

# New DLT law in practice: tokenisation of rights

06 April 2021 | Contributed by **Meyerlustenberger Lachenal**

## Introduction

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## Introduction

On 25 September 2020 Parliament passed a law to incorporate crypto assets and digital ledger technologies (DLT) into Swiss law (for further details please see "[New DLT law is just around the corner](#)"). This article focuses on the practical implementation of the changes in the Code of Obligations (CO) which entered into force on 1 February 2021. These regulations provide for the introduction of ledger-based securities according to Article 973d and subsequent articles of the CO. This new form of dematerialised security enables:

- the digitalisation and tokenisation of rights and financial instruments; and
- digital transfers based on blockchain technology.

## Key requirements

The issuance of ledger-based securities requires a registration agreement or clause regarding the establishment of a register security between the parties that are bound and entitled to the underlying right. The registration agreement or clause is the basis of any register security and includes the consensus that the underlying right can be transferred via a tamperproof digital registry (ie, a securities ledger) according to the newly introduced Article 973d(2) of the CO. The digital register enables the rights holder to claim and transfer the underlying right at any time and for such transfer to be initiated and carried out by the rights holder itself without the involvement of third parties or regulated institutions. The transfer of ledger-based securities is implemented pursuant to the specific rules of the digital register. However, the transfer of ledger-based securities which are outside the register is no longer possible (ie, parties may no longer transfer rights issued in the form of ledger-based securities by means of assignment).

The securities ledger must meet certain minimum requirements, including:

- granting the rights holder, but not the debtor or issuer, the possibility to dispose of such rights through technical procedures;
- preventing unauthorised changes through appropriate technical and organisational means; and
- enabling rights holders to:
  - view the information and data relating to their rights; and
  - verify, without third-party support or intervention, the integrity of the securities ledger's content.

The legislation deems both unpermissioned systems (eg, ethereum) and permissioned systems (eg, corda or hyperledger) to fulfil the statutory minimum requirements.

## Ledger-based securities and intermediated securities

The absence of third-party (eg, custodian) involvement constitutes the key characteristic of ledger-based securities. Unlike intermediated securities under the Federal Intermediated Securities Act (FISA), which also result in the dematerialisation of securities, the issuance of ledger-based securities does not require any regulated institution (eg, a licensed bank, securities firm or central securities depository) to act as a custodian to credit such intermediated securities to particular securities accounts or other custodians.

However, Article 6(1)(d) of the FISA states that a party can also convert ledger-based securities into intermediated securities by transferring them to a custodian and crediting the respective rights to one or more securities accounts. Under Article 6(3) of the FISA, the creation of intermediated securities further requires that the ledger-based securities are immobilised in the digital registry upon transfer to the custodian. This

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means that the underlying right can be transferred only according to the rules of the FISA. Therefore, the information in the securities ledger is no longer relevant regarding the creditor position but is instead relevant regarding the crediting of the rights to the security account.

Thus, the new regime enables parties to hold ledger-based securities both on a DLT system or blockchain and through a traditional custodian and to subsequently credit such securities to a traditional securities account held with a bank or securities firm. Therefore, ledger-based securities can easily be transferred from a blockchain wallet to a traditional securities account, if desired.

## Possibilities for use

Ledger-based securities are created:

- directly, by the involved parties entering into a registration agreement and entering the ledger-based securities (eg, shares or participation certificates) into the securities ledger; or
- by converting existing certified or uncertificated securities.

In the latter case, any certificates must be destroyed or declared invalid before the securities are registered in the digital registry.

However, the securities ledger does not only serve the purpose of holding ledger-based securities; according to Article 686 of the CO concerning registered shares, where the underlying rights are shares, the securities ledger can also constitute a share register and hold information on the beneficial owner.

Registered shares in the form of certified securities require a written assignment or endorsement to be transferred to a subsequent rights holder. This process can be significantly simplified using ledger-based securities, as such securities are transferred via the securities ledger based only on the transfer of a token on the blockchain. Parties should consider and include any transfer restrictions within the securities ledger technology. Where the transferability of shares is restricted pursuant to the company's articles of association, parties must ensure that registered shares in the form of ledger-based securities cannot be transferred without the company's prior consent. This can be achieved using an escrow mechanism (eg, an escrow agent or smart contract) since a transfer on the blockchain cannot be reversed once effected.

Finally, smart contracts enable dividends to be distributed to each ledger-based securities holder listed in the securities ledger. However, as the securities ledger is based on a blockchain, any dividends must be paid in blockchain-enabled cryptocurrencies. From a legal perspective, such dividends would qualify as a dividend in kind, rather than a monetary dividend.

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