

Private Law Underpinning of Public Debt Securities Markets

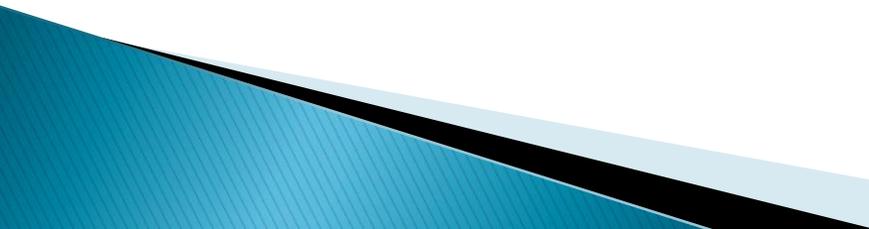
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UNIDROIT Committee on Emerging Markets Issues
Colloquium on Promoting Investors Confidence and Enhancing Legal
Certainty for Securities Trading in Emerging Markets

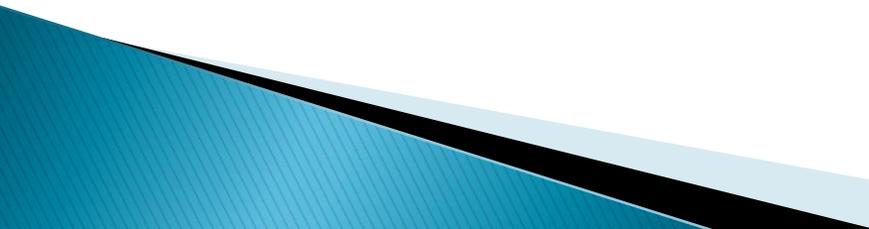
Rio de Janeiro, Brazil – 27 March 2012

Importance of Well Functioning Local Public Debt Markets

- Main financing tool for State as alternative to borrowing on foreign capital markets
 - Yield curve is benchmark for private debt
 - Key role in monetary policy of central bank
 - Key market to bring in foreign institutional investors
 - Well functioning local public debt markets are public good and supported by Bretton Woods Institutions
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Importance of Robust Legal Underpinnings

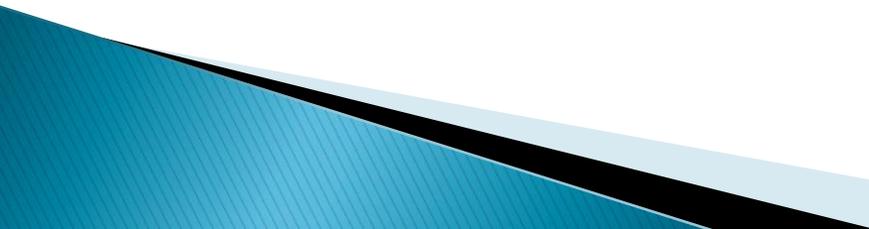
Well functioning securities markets require a robust legal framework dealing with, i.a.:

- ▶ Nature of securities
 - ▶ Market access
 - ▶ Issuance process
 - ▶ Trading and Holding
 - ▶ Orderly functioning of the market
 - ▶ Supervision of Intermediaries
 - ▶ Post trading: Clearing and Settlement
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Legal Underpinnings – General

- A significant part of the legal framework for Public Debt Securities (PDS) Markets is public law:
 - Public debt laws
 - Securities laws
 - Primary market regulations
 - Secondary market regulations
- But private law part is equally important, and often neglected

PDS incorporate Contracts

- ▶ As any other security, PDS incorporate a bundle of rights (qua negotiable instrument or *valeur mobiliere*)
 - ▶ This bundle of rights represents a loan and a claim on payment of interest (where applicable) and principal
 - ▶ While the loan agreement, and resulting claims, have public law features, they are also governed by private contract law...
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PDS incorporate Contracts II

- ▶ How are the contractual terms and conditions (T&Cs) of the loan incorporated in PDS?
- ▶ Can the legislator modify these contractual T&Cs during the duration of the contract?

e.g. ex post insertion of Collective Action Clauses by Act

- ▶ The contractual T&Cs are governed by civil codes or common law
- ▶ What is applicable law? (conflicts of law)

PDS and Contractual Capacity

- ▶ Does the State (as principal) have authority to borrow and contractual capacity to issue PDS?
- ▶ What is the private law legal effect of public debt ceilings? Invalidation of PDS?
- ▶ Who has capacity to issue PDS on behalf of the State?

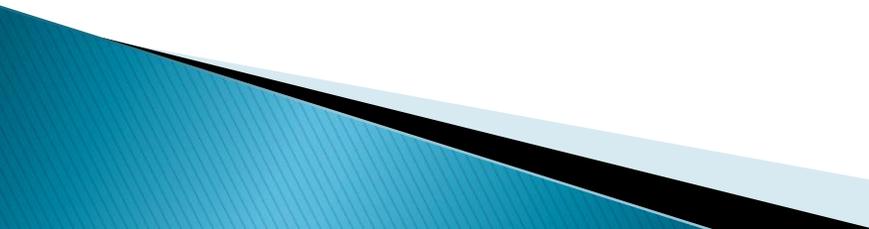
MoF? Central Bank? Separate Public Debt Management Agency?

- ▶ How is agency capacity established: by law or by contract?

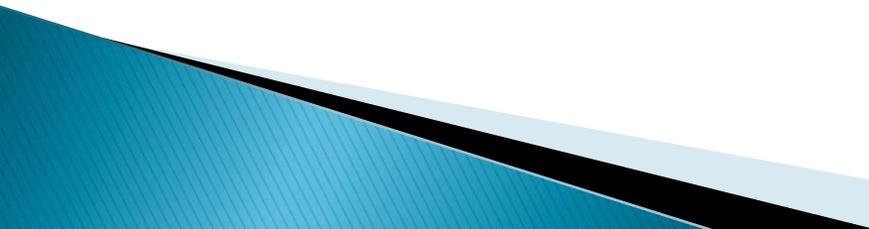
How does offer meet acceptance?

- ▶ In the primary market, what is the form of the offer and acceptance?
 - ▶ How does offer meet acceptance?
 - ▶ Are these issues well set out in primary market regulation?
 - ▶ What is legal interaction between primary market regulations issued by MoF and general rules of civil code/common law?
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Private Law Form of PDS

- ▶ What is the private law form of the PDS: bearer, registered, or fully dematerialized?
 - ▶ Does the general legal framework pertaining to the form of securities apply?
 - ▶ Is the company law relevant?
 - ▶ Is there a specific legal framework for intermediated securities holding (such as UNIDROIT Geneva Convention)?
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Public law shapes private law

- ▶ Public debt laws may include rules that raise questions about private law consequences
 - ▶ Public law instruments (regulations) may include, or establish, private law mechanisms
 - ▶ To which extent does the public interest justify unilaterally modifying contractual T&Cs?
 - ▶ Capital controls and selling restrictions may limit market access of (potential) buyers
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Conclusion

- ▶ Even though PDS have an explicit legal basis in public law....
 - ▶private law is very important in shaping the legal contours of PDS!
 - ▶ And in designing legal frameworks for PDS, due regard must be given to private law....
 - ▶ ...while understanding how the public law shapes private law choices.
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Questions?

- ▶ Questions?