fr/classified-compilation/20141779/index.html>.

³² 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 October 7, 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/>.

of vindication to those securities is inappropriate. The legislator has modified the RCC. Art. 149.2, para. 3 of the RCC provides that the titleholder could claim for restitution of the securities of the same description and of the same quantity.

3.2. The Problem of a Bona Fide Acquisition

The modified RCC has also covered the problem of an innocent or bona fide acquisition. The Code is based in this respect on two criteria: acquisition for value and good faith (Art. 149.3 of the RCC). This approach is in line with Swiss law which follows the same standard (Art. 29 of the FISA). We should however clarify what constitute good faith under the RCC, FISA and Geneva Securities Convention. The Convention is based on "Knowledge Criterion." Art. 18 of the Convention provides that the holder is not protected if he "*knows or ought to know*" the information regarding the title of a vendor. As for Russian law, the test for uncertificated securities is the same that applies to those in paper form unless otherwise provided by Law or flows out of the nature of those securities (Art. 143, para. 6 of the RCC).³³ Russian law uses also the same wording: "*knows or ought to know*." It also adds that the acquirer is not protected if he illicitly contributed to the termination of the rights of an initial holder (Art. 147.1, para. 4 of the RCC). Thus, the RCC is in compliance with the Geneva Securities Convention.

4. Future Perspectives of the Geneva Securities Convention and Conclusions

For the present moment the Geneva Securities Convention is not in force. Although UNIDROIT tried to use functional approach, which consider the differences between common law and civil law systems, only one country has ratified this Convention: the Republic of Bangladesh.³⁴ The approach did not describe the legal nature of institutions.³⁵ Thus, national legislators are free to define it. We could ask whether the attempt of UNIDROIT to harmonize the law of securities was successful? Even though, the Convention is not in force, we answer affirmatively. We remind once again that neither Russia nor Switzerland ratified it despite participating at the UNIDROIT working groups. Swiss authorities even hosted the delegation in Geneva.

³³ 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., Серебренников М.М., Шадрин Е.Г., Юдина А.Б. Комментарий Гражданскому кодексу Российской Федерации. Часть первая от 30 ноября 1994 г. № 51-ФЗ [Natalya A. Ageskina et al., *Commentary of the Civil Code of the Russian Federation. Chapter I of November 30, 1994 No. 51-FZ*] (SPS "Garant", 2014) (Jan. 11, 2017), available at <http://base.garant.ru/57518292/>.

³⁴ Available at <http://www.unidroit.org/fr/etat-geneva-convention>.

³⁵ See Luc Thévenoz, *Intermediated Securities, Legal Risk, and the International Harmonisation of Commercial Law*, 13 *Stanford Journal of Law, Business, and Finance* 416 (2008).

Swiss scholars acknowledge that the Convention has influenced the drafting of the FISA and affirm that “FISA can also be seen as a possible model for implementation of the Convention in a civil law jurisdiction.”³⁶ In that case we formulate the question as follows: If the legislator is already compatible with the Convention should he ratify it? We don’t think so. As we see, the Geneva Securities Convention served as a guideline for national legislators. In particular, Russian legislator has modernized the provisions of the RCC in compliance with this Convention. However it is highly unlikely that either Russian Federation or Switzerland ratify the Geneva Securities Convention.

As for the Russian civil law reform we affirm that in relation to “uncertificated securities” it was completely unsuccessful. Although the formulations in the RCC coincide with those in the FISA and with the Geneva Securities Convention *we regret to affirm that Russian legislator has adopted those provisions without a systematic rethinking of the concept of security.* In our opinion the term “uncertificated security” should be replaced to “intermediated security.” The ratification of the Geneva Securities Convention seems necessary to us. We share the documentary concept [документарная концепция] of securities and consider that it is important to distinguish “paper-form securities” from those that are dematerialized. Thus we propose to introduce a specific Chapter devoted to intermediated securities in the RCC. As we have already described, in French there are special wordings that designate different legal institutions: paper-form security – “papier-valeur”, uncertificated security – “droit-valeur” and intermediated security – “titre intermédiaire”. The issue that may arise at this stage is not even legal but terminological. It would be difficult to eliminate the Russian wording: “ценная бумага”. However it is not of primary importance how we call it. In our opinion the legislator and the Courts should grant a distinct legal nature to those securities. *They constitute neither claims nor chattels.* The approach pursued by the Swiss legislator is quite helpful in this respect. *The intermediated security should become a new object of the Russian civil law.*

Finally, the vindication cannot be applied neither to “uncertificated securities” nor to those “intermediated.” As we have analyzed, the Swiss Federal Tribunal has ruled that intermediated securities cannot be vindicated. In Russian some scholars prudently affirm that although “*the legislator has precised the conditions of vindication... The method described in Art. 149.3 is closer to the condition.*”³⁷ Following the approach of the Swiss Federal Tribunal, we consider that the rules of the unjust enrichment should apply to the restitution of those securities.

³⁶ *Intermediated Securities*, *supra* note 28, at 309.

³⁷ Коммерческое (предпринимательское) право: Учебник. В 2 т. Т. 1 [*Handbook of Commercial (Business) Law: Textbook. In 2 vol. Vol I*] 675 (V.F. Popondopolo, ed., 5th ed., St. Petersburg: Prospekt, 2015).

Acknowledgments

Firstly, I would like to express my particular gratitude to the Lord *JESUS CHRIST* for his kind support in drafting and finishing the present article. I kindly dedicate this article to him.

I express my gratitude to my parents and to my younger brother for the support during my Master studies at the University of Geneva.

I deeply thank the professor Luc Thévenoz (professor at the University of Geneva) for prolific and serious discussions regarding the compatibility of two legal orders at question. This certainly helped me to improve the present article.

I am also greatly thankful to Mrs. Florence Guillaume (professor at the University of Neuchâtel), to Sir Peter Nobel (professor at the University of Zurich), to Mrs. Irina Gehter-Huber (Nobel & Hug) and to Sir Christian Bovet (professor at the University of Geneva) for answering my questions regarding the Swiss legislation.

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