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Vorlesung "Europäisches und internationales Kapitalmarkt – und Finanzdienstleistungsrecht"

im WS 2015/2016

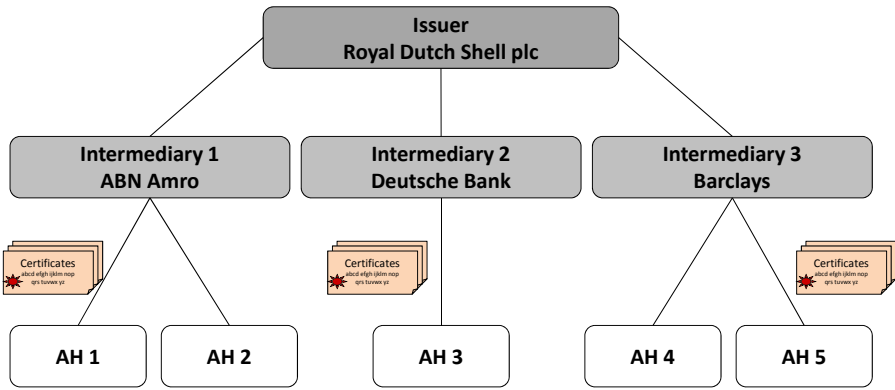
Geschäftsabwicklung (*Clearing & Settlement*)
und Depotgeschäft generell –
Finanzinstrumente als Kreditsicherheit

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The Good Old Days: Securities Holding at Arm's Length




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graph TD
    Issuer["Issuer  
Royal Dutch Shell plc"]
    I1["Intermediary 1  
ABN Amro"]
    I2["Intermediary 2  
Deutsche Bank"]
    I3["Intermediary 3  
Barclays"]
    AH1["AH 1"]
    AH2["AH 2"]
    AH3["AH 3"]
    AH4["AH 4"]
    AH5["AH 5"]

    Issuer --- I1
    Issuer --- I2
    Issuer --- I3
    I1 --- AH1
    I1 --- AH2
    I2 --- AH3
    I3 --- AH4
    I3 --- AH5
  
```


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The Paper Crunch and the Aftermath: Pioneers DK and F

Dematerialisation



and/or

Immobilisation




(if any)

----- CSD ----- Issuer

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The New World: Securities Holding/Trading Through Intermediaries

German CSD
Clearstream Banking AG

----- account agreement -----

Dutch CSD
Euroclear Nederland

aa

Bank 3 Bank 4

aa aa

Bank 1 Bank 2

aa aa

AH 1 AH 2 AH 3


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Scope in a nutshell

- “Intermediated securities” means securities held through a bank or broker etc.
- Estimated value of securities held in custody world wide: **>50,000,000,000,000 Euro/USD**; trading volume and collateral transactions per day **>USD 2 trillion** (i.e. world’s total GDP every 20 trading days)
- Challenge: cross border links of holding systems (for holding and transfer)
- Legal risk, because legal framework not always compatible amongst different jurisdictions
- Objectives of the Convention on Intermediated Securities:
 - Protection of market participants
 - Protection of the financial system
 - Gains in economic efficiency

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History and Status of Global Instruments

- Expert Study Group 2002 – 2004 (result: “preliminary draft Convention”, Doc. 18, cf. www.unidroit.org)
- Consultations in 22 countries
- Committee of Governmental Experts “CGE”; 4 sessions, May 2005 and March and November 2006, May 2007, 42 delegations and 10 Observers participating
- Diplomatic Conference, 1st session, 1-13 September 2008; final session 5-9 October 2009 for the adoption of a final text (“Convention”) which has binding effect if signed and ratified.

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History of European Efforts

- Settlement Finality Directive (Directive 98/26/EC of 19 May 1998)
- Financial Collateral Directive (Directive 2002/47/EC of 6 June 2002)
- Never-ending story of drafts, proposals, etc.: “Brüsseler Springprozeession”
- Current status?



Part I - Background

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Question 1

Which legal concepts are applied to intermediated holding in different jurisdictions?

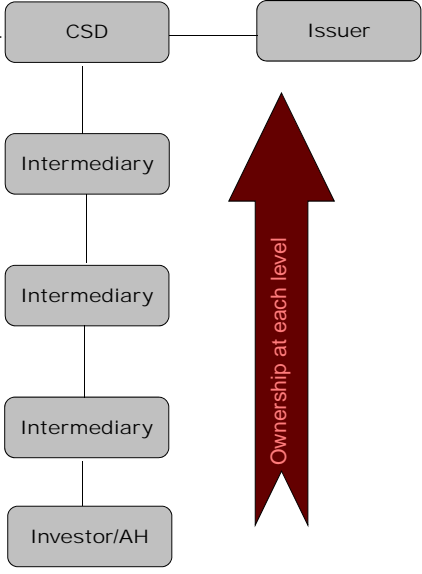
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Certificates
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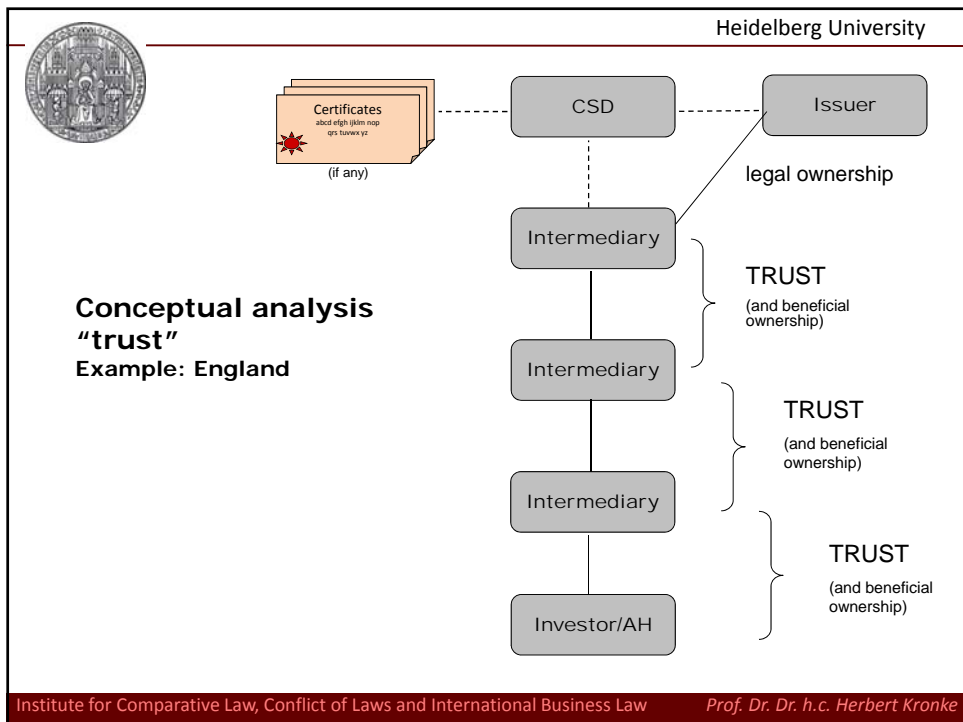
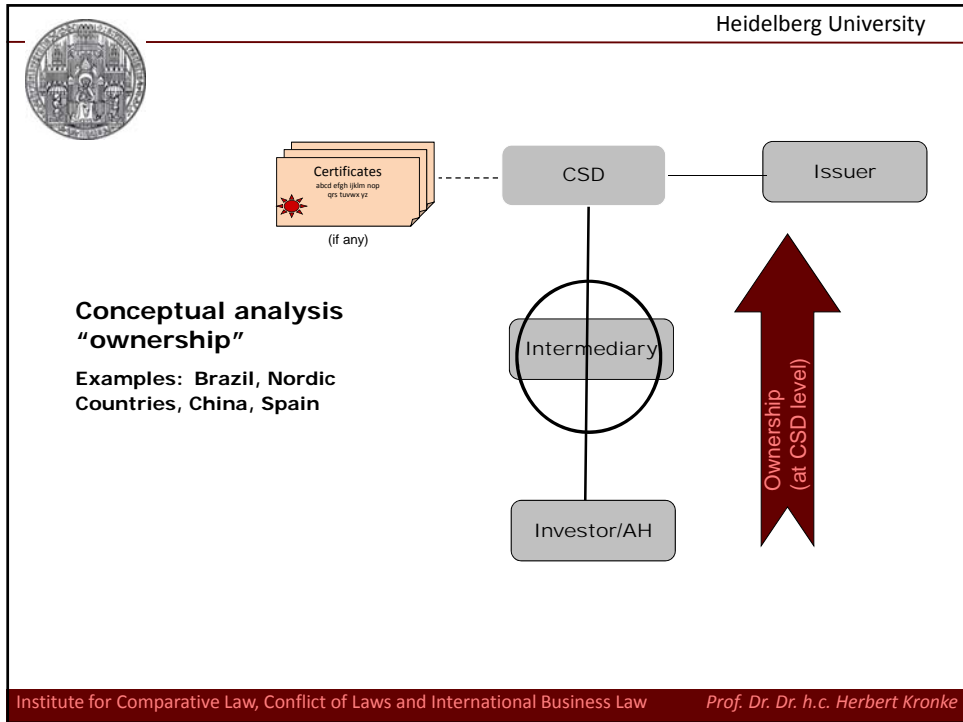
graph TD
    Issuer --- CSD
    CSD --- I1[Intermediary]
    I1 --- I2[Intermediary]
    I2 --- I3[Intermediary]
    I3 --- Investor[Investor/AH]
            
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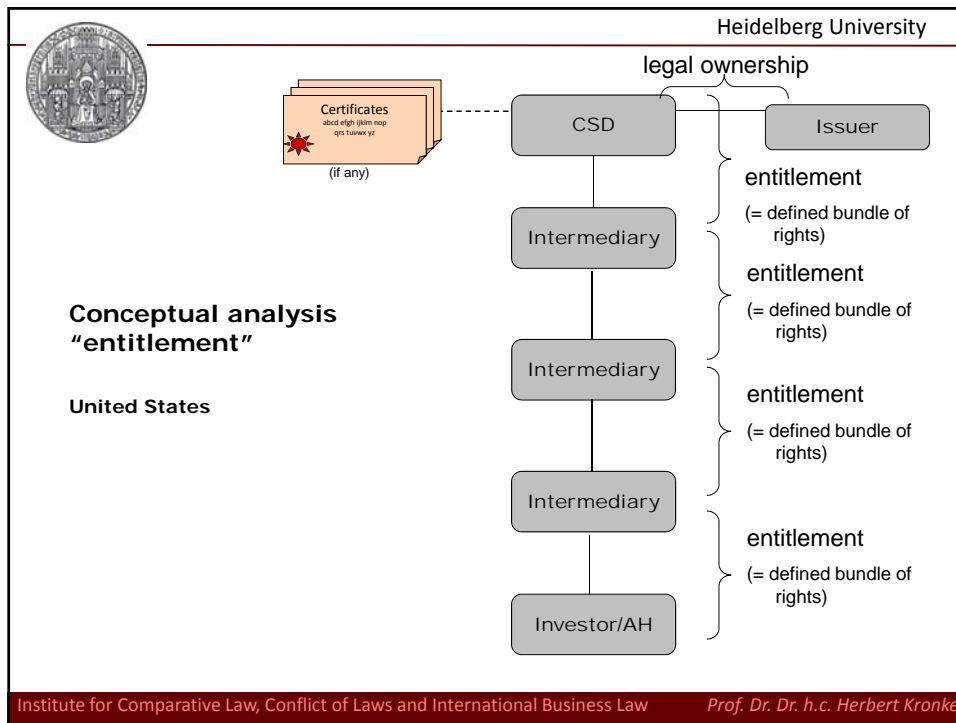
Conceptual analysis
"ownership" / "co-ownership"

Examples: Japan, France, Germany, Netherlands, other civil law jurisdictions

Ownership at each level

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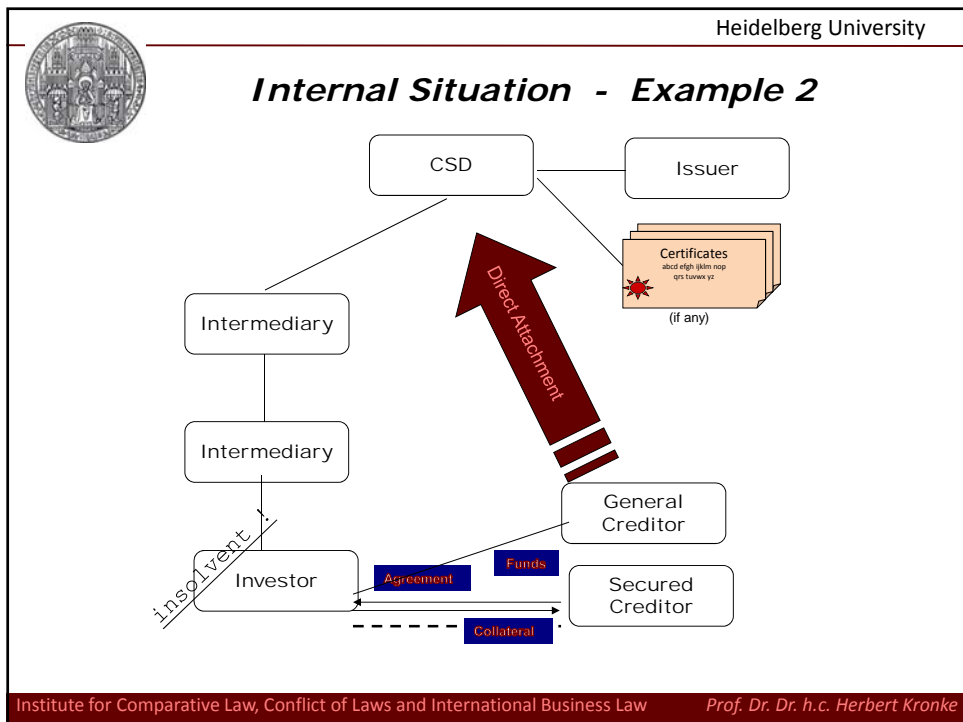
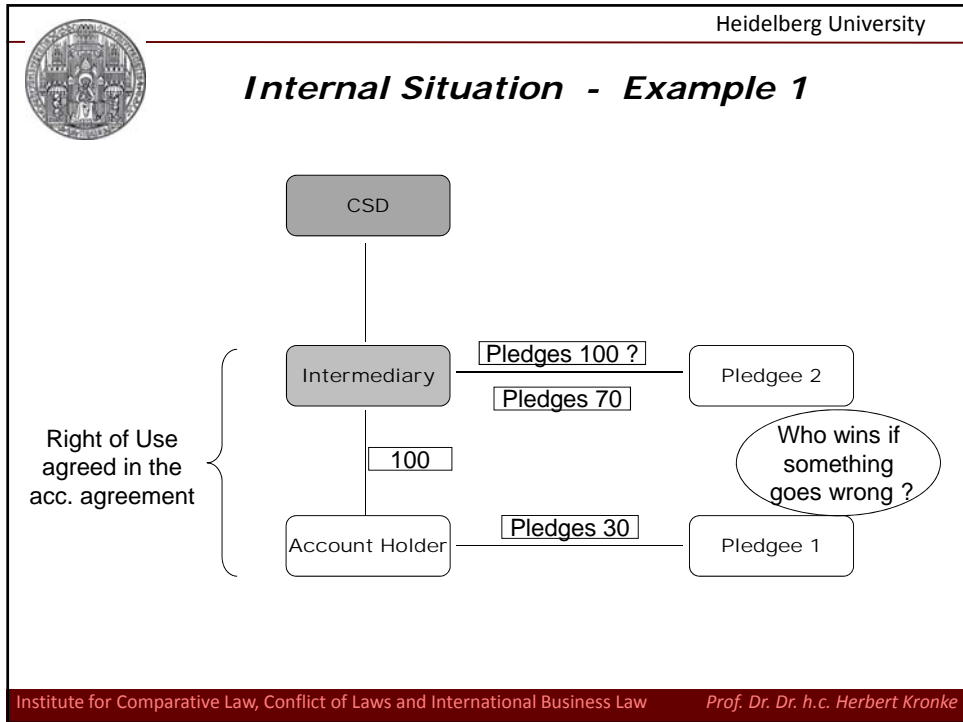


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Question 2

Do all concepts work satisfactorily in internal practice?

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Question 3

Why is the cross-border situation particularly difficult to assess from a legal point of view?

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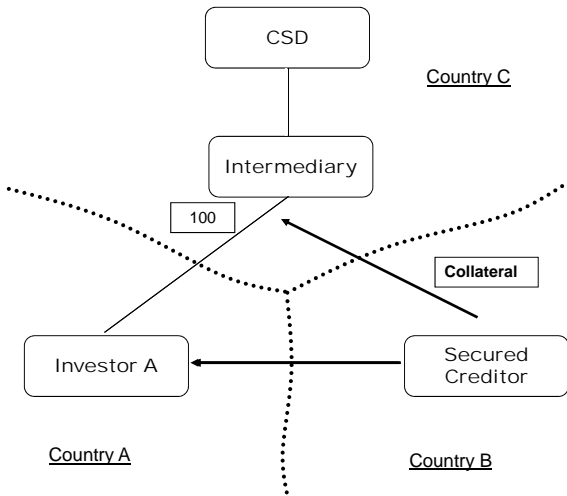
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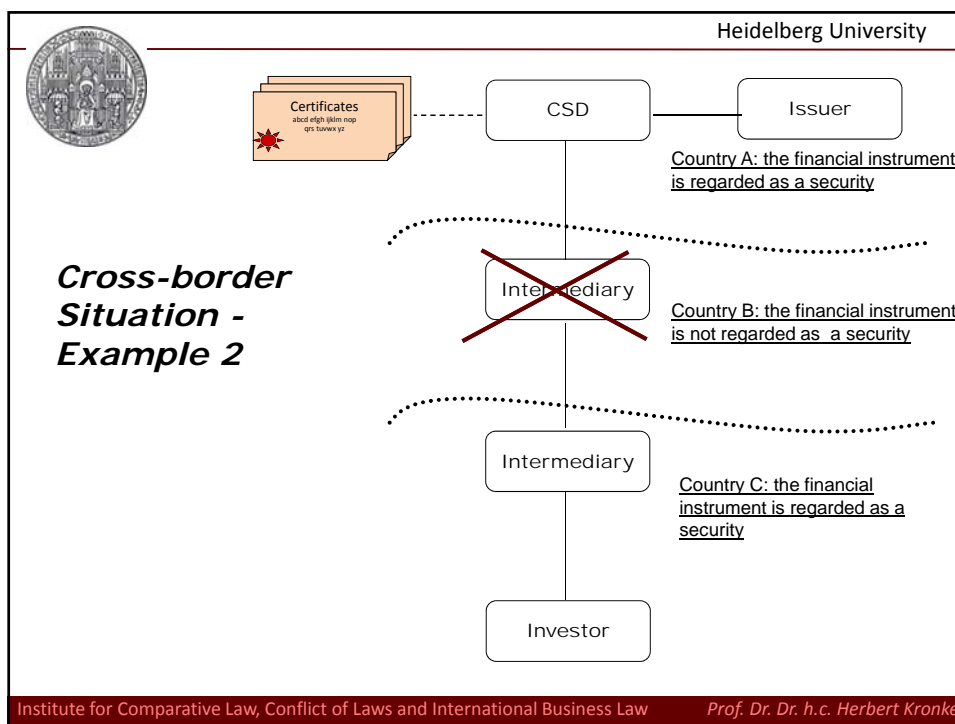
Cross-border Situation - Example

Solution in a cross-border context:

- Conflict-of-laws
- Substantive law
 - Corporate law
 - Law governing proprietary aspects
 - Other private law
 - Insolvency law
 - Supervisory rules have to work together



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Conclusions: Practice and Law regarding Intermediated Securities

- Practice of securities holding and transfer has departed from the law since traditional holding patterns disappeared.
- Domestic legislation is “insular”, i.e. differs from country to country => Cross-border compatibility?
- Domestic legislation is not always sound in itself => Internal soundness?
- A significant number of jurisdictions have no rules governing intermediated securities at all.

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Conclusions: Legal Approach to a Cross-Border Situation - Conflict of Laws

- Need: absolutely essential in absence of a uniform supranational substantive law and antiquated and hard to ascertain connecting factors (*lex situs*)
- Different solutions world-wide; some functionally adequate, others not: *Macmillan Inc. v Bishopsgate Investment Trust plc and others (No 3)* [1995] 1 WLR 978
- Harmonised modernisation to date: **2006 Hague Securities Convention** (party autonomy) and EU Collateral Directive

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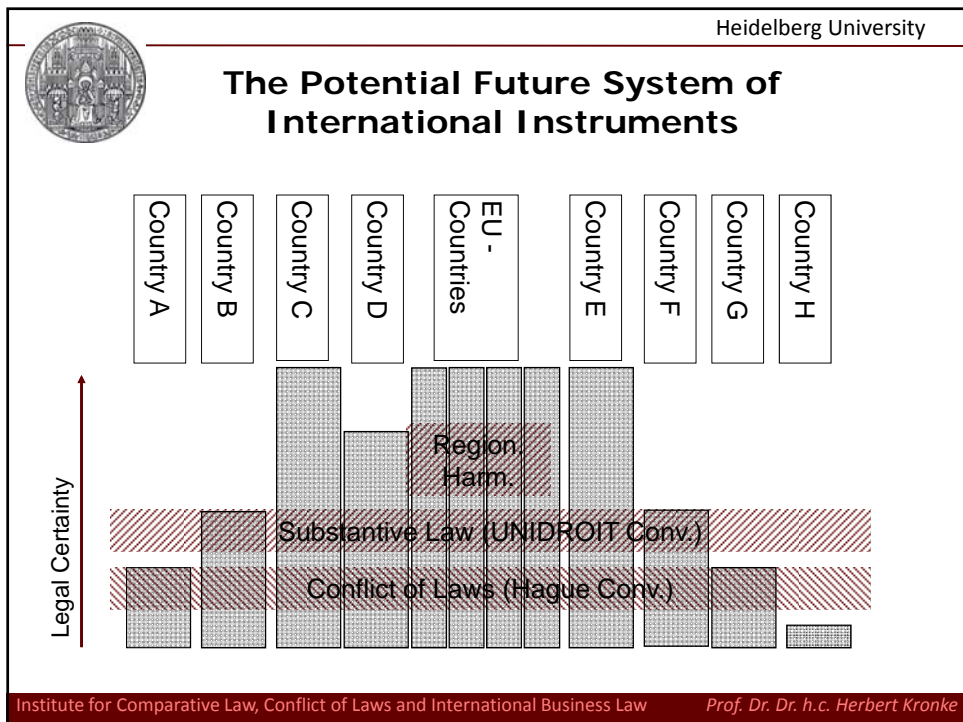
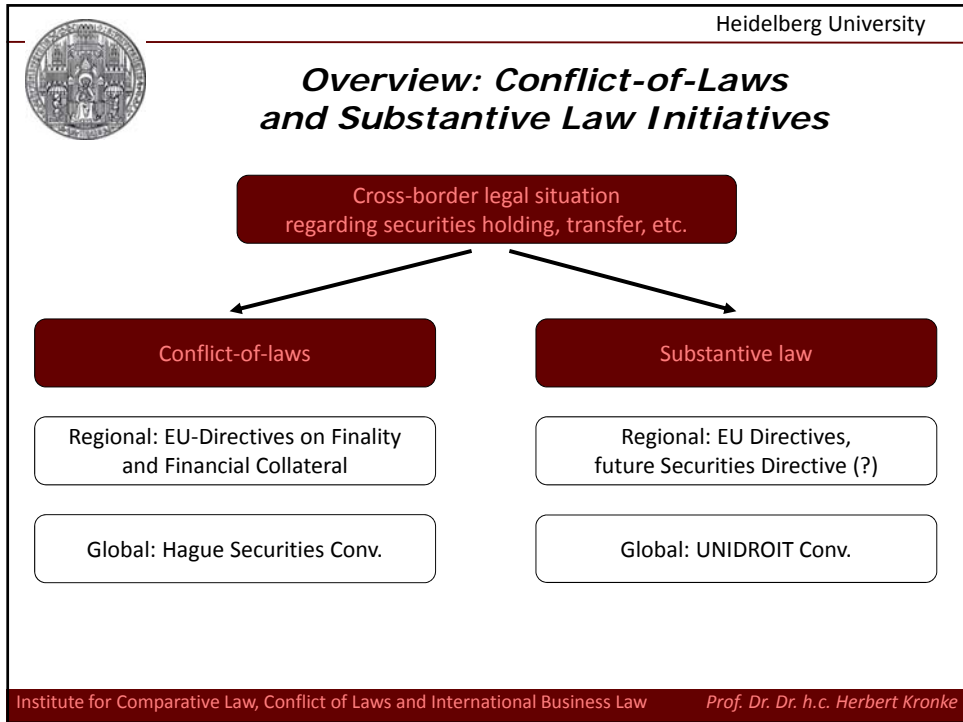
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Conclusions: Legal Approach to a Cross-Border Situation - Substantive Law

- Need for harmonised substantive law?
- Two questions cannot be addressed by a conflict-of-laws rule:
 - is the domestic law identified by the private-international-law rule clear and satisfactory? More important once party autonomy introduced by Hague Convention
 - does the domestic law interact effectively with other jurisdictions in a cross-border context?
- Approach: improving *internal soundness* and *compatibility*
- Economic efficiency
- Harmonisation of substantive law to date:
 - EU-Finality and Collateral Directives: discrete areas; only distinct market participants or specific transactions
 - UNIDROIT Convention: general legal mould for indirect (and direct) holding patterns

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Additional Benefits

- Improvement of economic efficiency
 - Lower transaction costs (example: legal opinions)
 - Lower credit costs (difficult to assess, but potential)

- Enhanced understanding of the legal framework from outside the country
 - Point of reference in international competition of legal systems and markets
 - Useful even for many developed markets (US, Switzerland, Canada, Japan have acted; UK and Germany waiting in the wings)

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Part II

Overview of the UNIDROIT Convention

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Six Overarching Policy Decisions

1. Improving *internal soundness* and *compatibility* of national legal frameworks
2. Scope: cross-border and domestic transactions. Reasons why distinction between “international” and “domestic” transactions inadvisable
3. Neutrality, functionality, accommodation of different legal approaches (no uniform “International Custody, Clearing & Settlement Act”). Examples for “functional approach”: Articles 9 and 18
4. Unifying element: recognition of book-entry accounts
5. Minimalist approach – role of “non-Convention law” (referred to 29 times)
6. Compatibility with other relevant instruments (Hague Convention, EU-Directives etc.)

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The needs of market participants: guidelines for core issues

1. Effective book entries
 - Against the intermediary and third parties
 - In particular, in case of intermediary’s insolvency
2. Encompassed both “classic indirect holding systems” and “transparent systems”: the problem of shared functions of intermediary and other entities
3. Fruits, voting rights, etc
4. Clear and simple rules for acquisition and disposition, including creation of security interests
5. Cross-border recognition of book entries on a net basis
6. Prohibition of upper-tier attachment
7. Clear rules on priority
8. “Good faith” acquisition
9. Insolvency protection
10. Integrity of the issue/loss sharing

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Example for Functional Approach: Shareholder's Rights

Which are a shareholder's rights in your domestic law?


Geneva Convention
Chapter II – Rights of the Account Holder

Article 9
Intermediated Securities

1. The credit of securities to a securities account confers on the account holder:
 - (a) the right to receive and exercise any rights attached to the securities, including dividends, other distributions and voting rights:
 - (i) if the account holder is not an intermediary or is an intermediary acting for its own account; and
 - (ii) in any other case, if so provided by the non-Convention law;
 - (b) the right to effect a disposition under Article 11 or grant an interest under Article 12;
 - (c) the right, by instructions to the relevant intermediary, to cause the securities to be held otherwise than through a securities account, to the extent permitted by the applicable law, the terms of the securities and, to the extent permitted by the non-Convention law, the account agreement or the uniform rules of a securities settlement system;
 - (d) unless otherwise provided in this Convention, such other rights, including rights and interests in securities, as may be conferred by the non-Convention law.
2. [...]

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Example for Functional Approach:

Shareholder's Rights (cont'd)


Geneva Convention
Chapter II – Rights of the Account Holder

Article 9
Intermediated Securities

1. [...]
2. Unless otherwise provided in this Convention:
 - (a) the rights referred to in paragraph 1 are effective against third parties;
 - (b) the rights referred to in paragraph 1(a) may be exercised against the relevant intermediary or the issuer of the securities, or both, in accordance with this Convention, the terms of the securities and the applicable law;
 - (c) the rights referred to in paragraph 1(b) and 1(c) may be exercised only against the relevant intermediary.
3. If an account holder has acquired a security interest, or a limited interest other than a security interest, by credit of securities to its securities account under Article 11(4), the non-Convention law determines any limits on the rights described in paragraph 1 of this Article.

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Structure of the Convention

Chapter I [Articles 1-8]: Definitions, interpretation and relationship with issuer of the securities

Chapter II [Articles 9-10]: Rights of the account holder

Chapter III [Articles 11-20]: Transfer of intermediated securities

Chapter IV [Articles 21-30]: Integrity of the intermediated holding system


Chapter V [Articles 31-38]: Special provisions with respect to collateral transactions

Chapter VI [Article 39]: Transitional provision for priority

Chapter VII [Articles 40-50]: Final provisions

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Implementation

- Implementation
 - Public International Law and Constitutional Law of Contracting States ('dualist' and 'monist' systems)
 - Deposit of instruments of ratification or accession
 - **Adaptation of domestic law: strategic choices to be made (example: Swiss BEG)**
 - The role of disclosure: Article 7
- The Convention in force: achieving and maintaining uniformity in the interpretation and application as major challenges
- **Status and practical role of the *Official Commentary***

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