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An Introduction to the New Rules for Digital Assets

Reference: CapLaw-2020-01

New rules for digital assets have been proposed by the Federal Council in its Dispatch to the Parliament of 27 November 2019 in Switzerland. This contribution provides a brief overview of the big picture, the key legal amendments related to distributed ledger technology, as well as the latest adjustments to the draft of the DLT-Rules of 27 November 2019 in comparison to the Preliminary Draft of 22 March 2019. Further, the impact of the new rules on market participants is discussed.

By Luca Bianchi

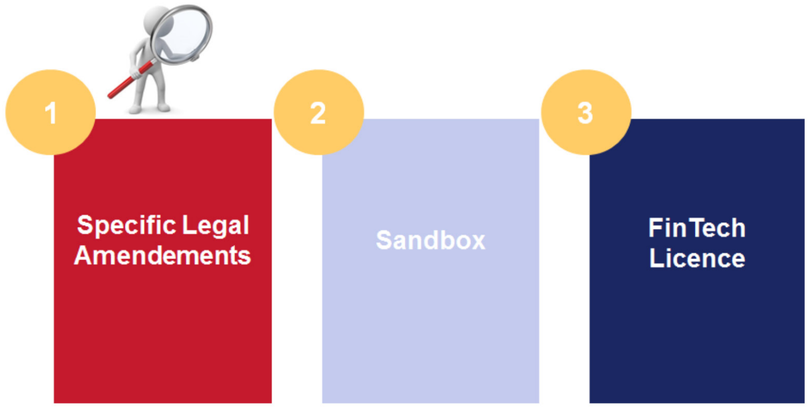
1) Introduction

Great news for the digital assets industry: the Federal Council has adopted and submitted the ***Dispatch of 27 November 2019 on the Federal Act on the Adaptation of Federal Law to Developments in Technology of Distributed Ledgers*** (the ***Dispatch***) to the Parliament. The proposed new rules for digital assets aim to further improve the framework conditions for distributed ledger technology (***DLT***) in Switzerland. The latest draft of the DLT-Rules of 27 November 2019 (the ***DLT-Rules***) is the result of a collective effort of the federal administration, market players, industry associations, and other participants of the consultation proceeding (which ended on 28 June 2019) regarding the Preliminary Consultation Draft of the DLT-Rules of 22 March 2019 (the ***Preliminary Draft***). Now, the Parliament has a chance to discuss the DLT-Rules (which already comprise the results of the consultation process).

This contribution serves as a general introduction to this CapLaw edition (which is dedicated to the DLT-Rules). More detailed reflections on the key areas and latest developments of the DLT-Rules are provided in the other articles of this newsletter. Notably, various updates on related developments have already been provided over the last years (see CapLaw 2019-15, 2017-02, 2016-47, and 2016-31). The contribution at hand builds on these foundations and contains selected repetitions thereof.

2) The Big Picture: Three Element Approach of Swiss FinTech Regulation

The regulation of Financial Technologies (FinTech) has become a new chapter of financial market law in Switzerland as well as worldwide. In this context, the Federal Council and the Federal Department of Finance (FDF) have developed a model for a Swiss FinTech (de)regulation, namely, the "Three Element Approach" set out in the following graph:



(See CapLaw 2017-02, p. 14, with further references)

As indicated in the above graph, the existing ***regulatory mismatch*** between historically grown and, thus, outdated laws and new business models shall be (further) reduced by three different elements. This CapLaw edition takes a closer look on the ***next milestone*** in terms of ***specific legal amendments (Element 1)*** – the ***DLT-Rules***. The DLT-Rules are a logical consequence of the FinTech strategy of the Swiss authorities.

3) New Rules for Digital Assets

a) Specific Legal Amendments in Key Areas

Specific legal amendments for digital assets are proposed in the following key areas:

(See CapLaw 2019-15, p. 22)

The key legal areas of the DLT-Rules have already been discussed in a *tour d'horizon* provided by the author in CapLaw-2019-15 (based on the Preliminary Draft). Thus, only selected adjustments made in the latest draft of the DLT-Rules shall be elaborated in the following section 3)b). However, a closer look at the inner mechanics of the DLT-Rules can be found in the other contributions of the present CapLaw edition.

b) Selected Adjustments based on the Dispatch of the Federal Council vis-à-vis the Preliminary Draft

The draft of the DLT-Rules of 27 November 2019 contains the following selected adjustments when compared to the Preliminary Draft of 22 March 2019:

- ***Civil Law***: A new registered DLT-Uncertificated Security (*i.e.*, a right which is entered in a register of uncertificated securities (*Wertrechte*)) (***DLT-Uncertificated Securities***) is being introduced in securities law (article 973d of the Swiss Code of Obligations (CO)). The transfer of DLT-Uncertificated Securities shall be subject to the rules of the registration agreement (article 973f(1) D-CO). Furthermore, it is interesting to note that a provision limiting bearer shares to listed companies and companies with shares that represent intermediated securities (*Bucheffekten*) in terms of the Federal Intermediated Securities Act (FISA), which are deposited with a custodian in Switzerland or stated in the main register has been inserted in the DLT-Rules (article 622(1^{bis}) D-CO). However, this provision has already entered into force on 1 November 2019 and reflects a mere cosmetic adjustment in the context of the DLT-Rules.

- ***Insolvency Law***: The bankruptcy administration shall explicitly be able to issue a decision on the release of ***crypto-based assets over which a joint debtor has the power of disposal*** at the time of the opening of bankruptcy proceedings and which are claimed by a third party (article 242a(1) D-DEBA). Such claim shall be deemed to be well-founded if the joint debtor has committed itself to hold the crypto-based assets ready for the third party at any time and these are either (i) individually assigned to the third party, or (ii) assigned to a community and it is clear what proportion of the joint assets belongs to the third party (article 242a(2)(a-b) D-DEBA).

- ***International Private Law***: A revised article 106(2) D-PILA has been proposed which states that if a physical title represents goods the rights in rem (*dingliche Rechte*) to the title and to the goods shall be subject to the law applicable to the title as a movable object.

- ***Financial Market Law***: The legal definition of the term ***securities*** (*Effekten*) shall be adjusted in the ***Financial Services Act (FinSA)*** and the ***Financial Market Infrastructure Act (FMIA)***. "Securities" comprise standardized securities suitable for mass trading, uncertificated securities (*Wertrechte*), in particular, simple uncertificated securities pursuant to article 973c D-CO and registered DLT-Uncertificated Securities according to article 973d D-CO, as well as derivatives and intermediated securities (*Bucheffekten*) (article 3(b) D-FinSA; article 2(b) FMIA). Furthermore, article 2(b^{bis}) FMIA shall set out the (revised) ***definition of DLT-Securities*** (*DLT-Effekten*) which now explicitly comprises DLT-Uncertificated Securities according to article 973d D-CO as well as other uncertificated securities held in distributed electronic registers which, by means of technical procedures, give the creditors, but not the debtor, the power to dispose of the uncertificated securities. Moreover, a new definition of the term DLT-trading system has been proposed in article 73a D-FMIA.

Besides, various new provisions have been suggested to the ***Federal Intermediated Securities Act (FISA)***. In particular, DLT-Uncertificated Securities are newly listed in the catalogue of feasible underlyings for the creation of intermediated securities (article 6(1)(d) D-FISA). However, it is required that DLT-Uncertificated Securities are decommissioned in the register of DLT-Uncertificated Securities they derive from (Dispatch, p. 76). Such amendments facilitate a conversion of DLT-Uncertificated Securities (according to article 973d D-CO) into intermediated securities (pursuant to article 3 FISA in connection with article 6(1)(d) D-FISA). These regulatory developments are in line with the ongoing market trend of a convergence of financial products.

In addition, the provisions of the ***Banking Act (BA)*** shall apply by analogy to persons, who are mainly active in the financial sector and: (i) commercially accept retail deposits of up to CHF 100 million ***or crypto-based assets*** designated by the Federal Council, or publicly advertise as doing so; as well as (ii) neither invest nor pay interest on these deposits or assets (article 1b(1)(a-b) D-BA). Crypto-based deposits from the public or crypto-based assets designated by the Federal Council held by persons referred to in article 1b(1) D-BA shall ***not*** be subject to the provisions on privileged deposits (article 37a BA) and on immediate payouts (article 37b D-BA); depositors must be informed of this fact before they make the deposit (article 1b(4)(d) D-BA). However, the term deposited assets according to article 37d D-BA (segregation of assets) includes crypto-based assets (article 16(1bis) D-BA). As a result, crypto-based assets in deposits shall be segregated pursuant to articles 17 et seq. FISA in case of a default (article 37d D-BA).

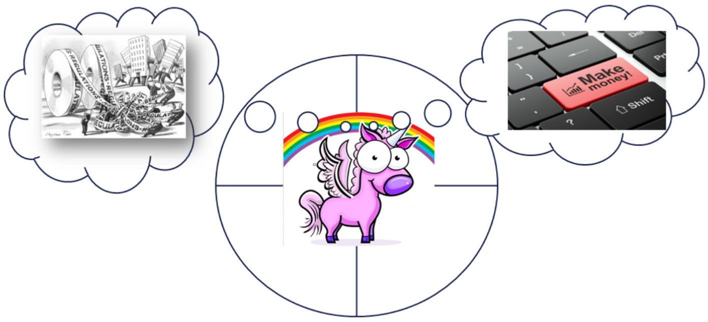
– ***Anti-Money Laundering Regulations***: In the Anti-Money Laundering Act (AMLA), article 2(2)(d^{bis}-d^{ter}) D-AMLA shall be adjusted in order to comply with the DLT-Rules (in particular, the provisions of the D-FMIA). Further, a number of rather technical adjustments to the AMLA have been proposed.

4) Impact on Market Participants

a) General Impact

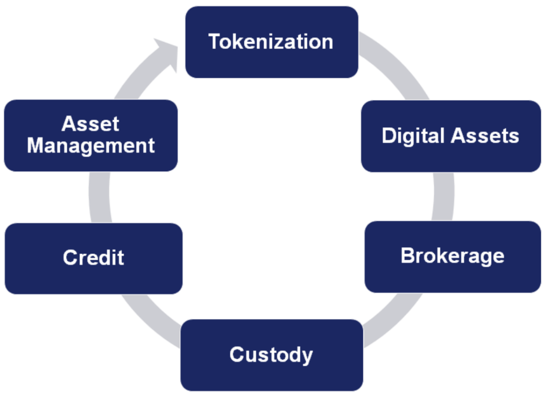
Innovative market participants in the area of digital assets currently face the challenge of evaluating the impact of the new Swiss financial market architecture. In particular, the FinSA as well as the FinIA have entered into effect on 1 January 2020 and are currently being implemented. At the same time, market participants have to follow the legal developments regarding digital assets. However, the DLT-Rules will, hopefully, allow them to see the light at the end of the (regulation) tunnel in terms of finally being subject to a punctual deregulation after a decade of ever increasing financial services and products regulation.

Against this background, the following chart illustrates the innovative digital assets company (symbolized by the pink unicorn) which will have to keep one eye on the new financial market architecture (compliance) and the other eye on the DLT-Rules (which rather represent a business opportunity):



b) Impact on Business Areas

The DLT-Rules will affect different business areas in the value chain of the digital assets industry:



Market participants must evaluate if and to what extent their business will benefit or be restricted by the DLT-Rules because once the proposal is final and enters into effect it will have to be implemented in internal guidelines and policies, in the product documentation, as well as regarding operative processes. Regulatory licenses or approvals may have to be obtained (where required by financial market law).

5) Conclusion

The DLT-Rules are a fast and appropriate reaction of the Federal Council and the FDF to the ICO-boom of 2014-2018. Further, the general design of the proposed regulation shows the openness of the Swiss authorities towards innovation as well as the ongoing trend of a convergence of financial products. In addition, the increase of legal certainty regarding the transfer of digital assets provided by the DLT-Rules is very welcome and allows digital asset providers to create better products. However, the DLT-Rules will have a major impact on the *new kids on the block* in the financial services and products industry (*i.e.*, challenger banks and other innovative companies in the digital assets industry). Thus, it will be interesting to see how the Parliament will further deal with the DLT-Rules.

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DLT Draft Law – Civil Law Aspects

Reference: CapLaw-2020-02

A cornerstone of the DLT Draft Law aims at improving legal certainty in connection with the issuance and transfer of tokenized rights and financial instruments, such as bonds and shares. To that effect, the DLT Draft Law provides for the introduction of a new concept of so-called uncertificated register securities (*Registerwertrechte*) and specific rules in the Code of Obligations for corporations looking to issue shares in tokenized form.

By Stefan Kramer / Urs Meier

1) Uncertificated register securities

a) General aspects

The draft of the Code of Obligations ("Draft-CO") provides for two categories of uncertificated securities: so-called simple uncertificated securities (*einfache Wertrechte*) and so-called uncertificated register securities (*Registerwertrechte*). The former are purely contractual uncertificated securities and already exist under current Swiss law (*Wertrechte*; article 973c CO). The latter are a newly introduced category.

A right will constitute an uncertificated register security if (i) the parties involved conclude a registration agreement (*Registrierungsvereinbarung*), (ii) the right is entered in a register of uncertificated securities (*Wertrechteregister*) and (iii) the right can be asserted and transferred to others exclusively via that register (article 973d(1) Draft-CO).

As far as simple uncertificated securities (*einfache Wertrechte*) are concerned, the DLT Draft Law will not introduce any changes. There will in particular be no changes with regard to possible contents of such uncertificated securities. Hence, simple uncertificated securities will likely continue to be issued (primarily) as an *underlying* for the creation of intermediated securities (*Bucheffekten*) under the Intermediated Securities Act ("FISA").

The new category of uncertificated register securities will in essence serve as a new form of dematerialization of securities and is hence similar to today's intermediated securities under the FISA. However, the key difference will be that, unlike intermediated securities under the FISA, uncertificated register securities will not require a custodian (*Verwahrungsstelle*). Establishing and transferring uncertificated register securities will therefore not depend on the involvement of a regulated institution, such as a bank, securities firm or central securities depository, which credits such intermediated securities to particular securities accounts, and thereby (at least indirectly) ensures the safety of the system.

The DLT Draft Law will also allow to "bridge" the new civil law framework with the "traditional" concept of intermediated securities. The currently envisaged amendments of the FISA will allow to register uncertificated register securities with a "traditional" custodian (*e.g.*, a bank) and to subsequently book them into a "traditional" securities account. Hence, uncertificated register securities could in the future be transferred to the "old world" too, if desired.

b) What requirements does the register of uncertificated securities have to meet?

The DLT Draft Law introduces minimum requirements, which a register of uncertificated securities (*Wertrechteregister*) will have to meet:

- First, the register must, by means of technical procedures, grant the creditors (*Gläubiger*), but not the debtor (*Schuldner*), power of disposal (*Verfügungsmacht*) over their rights;
- Second, the register's integrity must be ensured by implementing the appropriate technical and organizational protective measures (such as for example joint administration by several independent parties) that prevent unauthorized changes;

- Third, the content of the registered rights, the functioning of the register itself and the registration agreement (*Registrierungsvereinbarung*) need to be recorded either directly in the register itself or in accompanying data linked to the register;

- Fourth, the creditors must be able to view the information and data which concern themselves and they must be able to verify, without third party support or intervention, the integrity of the content of the register concerning themselves.

The Dispatch lists certain existing DLT-systems, which the Swiss federal government deems suitable to fulfil the statutory minimum requirements. Both *unpermissioned* systems (such as in particular Ethereum) as well as *permissioned* systems (such as in particular Corda and Hyperledger Fabric) are mentioned in this (non-exhaustive) list.

c) Which rights may (not) be tokenized?

Rights that can be issued in the form of a physical security (*Wertpapier*) under current law may also be issued in the form of uncertificated register securities under future law. The legal positions admissible as underlyings of uncertificated register securities therefore include rights against issuers, such as contractual claims or membership rights (*e.g.*, shares in a corporation).

Under the proposed new rules it will in particular be possible to issue all types of financial instruments as defined in article 3 (a) of the Financial Services Act ("FinSA") in the form of uncertificated register securities, *i.e.*, amongst others equity securities, such as shares and participation certificates, as well as debt securities, units in collective investment schemes, structured products, derivatives and bonds.

Furthermore, not only asset tokens but also utility tokens may be issued in the form of uncertificated register securities, provided the latter "embodies" rights, such as contractual claims. And also payment tokens and stablecoins may be issued in the form of uncertificated register securities, provided they represent a claim against an issuer (which may not always be the case).

d) Issuance of uncertificated register securities

A prerequisite for the issuance of uncertificated register securities is that the rights are represented in a register which fulfils the aforementioned requirements (see paragraph 1 b) above). The parties bound and obliged by the uncertificated register security must have agreed to the establishment of such uncertificated register security. The registration agreement (*Registrierungsvereinbarung*) or clause (*Registrierungsklausel*) required for this purpose contains the agreement between the parties that the relevant right can only be asserted and transferred via the register. Such registration clause therefore has a function, which is comparable to the function of the so-called securities clause (*Wertpapierklausel*) in the case of physical securities. In line with current practice regarding physical securities, the registration clause may for example be included in subscription forms (*Zeichnungsscheinen*), terms and conditions of the issuance (*Ausgabebedingungen*), terms and conditions of bonds (*Anleihebedingungen*), or in general terms and conditions of business (*Allgemeine Geschäftsbedingungen*), which are accepted when acquiring the relevant uncertificated register security.

When issuing financial instruments in the form of uncertificated register securities, the registration agreement or clause must be concluded between the issuer and the first holder (entitled party) of the instrument. For reasons of transparency, the registration clause should be recorded either in the register of uncertificated securities (*Wertrechteregister*) itself or in accompanying data or documents linked to that register. If the first holder subsequently transfers the uncertificated register security, the registration agreement or clause thus also applies to each subsequent holder of that uncertificated register security.

e) Transfer of uncertificated register securities

Once uncertificated register securities have been validly issued, subsequent transfers of these securities may be effected *exclusively* in accordance with the rules of the relevant register of uncertificated securities (*Wertrechteregister*). In other words, transferring the uncertificated register securities "outside" of the register will not be possible anymore. If the right issued in the form of an uncertificated register security is, for example, a claim (*Forderung*), that claim may therefore no longer be transferred by means of assignment (*Zession*; see article 164 et seqq. CO). Instead, the transfer of the uncertificated register security is governed exclusively by article 973f et seqq. Draft-CO, which is *lex specialis* and therefore takes precedence over the previous rules. Consequently, a transfer according to the rules of the relevant register is mandatory.

Such a transfer typically consists of transferring a token to the account / address of the recipient (*e.g.*, in the case of ERC-20 tokens on Ethereum). Merely disclosing the private key(s) required to initiate such a transfer to another person's account / address, does, however, not result in a transfer of the legal position or entitlement, even if that person – by knowing the private key(s) – would gain actual control over these tokens.

With regard to transferring uncertificated register securities the DLT Draft Law also provides for specific rules addressing topics such as when a transfer is deemed to be effected (article 973f (2) Draft-CO) as well as topics concerning the protection of good faith (article 973e (3) Draft-CO and article 973f (3) Draft-CO).

With regard to the acquisition of uncertificated register securities by way of universal succession (*Universalsukzession*), the DLT Draft Law does not provide for particular rules. In such situations, *e.g.*, an inheritance or merger, the transfer of the uncertificated register securities will be effected by operation of law. Technically, this legal transfer would therefore subsequently have to be reflected in the relevant register, *e.g.,* by transferring the tokens to an account / address of the heirs in the relevant register.

f) Assertion of rights

With regard to the assertion of rights "embodied" in uncertificated register securities, the DLT Draft Law provides that the issuer is only entitled and obliged to make payments "to the creditor identified in the register of uncertificated securities and against corresponding adjustment of the register" (article 973e (1) Draft-CO). It follows from this provision that the issuer is obliged to make payments only to the creditor entitled to these payments according to the register and against corresponding adjustment of the register. The "ownership" of the token according to the rules of the relevant register is thus necessary for the assertion of the right from the point of view of both the creditor and the issuer. Furthermore, it is in the interest of the issuer to adjust the register after the performance occurred, because otherwise the issuer risks having to perform a second time should the uncertificated register security be acquired, in good faith, by a third party. This applies in particular if an issuer fulfils an obligation outside the register ("off-blockchain"), *e.g.*, by paying dividends in fiat money, instead of executing such payments directly within the register itself ("on-blockchain").

2) Corporate law aspects

According to the DLT Draft Law, a company's articles of association may provide for, or may authorize the board of directors to resolve on, the issuance of shares in the form of uncertificated register securities (article 622 (1) Draft-CO). In this case, other registers where information regarding a company's shares (*e.g.*, the share register) or on the shares' beneficial owners is recorded, may be integrated into the register of uncertificated securities (*Wertrechteregister*).

The company is responsible for the selection of the register technology based on which the uncertificated register securities are created, as well as for the organization and the security of the register of uncertificated securities (*Wertrechteregister*) as well as its compliance with the relevant registration agreement. Therefore, if tokenized shares are issued, the smart contract(s) or any other relevant code will need to be programmed and deployed in a manner that ensures compliance with the requirements of Swiss corporate law, including, for example, any applicable limitations on the transfer of shares (*Vinkulierung*).

3) Appraisal

If the new rules enter into force as currently envisaged, they will significantly improve the Swiss civil law framework for tokenization of crypto-based assets. The introduction of the concept of uncertificated register securities will help to further enhance

Switzerland's attractiveness as a jurisdiction, where in particular tokenized financial instruments such as shares or bonds may be both issued and traded safely. Once that toolkit is in place, it will have to be seen how the markets for such instruments will develop in the future.

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DLT Draft Law – Insolvency Law Aspects

Reference: CapLaw-2020-03

One key element of the DLT Draft Law concerns the question of how crypto-based assets are treated in bankruptcy. When it comes to storing such assets there are basically two options: either the owner of the crypto-based assets stores the tokens him/herself, or the tokens are stored by a third party custodian. Under current Swiss law, it is not clear whether crypto-based assets held by a custodian on behalf of a client will be segregated in bankruptcy. The DLT Draft Law therefore proposes to introduce a new insolvency regime that will allow for such segregation.

By Benedikt Maurenbrecher / Urs Meier

1) Introduction

Crypto-based assets (*kryptobasierte Vermögenswerte*) are often stored with third party custodians, such as crypto exchanges or wallet providers. There are various reasons why the owner may choose to store tokens with a third party, such as the facilitated handling of private keys or improved security. If, however, a third party custodian becomes insolvent, it needs to be determined which assets belong to the bankruptcy estate of the custodian. This can be particularly difficult whenever the bankrupt custodian had control over assets to which a third party asserts legal or beneficial ownership.

Under current Swiss law, it is not clear whether crypto-based assets held by a custodian on behalf of a client will be segregated in bankruptcy, especially if the client of such custodian, *i.e.*, the creditor or investor, does not hold (any) private key(s). The DLT Draft Law therefore proposes to introduce a new insolvency regime that will allow the segregation of crypto-based assets for the benefit of the relevant creditors or investors.

In this article, we will first outline the key elements of the proposed regulation that will apply to all types of crypto-based assets, including tokenized financial instruments, such as shares or bonds issued in the form of uncertificated register securities (*Registerwertrechte*). Thereafter, we will address the special rules for segregating crypto-based assets in the insolvency of a regulated financial institution. And finally, we will discuss the proposed regulation concerning the segregation of data in insolvency.

2) Insolvency law aspects

a) Crypto-based assets

The DLT Draft Law does not define the term crypto-based assets. In the Dispatch, the Swiss federal government mentions that the term covers assets (*Vermögenswerte*) with regard to which the power of disposal (*Verfügungsmacht*) is conveyed exclusively via a crypto-based access procedure (*kryptobasiertes Zugangsverfahren*).

Consequently, the proposed new rules (see paragraphs 2 b) and 2 c) below) will not apply to assets, with regard to which the power of disposal is not conveyed via a crypto-based access procedure. In our view, this does, however, not mean that a particular token – for example a payment token – would stop qualifying as a crypto-based asset if the custodian's client only has an account-based access. From an insolvency law perspective, the relevant question is not how the client's access is structured, but whether the power of disposal regarding the asset, *i.e.*, the relevant token *per se*, is conveyed exclusively via a crypto-based access procedure.

The DLT Draft Law does not differentiate between the various categories of crypto-based assets. As a result of the public consultation process it was decided that the possibility of segregating crypto-based assets shall apply to all types of crypto-based assets with a view to avoiding possible delimitation difficulties between the different token categories. Consequently, not only uncertificated register securities, but also asset tokens, utility tokens, payment tokens, hybrid tokens as well as stablecoins will be subject to the envisaged new segregation regime, provided always that the relevant tokens represent assets and that the power of disposal over these tokens is conveyed exclusively via a crypto-based access procedure.

b) Segregation of crypto-based assets according to article 242a Draft-DEBA

According to the Dispatch, crypto-based assets only form part of the custodian's bankruptcy estate if the custodian's client had no access of his own and the bankrupt custodian at the same time had all the necessary keys to access the assets directly by itself. Hence, only if the custodian had such exclusive actual power of disposal (*ausschliessliche tatsächliche Verfügungsgewalt*) over the crypto-based assets in question, such crypto-based assets will form part of his bankruptcy estate. Accordingly, the custodian's client must request segregation based on article 242a of the draft of the Debt Enforcement and Bankruptcy Act ("Draft-DEBA") only in such a scenario, *i.e.*, where the custodian had all the necessary keys. In set-ups where the client and the custodian hold the necessary keys *separately* or *jointly*, article 242a Draft-DEBA will, however, not apply. Keys are held *separately*, for example, if there are two keys, each of which allows to access the assets, *i.e.*, to initiate a transaction in the relevant register, and if one of these keys is held by the custodian and the other key by the client. On the other hand, keys are held *jointly*, for example, if two keys are necessary to access the assets ("two out of two multi-signature" set-up), *i.e.*, initiate a transaction in the relevant register, and if one of these keys is held by the custodian and the other key by the client. In both of these scenarios the custodian does not have exclusive actual power of disposal (*ausschliessliche tatsächliche Verfügungsgewalt*) over the crypto-based assets in question and therefore they will not form part of his bankruptcy estate.

The custodian's bankruptcy estate will hence only include crypto-based assets to which the entitled party had no access of its own and for which the bankrupt custodian held all the necessary keys to dispose of these assets independently. Therefore, the bankruptcy administrator will have to assess whether he can dispose of these assets independently, *i.e.*, whether he has all the necessary keys to do so. Should this not be the case, the assets cannot be segregated on the basis of article 242a Draft-DEBA. In such a scenario, the client might, however, be able to obtain the necessary keys on the basis of article 242b Draft-DEBA, *i.e.*, based on the proposed new rules governing the segregation of data in insolvency (see paragraph 2 d) below).

Once it has been established that the bankrupt custodian had exclusive actual power of disposal over the relevant crypto-based assets, article 242a Draft-DEBA provides for two requirements which need to be met cumulatively in order for a client to have a segregation claim:

The *first requirement* is that the bankrupt custodian must have had an obligation vis-à-vis the relevant client to keep the crypto-based assets "available for it [*i.e.*, the client] at all times" (article 242a (2) Draft-DEBA). This means that the bankrupt custodian must have been obliged to uninterruptedly keep the power of disposal (*Verfügungsmacht*) over the crypto-based assets for the client. It is, however, sufficient if the corresponding obligation is limited to the uninterrupted retention of the number of units, *i.e.*, tokens, held for third parties. The custodian may therefore, if agreed with the client(s) accordingly, replace individual tokens as long as the total number of tokens under custody remains unchanged, which may, from a custodian's perspective, in particular facilitate the handling of tokens held in cold storage and hot storage.

According to the Dispatch, the custodian may, however, not carry out any proprietary business or own-account transactions (*Eigen- oder Aktivgeschäfte*) with the deposited crypto-based assets. Consequently, the custodian can for example not act as principal in lending transactions with such crypto-based assets. If the contract allows such transactions, that would, according to the Dispatch, mean that no bailment (*Hinterlegung*) occurred and that the assets are therefore to be regarded as deposits within the meaning of the Banking Act ("BA") (triggering corresponding consequences).

The *second condition* requires a sufficient nexus between the crypto-based assets and the client and can be met in two different ways:

– In the first alternative (*individual allocation*), the crypto-based assets can be "individually allocated" to the relevant client (article 242a (2) (a) Draft-DEBA). With regard to this type of allocation - in contrast to the initial draft of the envisaged new rules - it is no longer required that the individual allocation has to occur directly on the relevant blockchain / DLT-system itself. Instead, it suffices that each token can be assigned individually to a particular entitled person when the bankruptcy proceeding is opened. According to the Dispatch, such individualized allocation is generally achieved by crediting the tokens to a special account / address on the blockchain / DLT-system assigned to the relevant client. For this purpose, it shall, according to the Dispatch, be sufficient if this allocation is derived from an internal register of the bankrupt custodian. Also, if it is technically possible to individualize the tokens, for example by giving each token its own serial number, they do not have to be registered on a special account either. In such cases, it is sufficient that the tokens specified with numbers can be assigned to the individual entitled person by means of an "allocation chart", which must be available at the bankrupt custodian. In this context it must be noted, that it should in our view not negatively affect the clients' segregation claim under article 242a Draft-DEBA, if a custodian does not avoid shortfalls of tokens or if its internal books and records do not correctly reflect the individual allocation of tokens.

– The second alternative (*allocation to a community*) allows to segregate crypto-based assets held in collective custody. It is applicable if the assets cannot be individually allocated to the entitled person, but if they are allocated to a community and if it is evident what share of the joint holdings belongs to a given client, *i.e.*, creditor or investor (article 242a (2) (b) Draft-DEBA). The particular client's quota / share in the crypto-based assets held in collective custody can then be segregated. This makes it possible to store tokens from several clients in a collective account allocated to a community, much like it is possible to store other assets in collective custody.

If financial instruments, such as shares or bonds, are issued in the form of uncertificated register securities, their legal owners – unlike "holders" of pure cryptocurrencies such as Bitcoin or Ether – may demand segregation of the relevant uncertificated register security (and the claims against the issuer "embodied" therein) already on the basis of their *substantive* legal position (*e.g.*, as a shareholder or bondholder). The corresponding uncertificated register securities will therefore not become part of the bankruptcy estate of the custodian in the first place. This applies regardless of whether a uncertificated register security has been transferred to the account / address of a custodian or how the access keys (private keys) are managed in the specific case and corresponds to the legal situation under current law applicable to (regular) uncertificated securities (*Wertrechte*), negotiable securities in collective custody (*sammelverwahrte Wertpapiere*) and intermediated securities (*Bucheffekten*).

Since the DLT Draft Law is not intended to put investors in a worse position, it can in our view be assumed that article 242a Draft-DEBA will only have a procedural effect at most with regard to the segregation of tokenized financial instruments in the form of uncertificated register securities, *i.e.*, that this provision will solely govern the procedure for segregation (but not the conditions for segregation).

c) Segregation according to article 16 (1bis) Draft-BA

If the custodian of the crypto-based assets is a bank, a securities firm, a fund management company or a financial market infrastructure, special legal provisions for segregation apply. In the event of bankruptcy of such institutions, assets are transferred to the client in accordance with article 16 BA in conjunction with article 37d BA, *i.e.*, assets are separated *ex officio* from the bankruptcy estate in favor of the clients. The purpose of this provision is to give privileged treatment to *rights in rem* and certain contractual rights that are evidenced by the books and records of a regulated financial institution.

Parallel to this, the envisaged new provision of article 16 (1bis) Draft-BA will cover all types of tokens which are individually allocated to the custodian's client or which are allocated to a community and where it is clear which share of the community assets the custodian's client is entitled to (see the corresponding provisions under paragraph 2 b) above).

This means that collectively deposited crypto-based assets are also segregable pursuant to article 37d BA if they are individually allocated at any time in a suitable manner. However, it is not a prerequisite for segregation that the tokens on the blockchain / the DLT system itself are individually allocated.

If financial instruments, such as shares or bonds, are issued in the form of uncertificated register securities, they should in most cases also constitute intermediated securities (*Bucheffekten*) within the meaning of the Intermediated Securities Act ("FISA"). Accordingly, they can be separated directly on the basis of article 16 (1) BA, regardless of whether the requirements under the new article 16 (1bis) Draft-BA are met or not. This also applies with regard to uncertificated register securities that are being "converted" into intermediated securities in accordance with the envisaged article 6 (1) (d) Draft-FISA.

d) Segregation of data in insolvency according to article 242b Draft-DEBA

The DLT Draft Law also contains rules concerning the access to data in insolvency in general. Under current Swiss law, it is not clear whether digital data stored by a third party custodian (*e.g.*, a cloud provider) may be segregated from the bankruptcy estate, if such a custodian becomes insolvent. The Swiss federal government therefore proposes to establish a right to request segregation of digital data regardless of whether such data has any (market) value or not (*e.g.*, a holiday picture). The person requesting such segregation must show that it has a particular entitlement to the relevant data (*e.g.*, a statutory or contractual claim). Furthermore, the person requesting segregation might pay a fee in advance, which will then be used to cover the costs of the data retrieval and segregation.

3) Appraisal

The proposed new Swiss insolvency law regime governing both the segregation of crypto-based assets as well as the segregation of data is well balanced and will help to significantly increase legal certainty. However, it must be noted that from an operational point of view, storing tokens in a compliant way will be challenging. Custodians will, for example, have to ensure that there is no shortfall of tokens and that internal registers and / or "allocation charts" correctly reflect the individual allocation of tokens. Furthermore, legal uncertainties to be addressed will remain with regard to questions such as for example how pure cryptocurrencies like Bitcoin or Ether are to be treated outside of insolvency or how third party objection procedures pursuant to article 106 – 109 DEBA (in particular if crypto-based assets had been used as collateral) will be conducted. Finally, it will have to be clarified in particular that article 242a Draft-DEBA solely governs the procedure for the segregation of tokenized financial instruments in the form of uncertificated register securities but not the conditions for such segregation.

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Conflicts of Laws on the Distributed Ledger and Negotiable Instruments

Reference: CapLaw-2020-04

The Bill on the Federal Act on the Adaptation of Federal Law to Developments of the Distributed Ledgers Technology of 27 November 2019 (the "**DLT Bill**") which was sent to parliament addresses among other issues the question of conflicts of laws related to rights recorded on a distributed ledger. Considering the ubiquity of the potential users of a distributed ledger and the difficulty to localize a distributed ledger, which does not present a strong nexus to any given place, this is an absolute necessity. This article aims to present the principles of the amendments to the PILA that are being proposed by the DLT Bill.

By Rashid Bahar

1) Overview: an evolution not a revolution

The DLT Bill is not a comprehensive piece of legislation. Quite to the contrary, it is a patchwork of amendments to no less than ten different federal acts including the Code of Obligations, the Debt Enforcement and Bankruptcy Act, various acts governing financial markets regulation and the Private International Law Act ("**PILA**"). Rather than taking creating a new *sui generis* asset, the DLT Bill aims at making adjustments to the existing legal framework to provide legal certainty for transactions based on the digital ledger technology, including blockchain-based assets.

The question of conflicts of laws is a case in point: the DLT Bill does not only address rights recorded on a digital ledger. Quite to the contrary, the amendments to the PILA that are being proposed in connection with the DLT Bill do not mention expressly the term of rights recorded on a digital ledger, crypto-currency or digital assets. Instead the amendments aim at integrating rights recorded on a digital ledger in the broader framework of negotiable instruments (*Wertpapiere, papiers-valeurs*), book-entry securities (*Wertrechte, droits-valeurs*) and other equivalent instruments (*gleichwertige Titel, titres équivalents*). The DLT Bill was, thus, also an opportunity to address systematically certain issues which were not addressed explicitly until now, such as the question of which law governs a negotiable instrument, which was until now only expressly determined in connection with titles to goods (*Warenpapiere, titres représentatifs de marchandises*).

2) General Principle: Law determined by the Instrument as the Governing Law

The approach proposed by the Federal Council in connection with conflicts of laws is in line with the overall approach of the DLT Bill: it assumes that, from a conflict of laws perspective, rights recorded on a digital ledger are a special form of book-entry securities and amends the conflicts of laws rules to provide specific rules addressing the status of book-entry securities as a specific type of instruments that are neither proper negotiable instruments nor claims (*Forderungen, créances*). Doing so, the DLT fills a gap in the existing framework, which provided for a dedicated framework for book-entry securities only where they were held through an intermediary and booked to account, and, consequently, governed by article 108a PILA and the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary of 5 July 2006 (Hague Securities Convention).

Under the proposed framework, right recorded on a distributed ledger receives together with rights incorporated in a negotiable instrument a dedicated set of conflict of laws rules which apply to the transfer and the creation of security interest over the underlying right. Pursuant to article 145a (1) of the draft PILA as amended by DLT Bill, the law determined by the instrument determines (i) whether the instrument represents a right and (ii) whether the right is transferred using the instrument; absent any such chosen law, the law of the seat or the place of common residence of the issuer governs these issues. This rule is not revolutionary, nor even new. This principle was, however, only codified expressly in connection with titles to goods (see article 106 (1) PILA), although it was generally recognized as a matter of Swiss international private law in connection with negotiable instruments more generally. Therefore, by introducing the new article 145a (1) PILA, the DLT Bill codifies a largely accepted principle of conflicts of laws and addresses not only negotiable instruments proper but extends the scope of this rule to book-entry rights and allows not only a paper instrument but any other instrument to determine the law applicable to the transfer of a right. The use of the term 'other instrument' term aims at including any text-based instrument. Therefore, not only written instruments *stricto sensu*, but also electronic instruments such as a digital ledger, an email or an annex to an email can determine which law shall apply to the question whether a right is incorporated in the instrument and to the question whether the instruments is necessary to transfer and exercise the rights it documents the transfer of the right to the use of the instrument. Therefore, this principle of conflicts of laws will apply not only in connection with rights on a digital ledger, but also in connection with book-entry securities, where the use of the books and records determines the transfer of the security.

The same principles also apply to goods represented through an instrument. Indeed, article 106 (1) of the draft PILA as amended by the DLT Bill provides that article 145a (1) draft PILA determines whether the instrument represents goods. Consequently, the question whether an instrument represents goods will be determined by the law determined on the instrument, and absent such a choice, the law of the seat or common residence of the issuer. This approach offers legal certainty in terms of conflicts of law to the broad category of asset tokens that aim to incorporate a right in rem on moveable assets in a token. By contrast, this rule does not go so far as permitting the incorporation of rights to real estate on a digital ledger from a conflicts of laws perspective, as this question will continue to be governed by the law of the place of situation of the real estate as provided for by article 99 (1) PILA.

The metaphor of negotiable instruments does not carry through completely for book-entry rights, including book-entry securities and a rights recorded on a distributed ledger. Whereas a negotiable instrument is materialized in a physical instrument, typically a piece of paper, and can be transferred following the rules on transfer applicable to moveable goods and following the principle of the *lex chartae sitae* is subject to the law of the place where the physical instrument is located (article 145*a* (2) draft PILA as amended by the DLT Bill), a right recorded on a distributed ledger cannot be linked to a physical location. Therefore, the transfer of the underlying right recorded on the distributed ledger will continue to be governed by the law determined in the instrument or, absent such a choice of law, the law of the seat or common residence of the issuer, regardless of where the holder of the right is located. This approach has the benefit of being practicable and offering a high degree of legal certainty.

3) Exception: Security Interests

With regard to security interests, the draft PILA as amended by the DLT Bill follows the same philosophy of applying the rules developped for negotiable instruments to book-entry securities and other equivalent instruments, which leads, however, to the application of different rules on conflicts of laws: article 105 (2) draft PILA amended by the DLT Bill extends the objective rule on conflicts of laws applicable to negotiable instruments and applies them absent a choice of law among the parties, to book-entry securities and other equivalent instruments (subject to the special rules applicable to securities held through an intermediary governed by the rules of conflict of laws determined by the Hague Securities Convention). The rule on conflict of laws, however, does not refer to the law determined by the negotiable instrument, the book-entry security or the equivalent instrument, but to the law of the place of common residence of the secured creditor.

This rule is consistent with the general principles of conflicts of laws applicable to negotiable instruments and the principles applicable to the creation of security interests in receivables. However, it is likely to lead as a practical matter to a high degree of uncertainty: unlike receivables, book-entry securities are likely to be transferred regularly and circulate among a number of persons. Moreover, unlike negotiable instruments, they are dematerialized, it is therefore difficult for third parties to identify or even suspect that a secured creditor may have taken a charge in a book-entry security. Yet, based on the rules on conflicts of laws that are proposed to be applied by article 105 (2) of the draft PILA, they may be unwittingly confronted with the laws of jurisdictions they did not consider as being potentially applicable. Indeed, how can a third party absent any means of publicity come to consider the law of place of residence of a secured creditor? Therefore, this approach is likely to yield a number of surprises in practice, in particular at a time where the principles governing rights on the digital ledger are far from being harmonized.

Against this backdrop, it would have been preferable, in my opinion, to rely on the general rule on the conveyance of rights or the rules applicable to the creation of security interests in so-called other rights which provide that the law applicable to the right itself governs the creation of security interests in such rights.

4) Cryptocurrencies

Whereas the DLT Bill offers a legal framework for conflicts of laws related to rights recorded on a digital ledger, it remains silent with regard to the use of crypto-currencies as instruments of payment. Consequently, the existing rules continue to apply. This leaves unanswered the question whether the use of crypto-currency should be treated as a form of barter, where a crypto-currency is exchanged for another good or a service, or rather as a form private tender, which can be used to pay a monetary debt. In the first instance, a choice of law and absent a choice of law, the law applicable at the place of common residence governs the issue (see article 116 et seq. PILA), whereas in the second instance the law applicable at the place where the debt has to be discharged determines whether a debt can be validly discharged using a given currency (article 145 (3) PILA).

This uncertainty may seem *prima facie* unsatisfactory, but it presents the advantage of leaving this issue to be solved by the courts one step at a time considering both the specific circumstances of the cases and the domestic and internationals evolution in this area: although, currently, crypto-currencies are not widely accepted as "true" currency and are consequently their use is likely to be treated as form of barter, this may change rapidly and in such a case the rules on conflicts of laws on money and means of payments will take over and apply seamlessly. In other terms, this approach may not offer legal certainty but promises flexibility and adaptability.

5) Conclusion

The amendments to the rules of conflicts of laws proposed by the DLT Bill may seem strikingly modest, especially when compared to the changes they make in substantive law. As mentioned above, they do not even mention rights recorded on a DLT or crypto-currencies explicitly, and apply by implicit inclusion only to rights recorded on a digital ledger without covering crypto-currencies, which do not have an identified issuer. However, this approach is sensible as due to their global reach digital rights using a digital ledger technology are likely to come into contact with a number of jurisdictions and are likely to be subject to be the object of suits in competing international fora. Against this backdrop, it is obvious that if Swiss law took a completely novel approach, it would inevitably clash with the laws of other jurisdictions that did not adapt their legal systems to the demands of the new technology. By taking a modest approach, the Swiss legal framework aims to fit these new asset classes in existing categories of conflicts of laws and thus ensure that the Swiss legal principles on conflicts of laws will remain compatible with those of foreign jurisdictions and ultimately maintain a certain harmony in this area as long as the rules on conflicts of laws cannot be harmonized at an international level through a treaty or another instrument.

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Central Securities Depositaries in the Age of Tokenized Securities

Reference: CapLaw-2020-05

The distributed ledger technology offers a new way to transfer securities and record their ownership. When fully deployed, it could form the backbone of a new market infrastructure, and could even replace central securities depositaries as we know them today. The Federal Council however raised the possibility that certain distributed ledger infrastructures could be themselves qualified as central securities depositaries. This article reviews cases where the rules on central securities depositaries could apply in a distributed ledger technology context, and describes how the topic is addressed in the proposed Federal Act on Adapting Federal Law to the Developments of the Distributed Ledger Technology.

By Jacques Iffland / Ariel Ben Hattar

1) Central securities depositories in today's markets

The last decade saw the completion of the dematerialization of securities. Today, securities no longer need to be represented by a physical certificate and, with the Intermediated Securities Act ("**ISA**"), a bank transfer from one securities account to another is sufficient for the ownership of securities to pass. The system put forward by ISA (and similar legislation outside of Switzerland) is heavily centralized, though. It is based on the idea that certain intermediaries, in particular banks, can be trusted to keep a record of ownership. Proof that one owns these "intermediated" securities is therefore no longer a piece of paper, but a record in the books of a (regulated) custodian.

Central securities depositories ("**CSDs**") play two roles in this context. First, they keep intermediated securities in custody by acting as the ultimate custodian. To use the expression of the European Central Security Depositories Regulation ("**CSDR**"), they operate at the "top-tier level", meaning that all custodians holding the relevant (intermediated) securities ultimately hold them through the CSD. Second, CSDs also provide settlement services by facilitating transfers of securities between custodians. These two roles are reflected in article 61 of the Financial Market Infrastructure Act ("**FMIA**"), which defines CSDs as organizations that operate "*a centralized safe custody of securities and other financial instruments*" (article 61(2) FMIA), or a settlement system, *i.e.* a system to "*clear and settle trades in securities and other financial instruments*" (article 61(3) FMIA). In either case, the activity of CSDs is based on "*uniform rules and procedures*".

2) The disintermediation of securities markets – towards the end of CSDs?

An important use case of distributed ledger technology (or "**DLT**") in financial markets is the digitalization - or "tokenization" of securities. This term relates to a process through which a financial instrument is associated with a digital token recorded on a distributed ledger, so that the financial instrument cannot be transferred without the token and vice-versa.

The benefit of tokenizing securities is that it becomes possible to "disintermediate" the process through which securities are marketed to investors on the primary market and traded on the secondary markets. Contrary to intermediated securities, tokenized securities can be held and transferred without the involvement of any custodian. Control over tokenized securities does not depend on the ownership of a securities account. Rather, control is ensured through a so-called "private key", a digital code that is used to generate instructions to transfer tokens from one distributed ledger address to another. As private keys are digital codes, they can be kept by anyone who has access to IT storage devices such as hard drives or USB sticks. Private keys can – but do not need to – be kept in safe custody with a third party.

The practical implication of this is that the issuance and trading of securities does not necessarily require the involvement of custodians or CSDs. Tokenized securities can be created by issuers themselves, and transferred directly to investors. As the SIX Group's 2018 whitepaper on "the Future of the Securities Value Chain" notes, the tokenization of securities makes CSDs redundant, at least in theory.

3) The Federal Council report of December 2018

In its 2018 report on the potential of DLT in the financial sector, the Federal Council seemed to imply that "*due to the broad and technology-neutral manner*" in which FMIA defines CSDs, some DLT-based systems could be caught by that definition. The report mentioned that, as an example, trades in tokenized securities could be deemed to be cleared and settled on the basis of "*uniform rules and procedures*" within the meaning of article 61 FMIA, which would result in the operator of the system falling within the definition of a CSD, and as a result being subject to a licensing requirement in Switzerland.

In the report, the Federal Council suggested creating a new type of financial market infrastructure combining trade and post-trade activities. This new infrastructure is now contemplated in the draft Federal Act on Adapting Federal Law to the Developments of the Distributed Ledger Technology (the "**DLT Act**"). The Federal Council, however, also noted that the delimitation of activities between the various types of financial market infrastructures contemplated in FMIA should be "*clarified in details*" at a later date.

4) CSDs and DLT

At a conceptual level, there are several situations where the use of a distributed ledger can raise the question of the applicability of article 61 FMIA. The following sub-sections examine in more detail to what extent the Swiss CSD regime could apply in a distributed ledger context.

a) Distributed ledgers as CSDs?

Distributed ledgers can be used in various manners, including to effect transfers of tokenized securities. In addition, if a distributed ledger is used for such purpose, the ledger will in principle be the only way to record the ownership of the relevant securities.

The Swiss CSD regime only applies to organizations who operate a CSD. By nature, distributed ledgers are not "operated" by a single body or person. Distributed ledgers are based on IT protocols, and the entries in these ledgers are made and validated in a decentralized manner by a community of users. This is especially true for "public" distributed ledgers, where anyone can participate in the validation process by operating a "node". As an example, the transfer of tokens on the Ethereum blockchain is validated collectively by the consensus of the many nodes of that blockchain (who may not even be aware that they are validating entries corresponding to securities). "*Uniform rules and procedures*" do indeed exist to validate entries into the ledger, but they are not used by "*an organization*" to keep securities in central custody within the meaning of article 61(2) FMIA or to clear and settle trades within the meaning of article 61(3) FMIA. The nodes are the building blocks of the distributed ledger, but they are not an organization, and due to the decentralized logic of DLT, they cannot be deemed to be constituent parts of a broader organization.

Here, it is important to recall that the Swiss rules on CSDs were "*inspired*" by their European equivalent, in particular the CSDR. Although FMIA offers a simpler take on the regulation of CSDs, it rests on the same premise. The CSDR, as well as the European Settlement Finality Directive ("**SFD**") on which it is itself based, assume that settlement operations are performed on traditional securities accounts, *i.e.* accounts held with an intermediary (including with the CSD itself). The very reason for enacting the SFD and the CSDR is that these intermediaries can and should impose certain obligations to ensure the proper functioning of settlement systems. Even if the term "account" is sometimes used to describe distributed ledger addresses, these cannot be assimilated to proper accounts held with third parties. Applying the rules on CSDs to public distributed ledgers would therefore be largely pointless.

But if a public blockchain, such as Ethereum, cannot be characterized as a CSD for the purpose of FMIA, what about "permissioned" (or "private") distributed ledger? Contrary to public distributed ledgers that are essentially IT protocols not subject to any form of central governance, the validation of entries in the ledger of permissioned distributed ledgers is generally reserved to vetted participants. A vetting of the validating participants can mean that there is some form of central governance. It will, however, depend on the circumstances of each particular distributed ledger if the governance structure for granting of the permissions can be deemed strong enough for the distributed ledger and its participants to be considered an "organization" under article 61 FMIA.

b) Smart contracts to tokenize securities

To tokenize securities, one generally uses a "*smart contract*", a piece of computer code that runs on the distributed ledger. In the context relevant for this article, a smart contract serves to create a "sub-ledger" within the wider distributed ledger. The sub-ledger maintained by the smart contract records the ownership of the security to which it is associated (with "*tokens*" being entries into that sub-ledger). The issuer of tokenized securities generally retains the power to amend the code of the smart contract or – at a minimum – to disable it.

Clearly, the author of such smart contract cannot be deemed to be aiming for "*the central safe custody of securities*", as provided by article 61(2) FMIA, and the smart contract does not perform any custody operations. However, could such smart contract be operating a "*clearing and settlement system*"? The answer is, in our view, negative. Clearing and settlement operations are not performed by the smart contract itself or by the entity that has the power to amend its code, but rather by the distributed ledger.

c) Trading venues

In traditional securities markets, a distinction is generally made between trade and post-trade infrastructures. This distinction tends to vanish, however, when trades are entered into and settled by the same operator, as is increasingly common.

i. The new DLT Trading Venue

An important element of the proposed DLT Act is the creation of a new market infrastructure: the trading facility based on the DLT (the "**DLT Trading Venue**"). The DLT Trading Venue bears similarities with the multilateral trading facility ("**MTF**") of article 26(c) FMIA, but it also introduces a few notable differences. Like an MTF, a DLT Trading Venue is a multilateral system, *i.e.* orders of various participants compete against each other, can only be operated by an entity holding a dedicated license, admits securities to trading and operates based on non-discretionary rules. Unlike an MTF, however, a DLT Trading Venue may only admit DLT-based securities, can admit unregulated participants, including individuals, and can provide post-trade services (a) in the form of centralized safe custody services for DLT-based securities or (b) by operating a settlement system for such securities.

Under the proposed DLT Act, the DLT Trading Venue license would only be available to operators who offer trade execution services (*i.e.* multilateral trading of DLT-based securities) *and* either admit unregulated participants, or provide post-trade services. This particular solution was chosen, according to the Federal Council, because it makes clear that a system cannot be at the same time an MTF and a DLT Trading Venue. Since the post-trade services described above mirror articles 61(2) and 61(3) FMIA, the proposed regime essentially means that DLT Trading Venues could also operate as CSDs. Even if, in that case, there is no clear criteria to distinguish the DLT Trading Venue from the CSD, the former is a *lex specialis*. As a result, operators of DLT Trading Venues who provide CSD services will not need to obtain an additional CSD license.

Operators of venues admitting securities based on public distributed ledgers will have little use of the possibility to provide central custody services, as the idea of central custody in that context is of limited interest. Maintaining a settlement system appears more attractive: securities exchanges (article 26(b) FMIA) and MTFs cannot maintain accounts and perform settlement operations relating to trades executed on their platforms. These venues need to rely on a third party CSD or provide in their rules that settlement is performed bilaterally, between participants.

Allowing DLT Trading Venues to operate a settlement system however comes with strings attached, as it means allowing the operator of the venue to maintain accounts and hold assets belonging to clients. To address the additional risks that providing settlement services creates, the proposed DLT Act gives the Federal Council the ability to impose additional requirements, including with respect to regulatory capital, risk management, liquidity and segregation requirements.

ii. Other FMIA-regulated venues

With respect to the DLT Trading Venue, the DLT Act would solve the question of the applicability of article 61 FMIA by recognizing that the venue can also act as a CSD. This particular solution is however unique in the proposed DLT Act, which raises the question of the applicability of the CSD rules to other venues regulated by FMIA.

The first point to note in this respect is that the proposed DLT Act is not creating an exclusive regime, whereby only DLT Trading Venues would be authorized to admit DLT-based securities to trading. On the contrary, the proposed DLT Act is adding flexibility, by creating a type of venue intended to correspond to business models tailored for DLT. The lack of restriction on other types of venues is evidenced by the way the new license is framed. Under article 73a of the proposed DLT Act, DLT Trading Venues are multilateral venues that operate based on non-discretionary rules. Does it mean that DLT-based securities cannot be traded on bilateral venues or on venues operating based on discretionary rules? Surely not. Securities exchanges, MTFs and organized trading facilities ("**OTFs**", article 42 FMIA) can also list or admit to trading tokenized securities.

As discussed above, securities exchanges and MTFs cannot maintain accounts, and can therefore not perform custody or settlement operations. These venues are pure trading infrastructures, with no post-trade activity. There is no reason why they should be subject to the rules on CSDs.

OTFs can operate differently. Article 43(1) FMIA provides that these systems can be operated by banks or securities firms, with access to the OTF being granted to clients who hold accounts with those entities. When two clients of a bank enter into a trade on the bank's OTF, the bank will also organize the settlement of the trade. To the extent the OTF operator does so based on general terms that apply to those who trade on the OTF, one could argue that the settlement facility offered by the operator amounts to a settlement system. While the legal text of article 61 FMIA may lack the granularity to easily distinguish between what is a settlement system and what is simply executing trades between one's clients, the intent of the legislator when adopting FMIA was clear. Operating an OTF is first and foremost an extension of traditional brokerage services, *i.e.* bringing together interests of clients to organize a trade. If the legislator had wanted to treat brokers engaging in those activities as CSDs, it would have said so and there would be dozens of CSDs today.

5) Conclusion

Even if CSDs were introduced as a type of regulated entity only when FMIA entered into force in 2016, they are already under threat of being outdated. Under these circumstances, one could have imagined that the applicability of the CSD regime would become less and less of a concern, especially in the DLT world, where centralization is generally frowned upon. Instead, the broad language of article 61 FMIA and the limited attention given to the rules on CSD in general contributed to the impression that CSDs could be more prevalent in DLT-based business models. As our analysis above shows, however, there are in reality very few situations where a CSD license could actually be required.

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Acquisition of The Medicines Company

Reference: CapLaw-2020-06

In connection with the acquisition of NASDAQ-listed biopharmaceutical company The Medicines Company for USD 9.7 billion, Novartis AG and Novartis Finance Corporation entered into a USD 7 billion short-term (bridge) credit agreement and completed a USD 5 billion four-tranche SEC-registered bond offering.

Placement of SGS Shares

Reference: CapLaw-2020-07

The von Finck family successfully placed 960,000 shares (approx. 12.7%) in SGS SA by way of an accelerated bookbuilding process. The overall transaction volume amounts to CHF 2.3 billion. In light of its long-term investment strategy and planning, the family decided to divest a majority of its stake in SGS.

Addex Therapeutics Ltd lists American Depositary Shares (ADSs) on NASDAQ

Reference: CapLaw-2020-08

On January 29, 2020, Addex Therapeutics Ltd (Addex) (SIX: ADXN), a clinical-stage pharmaceutical company pioneering allosteric modulation-based drug discovery and development, announced the listing of American Depositary Shares (ADSs) representing its ordinary shares on the Nasdaq Stock Market. The ADSs will be listed for trading on Nasdaq under the symbol "ADXN" on January 29, 2020.

Amun AG lists its new Series of Exchange Traded Products on the SIX Swiss Exchange linked to a short position in Bitcoin (BTC)

Reference: CapLaw-2020-09

On January 22, 2020, Amun AG (Amun), a Zug-based special purpose issuance vehicle of the fintech group Amun, successfully issued and listed a new Series of Products (Ticker: SBTC) on the SIX Swiss Exchange. These Products, the "21Shares Short Bitcoin ETP" are linked to the inverse performance of Bitcoin (BTC) and allow a -1x exposure to Bitcoin (BTC)'s performance on a daily basis. The purpose of this Product is to allow investors to, on a short-term basis, benefit from a negative development in the value of Bitcoin (BTC), the largest cryptocurrency.

Valyo Innovative Capital Market Platform

Reference: CapLaw-2020-10

Valyo AG, a subsidiary of Raiffeisen Switzerland, has developed an innovative digital platform for issuances of exchange listed bonds geared towards institutional investors. The Valyo platform, intended to be launched in the first quarter of 2020, enables issuers to carry out all steps from the initial registration of a planned issuance through the book building process to closing and listing of the bond issuance in an integrated digital process.

Credit Suisse Switzerland issues CHF 660m Covered Bonds

Reference: CapLaw-2020-11

Following an inaugural issuance of CHF 250 million Covered Bonds on 16 July 2019, Credit Suisse Switzerland successfully completed its second and third issuances under the Programme on 31 January 2020, issuing CHF 350 million Series 2020-1 0.000 per cent. fixed rate Covered Bonds due July 2025 and CHF 310 million Series 2020-2 0.000 per cent. fixed rate Covered Bonds due October 2030. The Covered Bonds are listed on the SIX Swiss Exchange and rated AAA by Fitch.

Global Blue and Far Point Acquisition Corporation announce USD 2.6bn business combination and listing on NYSE

Reference: CapLaw-2020-12

On 16 January 2020, Global Blue, a leading strategic technology and payments partner empowering global merchants to capture the growth of international shoppers, today announced it will become a publicly traded company on the New York Stock Exchange through a merger with Far Point Acquisition Corporation, a special purpose acquisition company co-sponsored by the institutional asset manager Third Point LLC and former NYSE President Thomas W. Farley. The new public company will be incorporated in Switzerland and will trade as Global Blue under ticker symbol NYSE: "GB" upon closing.