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ENHANCING SHAREHOLDER RIGHTS IN INTERMEDIATED SECURITIES HOLDING STRUCTURES ACROSS BORDERS

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In today's interconnected capital markets, investors are no longer confined to national boundaries. On the contrary, domestic investors actively buy securities from companies incorporated in other jurisdictions. To connect companies with ultimate investors across borders, securities are allocated through multi-tier holding patterns formed by financial intermediaries. Each of the intermediaries in a chain holds investors' shares in securities accounts maintained with upper intermediaries located, on many occasions, in other jurisdictions. However, the flow of investors' rights along the holding chain may be interrupted for two major reasons. Local laws may ignore the cross-border financial reality: a particular domestic law may not recognize the interests of those ultimate investors located in another jurisdiction or prevent intermediaries from acting on behalf of those foreign inves-

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tors. Furthermore, securities holding chains suffer from structural deficiencies. The relationship between intermediaries across borders is governed by isolated contractual arrangements. As a result, the cross-border exercise of corporate rights is disrupted. Against this background, this Note proposes a combined solution that involves, first, increasing momentum for transnational harmonizing legal instruments, like the UNIDROIT *Convention on Substantive Rules for Intermediated Securities and the E.U. Shareholder Rights Directive, and, second, giving a greater role to institutional investors to exercise their bargaining power in order to influence contractual relationships vis-á-vis financial intermediaries in securities holding chains that go beyond the current limitations set forth by domestic legal frameworks.*

INTRODUCTION

In the past decades, most of the corporate legal regimes in developed economies have been subjected to three major phenomena. First, shareholders and policy makers have pushed boards of directors and CEOs for greater democratic corporate governance.[1] Second, the internationalization of capital markets has stimulated the number of cross-border transactions of securities indirectly held by investors through

1. *See* MARTIN LIPTON, STEVEN A. ROSENBLUM & KARESSA L. CAIN, THE FUTURE OF CORPORATE GOVERNANCE AND THE BOARD OF DIRECTORS 1 (2010) (noting that it was precisely the enactment of pro-shareholder legislation that permitted the rapid development of a shareholder-centric model of corporate governance from which activists have largely benefited).

financial intermediaries.[2] Third, the rising number of institutional investors has modified the traditional ownership landscape in publicly listed companies.[3] Since these three trends normally represent major competing interests, their interaction has proven to be a difficult territory where many complex legal issues have arisen.

Whereas recent reforms in corporate law seek to enhance shareholder democracy and participation as a sign of *good governance* in public corporations,[4] capital markets regulations aim to foster greater efficiency in securities transactions.[5] In other words, while the former purports to build a more transparent relationship between ultimate investors and the issuer,[6] the latter requires a lengthy system of intermediaries capable

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2. *See* Hideki Kanda, *Foreword*, *in* TRANSNATIONAL SECURITIES LAW V, V (Thomas Keijser ed., 2014); Thomas Keijser, *Preface*, *in* TRANSNATIONAL SECURITIES LAW VII, VII (Thomas Keijser ed., 2014); *see also* HIDEKI KANDA, LEGAL ASPECTS OF GLOBALIZATION, CONFLICTS OF LAWS, INTERNET, CAPITAL MARKETS AND INSOLVENCY IN A GLOBAL ECONOMY 69 (Jürgen Basedow & Toshiyuki Kono eds., 2000) (noting that many markets coexist in a multilayered fashion and that financial transactions take place, and financial institutions act, across national borders in these multi-layered markets).

3. *See* Martin Lipton, Partner at Wachtell, Lipton, Rosen & Katz, Activist Interventions and the Destruction of Long-Term Value, Talk Before the Directors Forum (Jan. 26, 2015) (on file with author) (arguing that after the financial crisis of 2008 and 2009 the influence of institutional investors has significantly increased because corporate boards should consider a wider array of constituents when making decisions, including employees, communities, and customers).

4. *See* EUROPEAN COMMISSION, *Communication From the Commission to The European Parliament, The Council, The European Economic and Social Committee and the Committee of Regions, Action Plan: European company law and corporate governance—a modern legal framework for more engaged shareholders and sustainable companies*, COM (2012) 740 final, 2012 (COD) 14–15 (concluding that the proposed initiatives and reforms aim to increase the level of transparency between companies and their shareholders, and as regards company law, the initiatives proposed focus in particular on providing companies more legal certainty regarding cross-border operations).

5. *See* RÜDIGER VEIL, EUROPEAN CAPITAL MARKETS LAW 18–19 (Rüdiger Veil ed., 2013).

6. *See* Luca Enriques & Paolo Volpin, *Corporate Governance Reforms in Continental Europe,* 21 J. ECON. PERSPECTIVES 117, 127–37 (2007) (explaining reforms made in France, Germany, and Italy in the last fifteen years to improve internal governance mechanisms, empower shareholders, enhance disclosure and strengthen public enforcement); *see also* EUROPEAN COMMISSION, *supra* note 4, at 5–8 (describing a number of initiatives to enhance transparency with regard to disclosure of board diversity policies and man-

of securing both the allocation and transfer of millions of securities worldwide at reasonable transaction costs.[7] At this sensitive crossroads, the basic tenet is that what is good for the economic efficiency of capital markets is in many ways counterproductive for the vindication of legal interests of ultimate investors, the so-called beneficial owners, who face a number of obstacles to enforce their rights through transnational chains of financial intermediaries.[8]

Part I states the problem that is subject to analysis in this Note, and Part II expounds on its relevant consequences. The presence of intermediaries across borders seems necessary for reasons of efficiency, operational certainty, speed, and safety.[9] However, even between two internally sound and reliable national systems, holding securities through a chain of intermediaries across borders usually causes a number of shortcomings.[10] First, the legal frameworks in which each market

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agement of non-financial risks, corporate reporting, and shareholder identification mechanisms).

7. *See* VEIL, *supra* note 5, at 87, 383 (noting that trading securities requires the intervention of financial intermediaries; as a result, only such intermediaries are authorized to conclude contracts for their own account or in their own name for the account of others); *see also Id.* at 211–12, (distinguishing three different goals in terms of efficiency in capital markets: allocational efficiency (matching investment opportunities to investable financial capital), institutional efficiency (referring to the availability of free market conditions), and operational efficiency (referring to speed and transactional costs)).

8. *See* Philipp Paech, *Capital Markets Union, Investment Securities and the Tradition of Casting Liquidity into the Law* (London Sch. of Econ., Law Dept., Working Paper No. 20/2015), at 5, http://ssrn.com/abstract= 2697718 (arguing that the concepts and mechanisms developed by securities law have proved unsuitable in the context of intermediation and centralised clearing and settlement, and that they are not compatible across jurisdictional borders).

9. *See* Luc Thévenoz, *The Geneva Securities Convention: Objectives, History, and Guiding Principles*, *in* INTERMEDIATED SECURITIES: THE IMPACT OF THE GENEVA SECURITIES CONVENTION AND THE FUTURE EUROPEAN LEGISLATION 7 (Pierre-Henri Conac et al. eds., 2013) (noting that the immobilization and dematerialization of securities create huge efficiencies, at the cost of relying almost exclusively on the operational safety and financial soundness of central securities depositories, banks, and other financial intermediaries).

10. *See* Luc Thévenoz, *Intermediated Securities, Legal Risk and the International Harmonization of Commercial Law*, 13 STAN. J.L. BUS. & FIN. 384, 398 (2008); *see also* UNIDROIT, Legislative Guide on Intermediated Securities (Revised Draft), Jan. 27, 2017, at 26, http://www.unidroit.org/english/documents/2017/study78b/s-78b-cem04-02-e.pdf.

participant (companies, intermediaries, or investors) operates are different.[11] This fact weakens both the legal compatibility among national jurisdictions and the effective exercise of investors' rights.[12] Second, some jurisdictions have legal frameworks in place based on traditional concepts of property law and capital markets.[13] Traditional models, although rationally developed from a legal point of view, do not match the current standards required by increasingly intermediated and interconnected capital markets.[14] Third, the process of determining the applicable law for each market participant is far from certain, so conflict-of-law issues arise among different legal regimes.[15]

In addition, those securities holding structures across borders are governed by contractual arrangements.[16] It is the contract itself which defines the rights and obligations between the concerned parties. If the contract does not contemplate the obligation to pass the rights through the intermediaries to the final investors, the exercise of rights is disrupted.[17] Against

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11. *See* Thévenoz, *supra* note 10, at 399; *see also* UNIDROIT, *supra* note 10, at 26.

12. *See* Nora Rachman & Maria Vermaas, *Corporate Actions in the Intermediated System: Bridging the Gap Between Issuer and Investor*, *in* TRANSNATIONAL SECURITIES LAW 145, 146 (Thomas Keijser ed., 2014) (arguing that "[p]art of the problem is the reluctance of lawmakers and regulators to enable the ultimate account holder or beneficiary to avail itself of its direct income, voting, and information rights"); *see also* UNIDROIT, *supra* note 10, at 26.

13. *See* José Angelo Estrella Faria, *The* UNIDROIT Convention on Substantive Rules Regarding Intermediated Securities: An Introduction, 15 UNIFORM L. REV. 196, 198 (2010); *see also* Philipp Paech, *Harmonised Substantive Rules Regarding Intermediated Securities – Paris Seminar on the* UNIDROIT Project, 11 UNIFORM L. REV. 319, 321 (2006); UNIDROIT, *supra* note 10, at 26.

14. *See* Hideki Kanda, *Legal Rules on Indirectly Held Investment Securities: The Japanese Situation, Common Problems, and the* UNIDROIT Approach, 10 UNIFORM L. REV. 271, 274–76 (2005) (describing the legal system in major jurisdictions, such as the United States, France, Germany, the United Kingdom, and Japan); *see also* UNIDROIT, *supra* note 10, at 26.

15. *See* Francisco J. Garcimartín Alférez, *The Geneva Convention on Intermediated Securities: A Conflict-of-Laws Approach*, 15 UNIFORM L. REV. 751 (2010); *see also* UNIDROIT, *supra* note 10, at 26.

16. *See* Eva Micheler, *Custody Chains and Remoteness – Disconnecting Investors from Issuers* 2 (London Sch. of Econ. Law Dep't, Working Paper No. 14, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2413025.

17. *Id.* (noting that neither issuers nor investors are able to control the complexity of the chain or the content of the legal arrangements that govern the holding structure because intermediaries are connected through a

this background, investors need to know whether they are entitled to exercise their corporate rights, receive necessary information from companies, and give instructions to their relevant intermediaries in a reasonably simple and convenient way.

Part III develops a tentative solution to solve the problem at hand. First, states must foster core harmonization of intermediated securities regulation at the cross-border level. Although not in force yet, the major legal platform achieved thus far is the UNIDROIT Convention on Substantive Rules for Intermediated Securities (the Geneva Securities Convention), which offers a set of essential harmonized material rules to develop internal soundness and cross-border compatibility of securities holding systems.[18] More significant steps have been taken in this regard by the European Union, namely through the establishment of binding legal instruments such as the Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the Exercise of Certain Rights of Shareholders in Listed Companies (the Shareholder Rights Directive).[19] Second, institutional investors have become prominent enough in some jurisdictions to play a key role in vindicating the rights of ultimate beneficial owners against cross-border financial intermediaries by altering the contractual terms. The sustained market power of intermediaries may be eroded by large institutional investors who are located downstream in the holding chain. As a result, institutional investors may be the missing piece of the puzzle needed to favor the ultimate shareholders.

Finally, this Note summarizes the conclusions of the legal analysis. The legislative and structural complexities of exercising corporate rights across borders by the ultimate beneficial owners of the shares can be minimized by non-mutually exclu-

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series of bilateral legal relationships that are independent of each other and eventually erode the rights of investors); *see also* UNIDROIT, *supra* note 10, at 26.

18. *See* UNIDROIT, Convention on Substantive Rules for Intermediated Securities, Oct. 9, 2009, http://www.unidroit.org/english/conventions/2009intermediatedsecurities/convention.pdf.

19. *See* Directive 2007/36/EC of the European Parliament and of the Counsel of 11 July 2007 on the Exercise of Certain Rights of Shareholders in Listed Companies, 2007 O.J. (L 184) 17, amended by Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014, 2014 O.J. (L. 173) 190.

sive remedies: on the one hand, harmonized international legislation offers an effective platform to enhance investors' rights across diverse legal regimes; on the other hand, structural shortcomings along the chain of intermediaries can be fixed by giving an increased role to large institutional investors.

I.
The Problem: Legislative and Structural Complexities in the Exercise of Corporate Rights Across Borders

Besides bonds, corporations traditionally use equity to raise capital for their business activities. Domestic corporate law grants equity holders, regardless of whether they are nationals or foreigners, a number of residual rights as the ultimate owners of the corporation. For instance, every shareholder usually has the right to vote on director elections at shareholder meetings. In addition, shareholders have the right to receive dividends and access certain corporate information. Furthermore, many jurisdictions acknowledge the shareholder right to vote on fundamental corporate changes, such as mergers or dissolutions. Finally, other matters, like the appointment of an independent auditor or the approval of management compensation, are also submitted for shareholder approval by the board of directors in many jurisdictions.[20]

However, in today's capital markets, acquirers of stock are no longer confined to national boundaries.[21] On the contrary, domestic shareholders actively buy shares from corporations incorporated in other jurisdictions. This trend has caused an increase in foreign ownership in publicly listed companies in

20. *See generally* Andreas Cahn & David C. Donald, Comparative Company Law 465–573 (making an overall comparative explanation of shareholder voting rights, shareholder information rights, and shareholder meetings among the jurisdictions of the United States, the United Kingdom, and Germany).

21. *See* Philipp Paech, Cross-Border Issues of Securities Law: European Efforts to Support Securities Markets with a Coherent Legal Framework 8 (Directorate General for Internal Policies, Policy Department A: Economic and Scientific Policy, eds. 2011) (Briefing for the Economic and Monetary Affairs Committee of the European Parliament).

advanced capital markets, such as those in the United States[22] and the Member States of the European Union.[23] For instance, the stock ownership structure in the European Union has changed substantially in the last decades.[24] In particular, shares in the hands of foreign investors have increased from ten percent in 1975 to forty-five percent in 2012.[25] The United States shows a similar trend. The foreign ownership of U.S. stock has steadily grown since the 1970s.[26] Whereas overseas investors owned less than five percent of the U.S. equity market in 1965, the most recent data shows a peak of over fifteen percent in 2015.[27] U.K. markets portray identical patterns;[28] more than half of the investors in U.K. equity come from outside the country.[29]

These statistical figures demonstrate that exercising voting rights matters both across borders as well as domestically. Unfortunately, the increasing appetite of domestic investors to go overseas has not been matched by the establishment of an adequate legal and regulatory framework. Some studies portray an inverse relationship between voting turnouts at shareholder meetings and foreign ownership of domestic corpora-

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22. *See* DINAH WALKER, COUNCIL OF FOREIGN RELATIONS, QUARTERLY UPDATE: FOREIGN OWNERSHIP OF U.S. ASSETS 4 (2015), http://www.cfr.org/united-states/quarterly-update-foreign-ownership-us-assets/p25685.

23. *See* EUROPEAN COMMISSION, *Proposal for a Directive of the European Parliament and of the Counsel Amending Directive 2007/36/EC as Regards the Encouragement of Long-Term Shareholder Engagement and Directive 2013/34/EU as Regards Certain Elements of the Corporate Governance Statement*, COM (2014) 213 final, 2014/0121 (COD) 3 (noting that the proposed E.U. action provides significant added value because non-national shareholders hold some forty-four percent of the shares listed in E.U. public corporations).

24. *See* OBSERVATOIRE DE L'EPARGNE EUROPEENE & OF INSEAD OEE DATA SERVICES, WHO OWNS THE EUROPEAN ECONOMY? EVOLUTION OF THE OWNERSHIP OF EU-LISTED COMPANIES BETWEEN 1970 AND 2012 (MARKT/2012/077/H) 5 (2013).

25. *Id.*

26. *See* WALKER, *supra* note 22.

27. *Id.*

28. *See* Paul L. Davies, *Shareholders in the United Kingdom* 21 (European Corp. Governance Inst., Working Paper No. 280, 2015), http://ssrn.com/abstract=2557680.

29. *Id.* at 4, 27. Table 1 of the Davies paper sets out the data produced by the Office of National Statistics' surveys on the beneficial ownership of listed U.K. equities since 1963, in particular the ownership held by "the rest of the world," which was 53.2% in 2012. *Id.* at 27.

tions.[30] Some commentators have suggested that this passivity of foreign investors may be linked to structural shortcomings in cross-border voting mechanisms.[31] Exercising voting rights is already an uneasy task for investors in domestic jurisdictions; even more complexity exists in the international arena. Cross-border voting implies a number of hurdles for investors. This process is costly, time-consuming, and inefficient.[32] First, each jurisdiction has its own set of rules to exercise voting rights at general shareholder meetings.[33] Second, the issuer (the public corporation) and the end-investor are separated by a chain of financial intermediaries that hold the shares indirectly on behalf of the end-investor.[34] Third, each jurisdiction has a different understanding of how capital markets and their corresponding interactions with property, securities, and corporate laws should be organized.[35]

With the expansion of financial globalization, harmonization efforts in the area of capital markets law have not been accompanied by similar legal adjustments in the field of corporate law. Perhaps, the cause stems from the natural inclination of human beings to agree more easily on economics than politics, and the ownership and trading of domestic equity by foreign shareholders is an issue with deep socio-political impli-

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30. *See* Dirk Zetzsche, *Shareholder Passivity, Cross-Border Voting and the Shareholder Rights Directive*, 8 J. CORP. L. STUD. 289, 290–95 (2008) (noting that there is no empirical evidence, but discussing data from several studies measuring voting turnout and concluding that the data suggests that the bulk of the passive shareholders constitute foreign investors).

31. *Id.* at 295.

32. *See Removing Obstacles to Cross Border Voting*, INT'L CORP. GOVERNANCE NETWORK: VIEWPOINTS (July 2014), https://www.icgn.org/sites/default/files/Removing%20obstacles%20to%20cross%20border%20voting.pdf.

33. *See* B. Espen Eckbo & Giulia Paone, *Reforming Share-Voting Systems: The Case of Italy* 5 (Tuck Sch. of Bus. at Dartmouth, Working Paper No. 93, 2011), http://ssrn.com/abstract=1822287 (discussing the efforts to harmonize cross-border voting systems in the Member States of the European Union and particularly Italy).

34. *See* Eva Micheler, *Custody Chains and Assets Values, Why Crypto-Securities Are Worth Contemplating*, 73 CAMBRIDGE L.J. 2 (2015).

35. *See* Luc Thévenoz, *Who holds (Intermediated) Securities? Shareholders, Account Holders, and Nominees*, 15 UNIFORM L. REV. 845, 846, 849, 858 (2010) (arguing that we are in a diverse world of national policies, legal and regulatory provisions, and clearing and settlement arrangements).

cations[36] Whereas capital markets law seeks to enhance investors' ability to hold, dispose of, and pledge securities in a faster, cheaper, and safer way,[37] corporate governance aspires to strengthen owners' rights attached to their shares.[38] As a result, cost-efficient and more liquid transnational capital markets have been accomplished in many ways at the expense of less transparent cross-border corporate governance schemes.[39]

Sometimes, holding chains are quite short.[40] A direct holding system is characterized by the lack of intermediaries between companies and investors.[41] There are no intermediaries because companies offer the securities directly to end-investors.[42] As a result, a mere agreement whereby the company agrees to issue securities in favor of investors is sufficient to create a legal relationship between the parties.[43] Both the issuance and the contractual privity between the company and the investors are usually governed by domestic corporate law, which determines the rights and obligations for both parties.[44] The advantage of direct holding is that the issuer is able

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36. *See* Paech, *supra* note 8, at 2 (noting that the reform in the field of securities law has the caveat of being a political and complex area which makes it some kind of no-go area somewhere).

37. *See* VEIL, *supra* note 5, at 73–74 (making an overview to capital markets as trading venue where companies and business can raise equity or borrow capital and where these are publicly traded).

38. *See* GEOFFREY P. MILLER, THE LAW OF GOVERNANCE, RISK MANAGEMENT AND COMPLIANCE 17 (2014) (taking an excerpt from Lucian Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 883 (2005)). Professor Bebchuk argues that providing shareholders with more power would operate over time to improve all corporate governance arrangements.

39. *See* Paech, *supra* note 8, at 2. Paech argues that the reforms of capital markets aim to increase liquidity in the securities lending market, but that relevant reforms tend to trail behind in adjusting legal schemes to what is useful for the economy. *Id.* As a result, legal concepts and vested interests were given an intrinsic value in determining what was and was not good for efficiency and liquidity, thereby distorting the results. *Id.*

40. *See* PAECH, *supra* note 21, at 9 (referring to the case of the so-called transparent system); *see also* UNIDROIT, *supra* note 10, at 16–17.

41. *See* Thévenoz, *supra* note 35, at 850; *see also* Int'l Inst. for the Unification of Private Law, *Harmonised Substantive Rules Regarding Intermediated Securities—Two Seminars on the* UNIDROIT Project, 10 UNIFORM L. REV. 824, 824 (2005).

42. *See* Thévenoz, *supra* note 35, at 850.

43. *See* Michel Deschamps, *The Best Rules for Non-Intermediated Securities*, *in* TRANSNATIONAL SECURITIES LAW 1, 5 (Thomas Keijser ed., 2014).

44. *See* Garcimartín Alférez, *supra* note 15, at 757.

to identify the investor's identity and the occurrence of further transfer of securities.[45] In terms of scope, direct systems may encompass both bearer securities held physically[46] by the investor and securities directly registered with the company in the name of the investors.[47] The structure of a direct holding system would be as follows:

FIGURE 1

Other times, the situation is fairly complex.[48] Complications stem from the introduction of different financial intermediaries between companies and ultimate investors.[49] The process of intermediation was possible due to the adoption of the book-entry system in the recent years,[50] which does not use physical certificates.[51] Instead, intangible securities are the result of a process of either dematerialization[52] or immobilization.[53] Neither process requires actual delivery of tangible certificates; rather, a mere electronic debit-and-credit entry in the

45. *See* WENWEN LIANG, TITLE AND TITLE CONFLICTS IN RESPECT OF INTERMEDIATED SECURITIES UNDER ENGLISH LAW 1–2 (2013).

46. *Id.* at 2–3, 152.

47. *See id.*

48. *See* Eva Micheler, *Transfer of Intermediated Securities and Legal Certainty*, *in* TRANSNATIONAL SECURITIES LAW 117, 118–22 (Thomas Keijser ed., 2014); *see also* UNIDROIT, *supra* note 10, at 16–17.

49. *See* Micheler, *supra* note 48, at 122.

50. *See* Luc Thévenoz, *Transfer of Intermediated Securities*, *in* THE IMPACT OF THE GENEVA SECURITIES CONVENTION AND THE FUTURE EUROPEAN LEGISLATION 138 (Pierre-Henrik Conac et al. eds., 2013) (noting that the intermediated holding system developed in the 1960s and many statutes were enacted to reflect the change to the book-entry method).

51. *Id.* at 138–39.

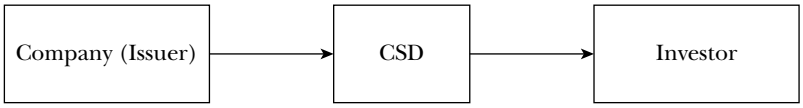
52. *See* LIANG, *supra* note 45, at 2–3.

53. *See id.* at 2 (noting that securities are instead immobilized when "all securities certificates or a global note representing the whole issue are deposited in a central securities depositary which maintains securities accounts for direct participants and records their holding on their securities accounts, direct participants then maintain securities accounts for its clients and record their holding, from tier to tier, up to a final investor who holds securities for himself").

relevant investor account made by the relevant intermediary is enough to complete a transfer in favor of another person.[54]

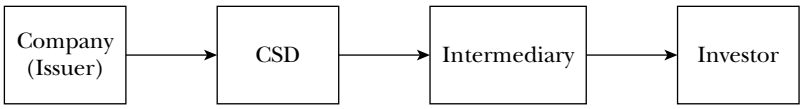
Intermediation takes place both domestically and across borders. On the one hand, domestic holding systems usually have a group of mechanisms to guarantee the internal soundness and compatibility of the complete chain of intermediaries.[55] The intermediaries may hold their securities according to different general patterns, which vary from jurisdiction to jurisdiction.[56] The simplest one is where a Central Securities Depository (CSD)[57] holds the securities in the name of the investor.[58]

FIGURE 2



A further step consists of the existence of a top-tier intermediary, such as a CSD, holding the securities in the name of another intermediary, and the latter holds them in the name of the ultimate investor.[59]

FIGURE 3



54. *See id.* at 3; *see also* Thévenoz, *supra* note 50, at 138–40.

55. *See* Int'l Inst. for the Unification of Private Law, *supra* note 41, at 829.

56. *See* Hideki Kanda, *The Law of Securities Trading in Emerging Markets: Book-Entry Operations and Property Law*, 16 UNIFORM L. REV. 13, 14–17 (2011).

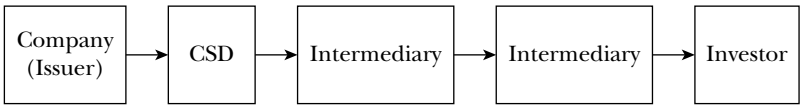
57. *See* PAECH, *supra* note 21, at 5, 19 (referring to the case of the so-called transparent systems and defining CSDs as "entities which keep securities centrally; usually they have a direct link with the issuer of the securities" (CPSS-IOSCO Glossary: "an institution for holding securities that enables securities transactions to be processed by means of book entries")).

58. *See id.* at 10–11; *see also* UNIDROIT, *supra* note 10, at 17.

59. *See* PAECH, *supra* note 21, at 10; *see also* UNIDROIT, *supra* note 10, at 18.

Naturally, the holding chain may become even more complex as the number of intermediaries increases at the level of the same jurisdiction.[60]

FIGURE 4



On the other hand, cross-border holding structures cause additional shortcomings. Imagine the following example.[61] Jean, a French retail investor, has his own securities investment strategy. In order to minimize risk, Jean decides to design a financial portfolio consisting of various types of assets from different capital markets around the world. Among the chosen assets, he holds bonds, stock, and other securities. Some of the stock is issued, for instance, by NewCo, a large U.S. multinational corporation incorporated in Delaware. However, under U.S. law, all stock issued by U.S. corporations must be held and registered in the name of Cede & Co., a subsidiary of the Depository Trust Company (DTC), which monopolizes the market for registering securities as the only CSD in the United States.[62] Based on these circumstances, there are two major problems. Opening a securities holding account abroad is a complex and costly task for Jean. Also, raising equity finance directly in every single domestic capital market is a burdensome legal process for NewCo.

A fair solution consists of building a chain of financial intermediaries, such as banks, investment firms, or securities brokers, between Jean, the ultimate investor, and NewCo, the issuer.[63] These intermediaries enhance efficiency and liquidity

60. *See* PAECH, *supra* note 21, at 11, fig.1; *see also* UNIDROIT, *supra* note 10, at 18.

61. *See, e.g.*, Thévenoz, *supra* note 10, at 398–99; *see also* Thévenoz, *supra* note 35, at 857–58; *see generally* PAECH, *supra* note 21, at 8; UNIDROIT, *supra* note 10, at 18–20.

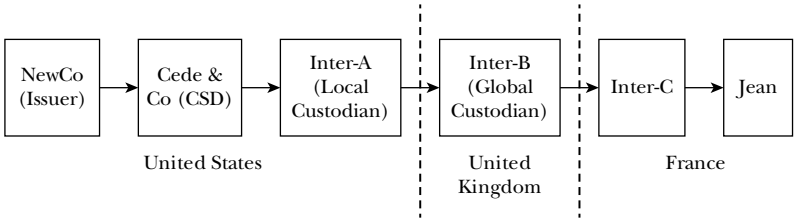
62. *See* Thévenoz, *supra* note 35, at 847 (noting that the DTC is at the top of the chain of intermediaries which create securities entitlements for their clients by setting a "credit" in the respective client's account, so that the client becomes the beneficial owner of the acquired securities).

63. *See id.* at 850; *see also* UNIDROIT, *supra* note 10, at 19–20.

in cross-border securities transactions.[64] Despite this positive cost-benefit analysis, intermediaries are established in different jurisdictions and subject to various legal regimes. In the example, Cede & Co., the CSD under U.S. regulations, is at the beginning of the chain. At the other end of the spectrum, Jean opens a securities account to acquire his NewCo shares through Inter-C, a local intermediary bank subject to French legislation. Because these shares are intermediated securities, Inter-C holds the stock in the name of and for the account of Jean.

The web of relationships[65] becomes even more intricate when, as occurs in many instances, the local intermediary in France, Inter-C, does not have a securities account opened with Cede & Co. to get direct access to NewCo shares. On the contrary, in-between Inter-C and Cede & Co., there is normally a U.S. local custodian, like Inter-A, that opens an immediate account with Cede & Co. Once the shares are credited to its account, Inter-A allocates the NewCo shares overseas through an external network of financial intermediaries. One of them usually is a global custodian, like Inter-B, with its headquarters in London. Finally, Inter-B may outsource its custody activity in the Eurozone to local intermediaries, like Inter-C, which credit NewCo shares to eventually allocate them to their French clients.

FIGURE 5



64. *See* UNIDROIT, Convention on Substantive Rules for Intermediated Securities, *supra* note 18, at Preamble ("Conscious of the growth and development of global capital markets and recognising the benefits of holding securities, or interests in securities, through intermediaries in increasing the liquidity of modern securities markets.").

65. For other similar examples of such webs of relationships, see Thévenoz, *supra* note 10, at 398–99, and Thévenoz, *supra* note 35, at 856–58. *See generally* PAECH, *supra* note 21, at 13–15; *see also* UNIDROIT, *supra* note 10, at 19–21.

An additional problem with the length of holding chains is the way in which intermediaries hold securities in the name of their clients, regardless of whether they are a lower intermediary or the indirect investor. Sometimes ultimate investors or intermediaries open individual separate accounts at a particular level of the holding chain, which makes it much easier to identify the actual holder of the securities; however, in other instances, cross-border intermediaries hold securities in pooled or omnibus accounts where the ultimate investor is not easily identifiable[66] since shares of numerous shareholders are commingled.[67] By consequence, the intermediary holder knows how many shares it holds on behalf of a plurality of investors, but it cannot exactly recognize the ultimate beneficial owner because it does not keep[68] separate accounts to register the shares held for each individual client.[69]

II.
The Consequences

In the described complicated cross-border scenario, if Jean wants to exercise his rights as NewCo's shareholder, he must cope with a number of challenging issues. First, vertically, four intermediaries separate him from NewCo. This long chain is comprised of the issuer (NewCo), the CSD (Cede & Co.), a U.S. local custodian (Inter-A), an English global custodian (Inter-B), the French intermediary (Inter-C), and the ultimate investor (Jean).[70] Second, relationships among intermediaries in the holding chain are governed by a series of bilateral contracts in a way that does not fully take into account the reality of the entire holding chain.[71] That means

66. *See* Mirjana Radović, *Supranational Regulation of Exercising Shareholders' Rights in Indirect Holding Systems*, Annals Fac. L. Belgrade L. Rev. 170, 172 (2012).

67. *See* Louise Gullifer, *Ownership of Securities: The Problems Caused by Intermediation*, *in* Intermediated Securities: Legal Problems and Practical Issues 1, 12–16 (Louise Gullifer & Jennifer Payne eds., 2010).

68. *See id.* at 17.

69. *See* Kanda, *supra* note 56, at 15 (noting that it is impossible to tell what amount of intermediated securities belongs to which customer).

70. *See* Micheler, *supra* note 34, at 2 (referring to cross-border investments that usually look like the following holding chain: Investor – Custodian 1 – Custodian 2 – Custodian 3 – Central securities depositary – Issuer).

71. *See* Eva Micheler, *Intermediated Securities and Legal Certainty* 6 (London Sch. of Econ., Law Dept., Working Paper No. 3/2014), http://ssrn.com/

that Jean is in privity of contract only with Inter-C, but not with any other intermediary in the holding chain.[72] Third, from a horizontal perspective, three different national laws are involved—those of the United States, the United Kingdom, and France—with different conceptions about corporate law, property, securities, and capital markets.[73] Therefore, under this full constellation of actors and legal systems, it is not unreasonable to believe that Jean, the ultimate investor and beneficial owner of his NewCo shares, may be dissuaded, or even prevented, from overcoming all these jurisdictional and contractual obstacles in order to be heard at shareholder meetings. Furthermore, the lineal structure described above can be extended to all international capital markets.[74]

A. *A Constellation of Contractual Relationships*

Assuming that the relevant local legislation (in principle, the law of the issuer) entitles cross-border investors to exercise their voting rights against the issuer, a preliminary problem should be solved: the bridge between the issuer and the ultimate investor is formed by a long set of bilateral (and isolated) contractual relationships among intermediaries.[75] In the example, if Jean desires to exercise his rights at a NewCo shareholder meeting in Delaware, provided that he is entitled to do so according to U.S. law, he needs to move up the securities holding ladder until he reaches NewCo. However, as mentioned earlier, Jean, the French investor, cannot jump over all the cross-border intermediaries. Instead, he only has an immediate contractual relationship with his bank in France, Inter-C. In that sense, he is at the will of his bank regarding his voting rights. If the terms of the contract acknowledge such an obli-

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abstract=2336889. Micheler notes that in an intermediation chain, there is a contract (Contract 1) between the Central Securities Depository (CSD) and the intermediary directly connected with the CSD (Intermediary 1). Intermediary 1 then has a contract (Contract 2) with Intermediary 2. Intermediary 2 has a contract (Contract 3) with Intermediary 3. Intermediary 3 has a contract (Contract 4) with Intermediary 4. Finally, Intermediary 4 has a contract (Contract 5) with the ultimate investor. *Id.*

72. *Id.*

73. *See* Kanda, *supra* note 14, at 274–76.

74. *See* PAECH, *supra* note 21, at 13.

75. *See* Micheler, *supra* note 71.

gation, Inter-C must exercise Jean's voting rights on his behalf.[76]

The story is not over yet. Jean's efforts run the risk of being useless. Inter-C contractually depends on Inter-B, its upper intermediary, and Inter-B, in turn, depends on Inter-A to pass the voting rights up the holding chain. In a nutshell, Jean is held hostage by cross-border intermediaries in exercising his corporate voting rights. A single fault in the holding chain would derail the process of transferring the voting rights from NewCo to Jean and from Jean to NewCo. This could happen either because any of the bilateral contracts among the different intermediaries does not acknowledge the voting rights or because one of the different local legal systems (United States, United Kingdom, or France) does not recognize such intermediaries' obligations as mandatory.[77] To cope with this situation, Jean may agree with Inter-C to include a provision in their bilateral contract which obliges Inter-C to include in its bilateral contract with Inter-B a similar provision with the purpose to ensure the transfer of Jean's rights further up the securities holding chain. However, because Jean is contractually bound neither with Inter-B nor Inter-A, he may encounter serious hurdles in passing his corporate rights beyond Inter-B.[78]

The web of relationships among cross-border intermediaries is mostly governed by contracts.[79] Their provisions are the result of the contractual freedom among the concerned parties. However, ultimate retail investors are faced with a variety of inconveniences. On one side, they have little market power to influence the contractual relationships between each financial intermediary.[80] Disseminated share-

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76. *Id.* at 6–7 (noting that, if the end-investor is merely a retail customer without any bargaining power vis-à-vis his intermediary, he or she is inclined to accept the standard terms offered by the intermediary).

77. *See* Micheler, *supra* note 34, at 67; *see also* UNIDROIT *supra* note 10, at 20.

78. *See* Micheler, *supra* note 71, at 7 (noting that the process of drafting contractual documentation repeats the same terms and conditions at each level of the securities holding chain and explaining, "[e]ven if an ultimate investor is able to and interested in negotiating the terms of contract 5 which he enters into with Intermediary 4, he does not have the right to see contracts 1, 2, 3, or 4 or request amendments to these contracts").

79. *Id.* at 6.

80. *See* Michael C. Schouten, *The Political Economy of Cross-Border Europe*, 16 COLUM. J. EUR. L. 1, 5, 35–36 (2010).

holder structures are unable to prevent large intermediaries from deviating from the investors' best interests. In these cases, ultimate investors do not have very compelling economic incentives to invest personal resources in improving their voting mechanisms along the holding chain.[81] Because of the high degree of dissemination, retail investors need to find more effective solutions for the free rider problem. On the other side, intermediaries do not have sound economic grounds to exercise voting rights because all dividends are accrued to the ultimate investor.[82]

B. *Shortcomings of the Different Domestic Legal Frameworks in Place*

A real example of how chains of intermediaries reduce legal certainty for end-investors can be drawn from a recent opinion in the United Kingdom.[83] In *Eckerle*, an English corporation was headquartered in Germany.[84] The English shares were also listed on the German stock market.[85] At the 2011 shareholder meeting, three minority shareholders, holding altogether around six percent of the equity, lost the proposal for dividend distribution against a coalition of majority shareholders.[86] One year later, the resulting board of directors, representing the interests of the majority shareholders, proposed to turn the corporation into a private, limited one.[87] The plan jeopardized the shares' marketability, causing them to lose much of their market value.[88] As a result, the minority shareholders filed a complaint before English courts, seeking pro-

81. *See* FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 66–67 (1st ed. 1991) ("When many are entitled to vote, none expects his votes to decide the contest. Consequently, none of the voters has the appropriate incentive to study the firm's affairs and vote intelligently. If, for example, a given election could result in each voter gaining or losing $1000, and if each is sure that the election will come out the same way whether or not he participates, then the voter's optimal investment in information is zero.").

82. *See* Radović, *supra* note 66, at 173.

83. Eckerle v. Wickeder Westfalenstahl GmbH, [2013] EWHC (Ch) 68; *see also* Micheler, *supra* note 48, at 120–21; Micheler, *supra* note 34, at 15–17.

84. *See Eckerle*, [2013] EWHC.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

tection on the grounds that such a change triggered effects similar to a takeover action.[89] They argued that the court should force the majority shareholders to buy out the residual shares at the pre-existing market price.[90]

Basically, *Eckerle* revolved around the issue of whether those minority shareholders had legal standing to file an action to set aside the corporate transformation approved by the majority of shareholders. According to the U.K. Companies Act, the plaintiff shareholders were required to hold at least five percent of the company's share capital measured in nominal terms in order to have standing.[91] To resolve this matter, the court answered two essential questions. Firstly, which of the three plaintiffs could be strictly considered legal *holders* of the intermediated shares according to English law?[92] Secondly, once the shareholders were identified, how could their shareholdings be computed for the five percent minimum stake to have standing before courts?[93]

Eventually, the court ignored the cross-border reality of the intermediated shares. Because the corporation was incorporated in England, the court inspected the shareholders' register in that country.[94] The register contained only two references, one of an individual, the firm's CEO, holding one share, and one of a financial intermediary, the Bank of New York Depository Ltd (B.N.Y.D.), which held the remaining shares.[95] Unfortunately for the plaintiffs, there was no hint of the alleged shareholdings in the shareholders' register. B.N.Y.D. was a sub-intermediary that held the shares on trust for an upper-tier intermediary in Germany, Clearstream AG, the company in charge of securities trading in the German stock exchange.[96] Even more surprising in light of the court's ruling, the shares were only listed in that country.[97] Naturally,

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89. *Id.* at 204–10; *see also* Micheler, *supra* note 48, at 120–21; Micheler, *supra* note 34, at 15–17.

90. *Id.* at 197.

91. *Id.* at 197.

92. *Id.* at 204–05 (discussing the differences in English law between allotment and registration).

93. *Id.* at 205.

94. *See* Micheler, *supra* note 48, at 119–20 (discussing the cross-border complexity of intermediated shares and the registration issue in *Eckerle*).

95. *Eckerle* [2013] EWCH, at 202–04.

96. *Id.* at 202–04.

97. *Id.* at 200.

like B.N.Y.D., all the Clearstream clients were required to be financial entities responsible for managing the electronic trading orders received from the ultimate investors, like the plaintiffs.[98] As a result, the plaintiff shareholders were not direct owners of the English corporation; instead, they held an indirect equity interest through a cross-border chain of custodians in Germany and the United Kingdom, which was subject to different corporate laws.[99]

This real example shows why holding shares through cross-border intermediaries leads to numerous shortcomings for modern corporate law.[100] The court eventually denied the standing and dismissed the complaint based on a literal interpretation of the Companies Act that a *shareholder* or *the holder of a share* was only one whose name was formally registered in the shareholders' register.[101] Therefore, investors who benefit from the ultimate economic interest in shares registered in the name of a third party cannot be formally deemed *shareholders*.[102] In other words, the court set a maxim: One who is not in the issuer's books does not exist for the purposes of national corporate law.

If the conclusions from *Eckerle* were transposed to the complex scenario described for Jean above, he would be deprived of all enforceable rights against NewCo, the issuer of his shares, unless U.S. law provided for an appropriate legal solution. But again, the legal uncertainty persists because the solution is left in the hands of the relevant national legislature.

In *Eckerle*, the standard protection set by the English court for the holders of intermediated shares was very low. The court disregarded the underlying financial reality among the parties involved. Certainly, the plaintiffs were not registered as *formal shareholders* in the issuer's books in the United Kingdom. Nonetheless, it is hard to deny the fact that the ultimate investors are indeed the parties who bear the economic risk of their

98. *Id.* at 202–04.

99. *Id.* at 204–10; *see* Micheler *supra* note 48, at 120–21; *see also* Micheler, *supra* note 34, at 15–17.

100. *See* LOUIS GULLIVER & JENNIFER PAYNE, INTERMEDIATED SECURITIES: LEGAL PROBLEMS AND PRACTICAL ISSUES 87–208 (2010).

101. *See Eckerle* [2013] EWCH, at 204–05; *see also* Micheler, *supra* note 38, at 121.

102. *See* Micheler, *supra* note 48, at 121.

investment decisions.[103] In fact, the court itself indicated that the outcome achieved was not a particularly adequate one since the minority shareholders lost the kind of legal protection that every shareholder, foreign or national, would have expected to enjoy under the Companies Act.[104] However, the court believed that a different interpretation of the law would have involved "an impermissible form of judicial legislation."[105] The judicial response in *Eckerle*, mainly due to an outdated legislative approach about modern international corporate and securities law,[106] could be viewed as not providing the level of legal hospitality that foreign investors might expect from the courts of the City of London, one of the largest financial centers in the world. Furthermore, the decision does not reflect the trends and practices in the international securities markets.[107] Who would be willing to acquire shares under foreign law when the Companies Act denies the basic rights for risk-bearers abroad? From the very beginning, German risk-bearers believed that they held U.K. shares, but they found out that English law did not recognize them as actual shareholders.[108] Consequently, in order to bring more legitimacy and transparency to the process of corporate voting across jurisdictions, securities issuers should gradually grant financial in-

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103. *See* Schouten, *supra* note 80, at 4 (noting that one of the issues created by holding chains is that "the person who is legally entitled to vote might turn out to be a financial intermediary instead of the investor who bears the risk of the investment (the 'ultimate investor')").

104. *See Eckerle* [2013] EWHC, at 209–10 ("I am conscious that my reading of the Act does deprive the claimants as indirect investors of the sort of protection which those who formulated the 2006 Act thought ought to be extended to minority shareholders. That is not a particularly comfortable conclusion at which to arrive[.]").

105. *Id.*

106. *See* Paech, *supra* note 8, at 3 (noting that the practice in developed markets is governed by intermediation and the centralized clearing and settlement of securities, which enhances liquidity and reduces costs. However, jurisdictions have not even digested the emergence of all these aforementioned phenomena, consequently, laws have become complex and inconsistent with the underlying economic reality).

107. *Id.* (noting that legal certainty requires that the law be adapted to the new reality of intermediated systems in capital markets. This lack of adaptation causes, among other problems, the misattribution of rights by intermediaries, against which courts and legislatures have found complex or even mutually exclusive solutions).

108. *See* Micheler, *supra* note 48, at 120–21.

termediaries major access to the identity of the ultimate account holders, and national legislatures should enact softer rules on end-investors disclosure and communication.

The fact that an intermediary, by merely being registered in the shareholders' book of a company, can be empowered with all the rights stemming from the shares creates a dangerous interpretation that jeopardizes the traditional doctrines of the principal-agent theory.[109] According to the principal–agent theory, shareholders, as the beneficial owners of the company, lack sufficient business expertise and specialized knowledge to deal with complex business situations.[110] In order to overcome this deficiency, they appoint a group of people—a board of directors or a management team—as an agent to manage their assets on their behalf and for their best interests.[111] Despite this clear mandate, on occasion, the managers' self-interests deviate from those of their legitimate principals and, as a result, so-called "agency costs" emerge.[112] Jurisdictions with various distinct legal traditions and corporate governance systems have developed different devices to respond to the problem of separation of ownership and control, but shareholder voting has been the most important so far.

But what if the ultimate risk-bearers are not entitled to vote according to the law of the issuer? Or, perhaps, it is the law of the intermediary that impedes investor voting. How could they monitor and oversee the board of directors if they are deprived of the basic alignment mechanisms? How would risk-bearers implement incentives or measures against managers' potential egregious behavior when they are not even recognized as *owners* by a local court? How can they vindicate their rights arising out of their investment at the shareholder meeting?[113] After all, they are the ones who bear the risk and have an economic incentive to do that. Is it fair to deprive ulti-

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109. *See* Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 26 J.L. & ECON. 301, 304 (1983).

110. *Id.* at 308.

111. *Id.* at 311–12.

112. *Id.*

113. *See* Marcel Kahan & Edward Rock, *The Hanging Chads of Corporate Voting*, 96 GEO. L.J. 1227 (2008) (explaining the complexities of the U.S. corporate voting system and the underlying intermediated-ownership structure and how these problems create fundamental legal challenges for the shareholders' exercise of corporate rights).

mate investors of all their rights because a financial intermediary was registered instead in a shareholders' register?[114] Does the relevant intermediary have an incentive to properly represent the interests of the end-investors at shareholder meetings? Part III presents answers to many of these questions.

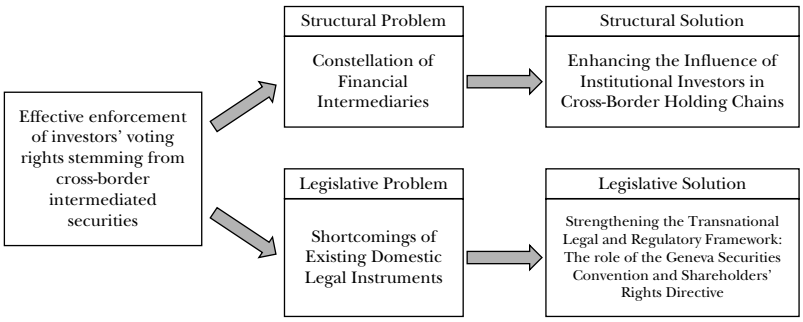
III.
The Remedies

Answering questions related to shareholders' rights within intermediated securities holding systems is certainly not a simple undertaking. To remedy the problems caused by the cross-border market infrastructure, ultimate investors may resort to different solutions. There could be room for more flexible alternatives, but each require the involvement, to a greater or lesser extent, of all the parties concerned: domestic legislatures, international organizations, corporations, financial regulators, intermediaries, and, of course, ultimate investors. The most satisfactory remedy should be the one where ultimate *actual* investors who hold intermediated securities are capable of exercising their corporate rights as if they were actually *formal* investors.

To achieve this goal, a combination of legislative and structural remedies would be necessary. If either is lacking, end-investors' rights are hardly exercisable through the cross-border holding chain against the companies, given the risks of malfunctioning. The solution therefore involves, first, giving a greater role to institutional investors to influence contractual relationships vis-à-vis intermediaries, and second, increasing momentum for transnational legal instruments, like the Geneva Securities Convention or the Shareholder Rights Directive, to counter the resistance and inflexibility of national legislation. The Chart below sheds light on the proposed strategy.

114. *See* Schouten, *supra* note 80.

FIGURE 6



A. *Structural Solution: Enhancing the Influence of Institutional Investors in Cross-Border Securities Holding Chains*

Results from the process of negotiation among the major interlocutors in holding chains have been relatively meager thus far. Some parties, particularly financial intermediaries, have a strong interest in preserving the cross-border complexity along the holding chain.[115] On the one hand, if intermediaries are required (by law or by contract) to provide voting services, they would not miss the opportunity to charge high fees.[116] On the other hand, if they are not required to provide that sort of services, they would not have any incentive to promote a change in the contractual conditions with ultimate investors because intermediaries are not the beneficial owners of such agency activity.[117]

In this context, institutional investors may be the missing piece of the puzzle. Rapid growth has rendered institutional investors well-prepared to vindicate voting rights on behalf of not only their clients but also all small retail shareholders. With their increasing weight in the shareholder base of publicly traded corporations, institutional investors enjoy favorable conditions of negotiation against financial intermediaries. This tilts the negotiating balance significantly in their favor, generating positive effects for all ultimate owners, regardless of whether they are represented by institutional shareholders or act in their own name.

115. *See id.*
116. *Id.* at 5.
117. *Id.* at 35.

As an example, this section will focus on the capital markets of major jurisdictions. Traditionally, most of the U.S. shareholder base has been defined by its large degree of dispersion.[118] Similarly, the United Kingdom has traditionally been classified as a jurisdiction with a widely held ownership base in public corporations.[119] However, both jurisdictions have progressively evolved to positions where most of the shares are held by a small number of institutional shareholders.[120] In contrast, jurisdictions that have been usually characterized by a highly concentrated domestic shareholder base, such as those of continental Europe, have gone through a process of shareholder dispersion due to the increasing receptiveness of domestic public corporations to international institutional investors.[121] Within the European Union, most securities are held by institutional investors, especially with respect to cross-border relationships.[122]

In the United Kingdom, in particular, institutional investors have become very powerful in recent years,[123] and the degree of share concentration by institutional investors has risen dramatically in the last decades.[124] Additionally, another collateral change in U.K. shareholder ownership comes from a shift in the nationality of investors who hold shares in public corporations.[125] Observing an average publicly traded company today, many of the institutional investors are from over-

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118. *See* CHRISTIAN ANDRES ET AL., CORPORATE GOVERNANCE: A SYNTHESIS OF THEORY, RESEARCH, AND PRACTICE 43 (H. Kent Baker & Ronald Anderson, eds. 2010).

119. *See id.* at 44.

120. *See generally* Paul Davies, *Shareholders in the United Kingdom* (Eur. Corp. Governance Inst., Working Paper No. 280/2015, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2557680 (explaining the grounds for the rise of institutional shareholders in the United Kingdom); *see also* Commission on Corporate Governance, *Report of the New York Stock Exchange*, 12 (Sept. 23, 2010) (commenting that institutional investors have dramatically increased their share ownership since the 1950s).

121. *See* Enriques & Volpin, *supra* note 6, at 128 (noting that the reforms in continental Europe with regard to corporate governance have been made with the purpose of increasing the attractiveness of national capital markets to international investors).

122. *See* OBSERVATOIRE DE L'EPARGNE EUROPEENE, *supra* note 24.

123. *See* Klaus J. Hopt, *Comparative Corporate Governance: The State of the Art and International Regulation*, 59 AM. J. COMP. L. 1, 9 (2011).

124. *See* Davies, *supra* note 120, at 3–4.

125. *Id.* at 21.

seas,[126] mainly the United States and continental Europe. This shift toward cross-border intermediated securities shows the increasing weight of international institutional investors. The rapid internationalization of British financial markets has altered the origin and the level of share concentration by institutional investors.[127] By way of contrast, in 1963, retail individuals owed 54% of all publicly traded shares in the United Kingdom as compared to the remaining 46%, owned generally by various sorts of institutional investors.[128] In 2012, 89.3% of the shareholder base was composed of institutional investors with 53.2% from overseas.[129]

Similar conclusions can be drawn based on the U.S. market. The first decade of the twenty-first century witnessed tremendous changes in the composition and influence exerted by shareholders of publicly held corporations.[130] The current complexity of the U.S. shareholder reality can no longer be described in terms of individuals versus institutions. "[I]t's all institutions now . . . . [For] the average company, 75 percent of their shares are owned by institutions, answered a scholar to a qualitative research survey commissioned by the Aspen Business and Society Program in late 2013."[131] Therefore, only 25% of the corporate equity is owned by retail investors, an amount that is very far from the former 93% held sixty years ago.[132] This data proves a clear shift away from a culture of

126. *Id.* at 6.

127. *Id.* at 3–4.

128. *Id.* at 3. In particular, insurance companies, 10%; pension funds, 6.4%; other financial institutions, 11.3%; unit and investment trusts, 1.3%; banks, 1.3%; and overseas institutional investors, 7%. *See id.* at 27. Table 1 sets out the data produced by the Office of National Statistics' surveys of the beneficial ownership of listed U.K. equities since 1963. *Id.*

129. *Id.*

130. NYSE, REPORT OF THE NEW YORK STOCK EXCHANGE COMMISSION ON CORPORATE GOVERNANCE 12 (2010).

131. ASPEN INST. BUS. & SOC'Y PROGRAM, UNPACKING CORPORATE PURPOSE: A REPORT ON THE BELIEFS OF EXECUTIVES, INVESTORS AND SCHOLARS 28 (2014), https://dorutodpt4twd.cloudfront.net/content/uploads/files/content/upload/Unpacking%20Corporate%20Purpose%20May%202014.pdf.

132. ABA SECTION OF BUS. LAW CORP. GOVERNANCE COMM., REPORT OF THE TASK FORCE ON DELINEATION OF GOVERNANCE ROLES AND RESPONSIBILITIES 15 (2009); *see also* ASPEN INST. BUS. & SOC'Y PROGRAM, OVERCOMING SHORT-TERMISM 2 (2009), http://www.aspeninstitute.org/sites/default/files/content/docs/pubs/overcome_short_state0909_0.pdf (stating that one third of corporate equity is held by mutual and hedge funds in the United States.).

individual ownership toward one of institutional ownership, especially ownership in those companies with the largest market capitalization.[133]

The information above demonstrates that the trend of share concentration by institutional investors is conclusive.[134] To provide an example, investment managers, like Blackrock or Fidelity, practically have a ubiquitous presence in corporate America.[135] Blackrock, in particular, manages around $4 trillion in assets,[136] enabling it to be "the single largest shareholder in one of every five United States companies."[137] For instance, Blackrock controls a large block of shares in key companies for the national economy, such as JPMorgan Chase, Wal-Mart, and Chevron, owning "5 percent or more of roughly 40 percent of all publicly traded companies in the country."[138] These figures are indicative of the enormous impact that these asset managers can exert on cross-border securities intermediaries. Furthermore, in 2012, Blackrock cast votes on behalf of its clients on 129,814 proposals at 14,872 shareholder meetings around the world, 3800 of them for U.S. corporations.[139] With such large stakes and power to influence, if Blackrock decided that the applicable contractual terms were actually detrimental to their clients (the ultimate beneficial owners), the existing securities holding terms could be subject to a substantial review.

This Note has already argued that institutional investors have sufficient market power to affect intermediaries' behavior. Despite this ability, such investors' propensity to vote depends primarily on the procedural costs of voting, or the costs involved with the technical process of exercising the vote. Since these costs are particularly high in the present cross-border context, additional legal reforms and technological pro-

133. *Id.*

134. *See* Guangyao Zhu, The Extinction of Widely Held Public Companies 11–13, 40 (February 13, 2015) (unpublished manuscript), https://www.dropbox.com/s/uw819g1tnphjnzh/JMP-Guangyao-Zhu.pdf?dl=0.

135. *See* David Yermack, Private Benefits of Control—Restructuring Firms & Industries 4 (Apr. 2015) (unpublished manuscript) (on file with author).

136. *See* Susanne Craig, *The Giant Shareholders, Quietly Stirring*, N.Y. TIMES (May 18, 2013), http://www.nytimes.com/2013/05/19/business/blackrock-a-shareholding-giant-is-quietly-stirring.html?_r=0.

137. *Id.*

138. *Id.*

139. *Id.*

gress aimed at lowering these costs will encourage foreign institutional investors to vote.[140] The applicability of "*blockchain*" or "*distributed ledger*" technology could be a solution to increase speed and reduce costs in processing investors' votes and other corporate actions in cross-border securities holding structures. Nonetheless, market regulators and national legislatures are still considering the potential benefits and drawbacks of these cutting-edge mechanisms.[141]

B. *Legislative Solution: Strengthening the Transnational Legal and Regulatory Framework*

Enhancing the role of institutional investors to influence the contractual terms along intermediated securities holding chains is a necessary but hardly sufficient ingredient for an effective collective response in favor of investors' rights. The legal construction of traditional corporate law has been based on identifying the formally recorded holder of the shares.[142] This issue is paramount to determining who can actually exercise the rights attached to the shares.[143] Nonetheless, domestic legislatures never thought about transferability in heavily interconnected capital markets or the resulting impact from ongoing financial globalization. They simply enacted rules based on thinking of domestic acquirers for domestic issuers. As a result, the applicable corporate law is still broadly national.[144] By contrast, modern capital markets have been characterized by a heavy internationalization due to electronic book-entry sys-

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140. *See* Zetzsche, *supra* note 30, at 302–03.

141. *See* Nora Rachman & Maria Vermaas, *Corporate Actions in the Intermediated System: Bridging the Gap Between Issuer and Investor*, *in* TRANSNATIONAL SECURITIES LAW ¶ N-6-12 (Thomas Keijser ed., 2016) (Mar. 2016 online update to 2014 Edition from Oxford Legal Research Library).

142. *See* Thévenoz, *supra* note 35, at 846 (referring to the transparent systems in place in some jurisdictions where shareholders of a (domestic) company can be individually identified); *see also* Luca Enriques, Matteo Gargantini & Valerio Novembre, *Mandatory and Contract-based Shareholding Disclosure,* 15 UNIF. L. REV. 713, 718–724 (2010).

143. *See* Nora Rachman, *Securities Trading Meets Corporate Law: What Are "Securities" and Who Holds Them? Trends and Patterns in Brazilian Law*, 15 UNIF. L. REV. 833, 836 (2010).

144. *See* Philipp Paech, Intermediated Securities and Conflict of Laws 1 (June 14, 2014) (conference on 'Investing in Securities' Harris Manchester College, University of Oxford, May 16, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2451030.

tems.[145] In such systems, securities are represented by credits made in the securities accounts kept by financial intermediaries at each link of the holding chain.[146] While purely domestic systems may be consistent and sound from the top intermediary to the ultimate investor, in today's capital markets, most cross-border securities transactions are completed with a network of financial intermediaries located in different jurisdictions that credit or debit the securities to the corresponding securities account.[147]

As a consequence of this legislative isolation, various jurisdictions devised different approaches to modern securities and corporate law. *Eckerle* is only one of many examples of how national legislatures have set out their own particular vision about corporate concepts such as securities, issuers, shareholders, investors' rights, or intermediated holding chains.[148] In fact, some scholars distinguish five distinctive holding models with direct implications for the conceptions of property, securities, corporate governance, and capital markets: the trust system (found in the United Kingdom, Ireland, and most of the Commonwealth countries), the securities entitlement regime (with a presence in the United States and Canada), the pooled property or co-ownership model (in Germany, Austria, and Japan), the transparent model (in Spain, China, Poland, Brazil, and the Scandinavian countries), and the ownership scheme (found in France and other countries following the Napoleonic Code).[149] Against this background, if a securities holding chain begins or ends in another jurisdiction with a different characterization about the bundle of rights that ultimate investors may receive and enforce, a problem of legal uncertainty regarding investor protection may arise.

The fragmentation of legislation can be sustainably addressed only through international cooperation, by adopting

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145. *See* Faria, *supra* note 13, at 200.

146. *See* Francisco J. Garcimartín Alférez, *Disposition and Acquisition of Intermediated Securities: The Geneva Convention and Traditional Property Law,* 15 UNIF. L. REV. 743 (2010).

147. *See Harmonised Substantive Rules Regarding Intermediated Securities—Two Seminars on the* UNIDROIT Project, 10 UNIF. L. REV. 824, 825 (2005).

148. *See, e.g.*, Rachman, *supra* note 143, at 836–39 (comparing Brazilian corporate law to the Geneva Securities Convention).

149. *See* PAECH, *supra* note 21, at 14–19 (providing a full explanation and description of each securities holding scheme).

legal instruments with binding effects for the contracting states. Efficient cross-border holding chains are not especially useful if states do not assume the commitment to acknowledge corporate rights for intermediated ultimate investors vis-à-vis the issuer. The Geneva Securities Convention is the most important endeavor carried out by the international community to tackle the problem concerning the exercise of cross-border voting rights of intermediated securities. Within the European Union, the issue has been partially solved thanks to the Shareholder Rights Directive. Further improvements in the field have nonetheless been subjected to an intense debate with the purpose of facilitating the exercise of corporate rights in the area of E.U. securities law.[150]

1. *The Geneva Securities Convention*

The 2009 Geneva Securities Convention, in particular, is currently the most ambitious transnational legal instrument. Although not yet entered into force, it seeks, in a cross-border scenario, the global compatibility and convergence of substantive legal frameworks and, at the national level, aims to ensure the internal soundness and well-functioning of the domestic holding structure.[151]

The Convention devotes specific provisions to the substantive regulation of the exercise of investors' rights, on the one hand, and the obligations of financial intermediaries, on the other hand.[152] First, the Convention leaves intact the corporate rights conferred to investors by the relevant domestic

150. *See* EUR. COMM'N, SUMMARY OF THE SEVENTH MEETING OF THE MEMBER STATES WORKING GROUP ON SECURITIES LAW LEGISLATION (2013), http://ec.europa.eu/finance/financial-markets/docs/securities-law/130524_minutes_en.pdf (discussing the possible ways to improve legal certainty and client asset protection as well as facilitate the exercise of corporate rights in the area of securities law).

151. *See* ROY GOODE, HERBERT KRONKE & EWAN MCKENDRICK, TRANSNATIONAL COMMERCIAL LAW 433–34 (2d ed. 2015) (quoting and discussing the Preamble). See particularly the Second, Third, and Fourth items of the Preamble, emphasizing the protection of persons who acquire or hold intermediated securities, the reduction of legal and systemic risks in domestic and cross-border transactions, and the need to enhance the international compatibility of legal systems and the soundness of rules relating to intermediated securities.

152. For a full explanation and interpretation of the Geneva Securities Convention, see HIDEKI KANDA ET AL., OFFICIAL COMMENTARY ON THE

law.[153] Moreover, the Convention does not expressly set out who the corporation must recognize as the holder of securities (either the account holder, the intermediary, or a third party).[154]

Article 9, titled "Intermediated Securities," expressly states a list of core corporate rights attached to securities that investors must receive and be able to exercise, including dividend distributions and voting rights.[155] Together with this bundle of rights, the domestic (non-Convention) law may provide additional corporate rights to investors,[156] such as the right to access corporate information.[157] The breakthrough of this new approach provided by the Convention is not how corporate rights should come into existence or be regulated (since this aspect depends on the relevant domestic law) but rather how they should flow through the chain of intermediaries across borders.[158] For that reason, Article 10 of the Convention reinforces Article 9 with an essential provision requiring financial intermediaries to pass the voting rights attached to the securities down through the intermediary chain to whoever is entitled to receive and exercise them.[159] Article 10 states that "[a]n intermediary must take appropriate measures to enable its account holders to receive and exercise the rights specified in Article 9(1)."[160] Specifically, the intermediary must "give effect to any instructions given by the account holder or other authorized person, as provided by the non-Convention, the account agreement or the uniform rules of a securities settlement system"[161] and "regularly pass on to account holders information relating to intermediated securities, including necessary for account holders to exercise rights, if provided by the

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UNIDROIT CONVENTION ON SUBSTANTIVE RULES FOR INTERMEDIATED SECURITIES (2012).

153. *See* Thévenoz, *supra* note 35, at 848–49.

154. *Id.* at 849.

155. UNIDROIT, Convention on Substantive Rules for Intermediated Securities, *supra* note 18, at art. 9(1)(a)(i).

156. *Id.* at art. 9(1)(a)(ii) and 9(1)(d).

157. *See* GOODE, KRONKE & MCKENDRICK, *supra* note 151, at 435.

158. *Id.*

159. *Id.*; *see also* Thévenoz, *supra* note 35, at 848–49 n.8.

160. UNIDROIT, Convention on Substantive Rules for Intermediated Securities, *supra* note 19, at art. 10(1).

161. *Id.* at art. 10(2)(c).

non-Convention law, the account agreement or the uniform rules of a securities settlement system."[162]

In short, the Convention represents a major example of how international cooperation is absolutely critical to harmonize transnational rules in order to enhance legal certainty in the exercise of corporate rights arising out of securities held indirectly by investors.[163]

2. *The Shareholder Rights Directive*

Although less geographically ambitious than the Geneva Securities Convention, the Shareholder Rights Directive has proven to be a more successful legal instrument in the process of harmonizing intermediated securities regimes, in particular with regard to the strengthening of voting rights by shareholders across the European Union.[164] In a wave of corporate governance reforms after the series of financial and accounting scandals that occurred at the start of the 2000s, the E.U. legislature deemed it urgent to give shareholders a greater voice in cross-border voting.[165] Both fragmented national regulation and multiple layers of financial intermediaries between securities issuers and end-investors across Member States were considered eminent obstacles that needed to be tackled through intensive legal harmonization.[166] The E.U. legislature became aware of the inverse relationship between complexity of intermediated holding structures, in addition to legal disorganization among Member States, and cross-border corporate voting efficiency. Since end-investors were frequently trapped by the lack of cooperation of financial intermediaries, who enjoyed no economic return when exercising corporate rights on be-

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162. *Id.* at art. 10(2)(e).

163. *See* José Angelo Estrella Faria, *Sphere of Application of the* UNIDROIT Convention on Substantive Rules for Intermediated Securities and Future Work by UNIDROIT on a Legislative Guide for Emerging Financial Markets, 15 UNIF. L. REV. 357, 357 (2010) (asserting that the main purpose of the *Convention* is to offer harmonized transnational rules for the purpose of reducing the legal risk associated with the holding of securities through intermediaries).

164. *See* Shareholder Rights Directive 2007/36, 2007 O.J. (L 184) (EC), recital (2).

165. *See id.* recital (5) (considering that significant proportions of shares in listed companies are held by shareholders who do not reside in the Member State in which the company has its registered office).

166. *See id.* recitals (11), (14).

half of end-investors,[167] further substantive reforms were necessary.

Despite the good intentions of the E.U. legislature to provide increased legal certainty in casting corporate votes at shareholder meetings,[168] the Shareholder Rights Directive has suffered from a couple of substantial flaws since its inception. First, *shareholder* was defined as "the natural or legal person that is recognized as a shareholder under the applicable law."[169] That definition, set forth in Article 2(b), was not the most suitable match for the current standards that cross-border intermediated securities holding chains demand. Instead of conceptualizing a binding, harmonized definition of *shareholder*—as the ultimate holder of corporate rights—across Member States, the E.U. legislature preferred to leave the final answer to each national legislature.[170] As *Eckerle* shows, the issue is that the legal concept of shareholder varies from jurisdiction to jurisdiction. For instance, in those jurisdictions where the formal definition of shareholders does not encompass the idea of actual ultimate beneficial owners or end-investors, the duality problem between risk-bearers and legal owners remains where transnational exercising of corporate rights takes place.[171]

Second, Article 13 of the Directive foresees the removal of certain impediments to the effective exercise of voting rights.[172] As the only article of the Directive dealing with the cross-border exercise of corporate rights through financial intermediaries, it limitedly applies where such intermediaries or custodians, acting in the course of a business on behalf of a third party, the client, are formally recognized as formal *shareholders* by the applicable law.[173] In the way that Article 13 un-

167. *See* Radović, *supra* note 66, at 173.

168. *See* Shareholder Rights Directive 2007/36, 2007 O.J. (L 184) (EC), recital (6).

169. See *id.* art. 2(b).

170. *See* Radović, *supra* note 66, at 177.

171. *See* Anthony Hainsworth, *The Shareholder Rights Directive and the Challenge of Re-Enfranchising Beneficial Shareholders,* 1 LAW & FIN. MKT. REV. 11, 12, 17–18 (2007).

172. *See* Shareholder Rights Directive 2007/36, 2007 O.J. (L 184) (EC), art. 13.

173. *See id.*; *see also* Radović, *supra* note 66, at 180–82 (discussing the limitations of the achieved level of harmonization and, in particular, the limited scope of application of Article 13).

derstands corporate voting as attached to intermediated securities, the problem of corporate cross-border voting partially remains unresolved: it gives full effectiveness to voting only vis-à-vis intermediaries that are directly registered with the company in the name of the end-investors. Nonetheless, where the holding chain becomes more complex as the number of intermediaries increases, effectiveness is satisfactorily accomplished only in the first link.[174]

As the legislation stood for the last few years, the E.U. legislature reacted by recommending changes to these rules. The Proposal for a Directive of the European Parliament and of the Council amending (a) the Directive 2007/36/EC on the Encouragement of Long-term Shareholder Engagement, and (b) the Directive 2013/34/EU on Certain Elements of the Corporate Governance Statement, seeks to solve the said malfunctioning in intermediated securities structures across borders by improving, among other aspects, the exercise of shareholder rights.[175] Specifically, Article 3c requires Member States to ensure that financial intermediaries facilitate the exercise of such rights along holding chains, including the right to participate and vote at shareholder meetings.[176]

Taking a look at the proposed amendment, it seems that the E.U. legislature is basically content with a minimum agreement on basic principles and rules on exercising corporate rights across Member States. In this regard, the process of facilitation must cover *at least* either of the following: "the intermediary makes the necessary arrangements for the shareholder or a third person nominated by the shareholder to be able to exercise themselves the rights,"[177] *or* "the intermediary exercises the rights flowing from the shares upon the explicit authorization and instruction of the shareholder and for his

174. *See* Radović, *supra* note 66, at 180–82; *see also* Thomais Kotta Kyriakou, The Harmonisation of Corporate Actions in the European Securities Markets 19–20 (Jan. 2016) (unpublished LL.M. thesis, International Hellenic University), https://repository.ihu.edu.gr/xmlui/bitstream/handle/11544/ 12453/Dissertation_ThomaisKottaKyriakou.pdf?sequence=3).

175. *Proposal for a Directive of the European Parliament and of Council Amending Directive 2007/36/EC as Regards the Encouragement of Long-term Shareholder Engagement and Directive 2013/34/EU as regards Certain Elements of the Corporate Governance Statement*, at 2, COM (2014) 213 final (Apr. 9, 2014).

176. *Id.* at 18.

177. *Id.*

benefit."[178] It is evident that the reform mostly focuses on one of the key elements of the issue: the complexity and cost of intermediated holding chains, particularly where many intermediaries exist.[179] The implementation of the proposed amendment aims to increase efficiency and transparency in the flow of corporate rights from investors up to the issuers.[180] However, a key matter is still pending, which affects harmonization: the concept of *shareholder* is still left to the applicable law of each jurisdiction. As a result, different understandings of securities, the right of property, and corporate law may diminish the legal certainty of the facilitation services carried out by intermediaries and discourage end-investors from actively participating in the corporate governance of the companies.

This line of thinking pursued by the E.U. legislature is aligned with the current Eurosystem initiatives with regard to reforms for intermediated securities and capital markets. The Eurosystem implemented the Target2-Securities (T2S) system, an integrated, single platform to provide CSDs with a cross-border, cost-efficient settlement mechanism for securities transactions within the European Union.[181] The T2S therefore has more to do with speedy and cost-efficient securities transactions, rather than their underlying legal reality, because the formal exercise of voting rights from end-investors up to companies takes place completely outside this platform.[182] As a result, the T2S has strongly harmonized the rules for securities settlements across E.U. capital markets but has broadly ignored further harmonization in the field of exercising corporate rights. Whereas payment of dividends is closely connected to the T2S since securities transactions are settled on the common platform, investors' identification, voting process, and transfer of information still flow through traditional intermediated holding channels.[183]

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178. *Id.*
179. *Id.* at 5.
180. *Id.* at 6–7.
181. *See Target2-Securities,* BANCO DE ESPAÑA: EUROSISTEMA, http://www.bde.es/bde/en/areas/sispago/Sistemas_de_comp/TARGET2-Securiti/TARGET2-Securities.html.
182. *See* Rachman & Vermaas, *supra* note 141, ¶¶ N-6-9, N-6-10.
183. *Id.* ¶¶ N-6-8, N-6-9, N-6-10.

CONCLUSION

The effective exercise of investors' rights in cross-border securities holdings has been the subject of intense debate in many legal fora, domestically and internationally. However, past measures have only offered a partial, incomplete solution to the problem of, first, a constellation of contractual relationships through securities holding structures, and second, the presence of different domestic legal frameworks.

On the one hand, the good intentions of domestic legislatures unfortunately collide with the corporate reality beyond national borders. The reaction of the international community to overcome this political limitation has been to promote forward-looking transnational legislative instruments. However, multilateral negotiations brought to light countries' inability or unwillingness to agree on a comprehensive transnational legal framework. Once irreconcilable legal (or perhaps, political) differences were established, fears of a setback arose. Eventually, countries were content with a minimum agreement on basic principles and rules of substantive law. This was the situation at the regional level when the European Union took measures to address this issue with the Shareholder Rights Directive. At the global level, the UNIDROIT Convention on Substantive Rules for Intermediated Securities was the other major example of how the international community attempted to fill this gap within securities and corporate law.

The foregoing does not negate the merits of the Geneva Securities Convention or the Shareholder Rights Directive. First, the Convention has been the first of many necessary steps in the process of transnational legal harmonization in the field of intermediated securities. As financial globalization advances, so does the need for increasing legal certainty in the cross-border exercise of corporate rights attached to intermediated securities. Second, since the enactment of the Shareholder Rights Directive, the European Union has made steady progress toward harmonization of indirectly held securities. The proposed amendment to this Directive will further improve the current legal framework, in particular with regard to shareholders' identification, flow of communication, and the exercise of corporate rights.

Although highly positive for the construction of an adequate legal framework, current supranational legal instru-

ments do not offer, by themselves, an optimal solution to the problem of corporate rights in cross-border intermediated securities scenarios. Distinct understandings of property, corporate governance, securities, and capital markets remain insurmountable differences among jurisdictions. One thing is clear: if national legislatures disregard corporate rights for holders of intermediated securities, there is not much to be done in defining and protecting investors' corporate rights at the supranational level. Further legislative changes are inarguably a necessary, though not sufficient, condition to improve the legal enforcement of such rights. In the United Kingdom, *Eckerle* is a good example of how sound efforts by all the concerned parties—the issuer, intermediaries, and ultimate investor—were unsuccessful because of the inability of the national legislature to see the underlying financial truth behind the web of formal, legal relationships. Opinions like this are a case in point for why transnational binding substantive rules, such as the Geneva Securities Convention or the Shareholder Rights Directive, are needed and why they are crucial to achieve full legal harmonization.

An effective solution requires an extra layer, even within the context of forward-looking transnational legislation: structural changes in securities holding chains. Unfortunately, long chains of intermediaries still stand between companies and ultimate investors. Against this background, end-investors can do very little in cross-border settings. First, they cannot influence a foreign legislature to amend the rules of the jurisdiction in which they buy or sell securities. Second, with little market power against large multinational intermediaries, they are more likely to be the victims of disadvantageous contractual terms that set aside the responsible exercise of corporate rights through the holding chain.

Considering the current state of unfeasibility of reaching an extensive compromise at the international level that would satisfy all countries, and acknowledging the imbalance of powers between ultimate investors vis-à-vis financial intermediaries, further isolated mechanisms of legislative harmonization are likely ruled out. Utopian propositions, such as the instauration of a global transparent holding system without intermediaries, do not present much viability. Intermediaries will not be eliminated because they simply provide a necessary service in international capital markets. However, it is practically impossible

to demand an extensive international commitment from a majority of countries in order to establish an ambitious reform on substantive rules for intermediated securities. Each country has its legal idiosyncrasies, which will not be surrendered in the short run.

Given the circumstances, the question arises as to whether it is possible to introduce structural reforms in the holding chain that enhance legal certainty for investors' rights and simultaneously meet the expectations of all the parties involved: legislatures, companies, financial intermediaries, and end-investors. As discussed in this Note, there is little room for the structural modification of intermediated holding chains, but institutional investors may play a global leading role in this regard. The ownership of companies has become very concentrated in the last decades due to the intense business activity of institutional investors, such as fund managers, insurance companies, and pension plans. As a result, the success of this proposal stems from the ability of these institutional investors to mobilize the voting power of millions of end-investors to gain bargaining power and actively build favorable contractual relationships vis-à-vis the upper intermediaries in the securities holding chain that go beyond the ongoing limitations set forth by domestic legal frameworks. In this respect, the high concentration of shares held by institutional investors will provide a platform to push financial intermediaries to implement proper contractual schemes to make end-investors capable of exercising their corporate rights along the securities holding chain, even though the ongoing level of transnational harmonization is not optimal.