



INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW
INSTITUT INTERNATIONAL POUR L'UNIFICATION DU DROIT PRIVE

**UNIDROIT COMMITTEE OF GOVERNMENTAL EXPERTS FOR
THE PREPARATION OF A DRAFT CONVENTION ON
HARMONISED SUBSTANTIVE RULES REGARDING
INTERMEDIATED SECURITIES
First session
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**PRELIMINARY DRAFT CONVENTION ON HARMONISED
SUBSTANTIVE RULES REGARDING INTERMEDIATED SECURITIES**

*(as adopted by the Committee of Governmental Experts
at its first session, held in Rome, 9-20 May 2005)*

Introductory Remarks
by the UNIDROIT Secretariat

1. - During the first session of the UNIDROIT *Committee of Governmental Experts for the Preparation of a Convention on Harmonised Substantive Rules regarding Intermediated Securities* (the CGE), the Chairman of the Committee appointed Mr Hideki Kanda (Japan) to act as Chairman of the Drafting Committee, with Mr Guy Morton (United Kingdom) and Mr Michel Deschamps (Canada) acting as Co-Chairmen. Members of the Drafting Committee comprised representatives of the delegations from Belgium, Chile, Denmark (or another “Nordic” country), France, Germany, Luxembourg, Switzerland and the United States of America. The Chairman of the Drafting Committee invited observers from the European Commission and the Trading Association for the Emerging Markets to participate in its work.¹

2. - The task of the Drafting Committee was to review the draft articles of the *Preliminary draft Convention on Harmonised Substantive Rules regarding Securities held with an Intermediary*² as submitted to the CGE by the UNIDROIT Secretariat, following the preparation of this text by a Study Group³ and authorisation by the UNIDROIT Governing Council on 23 December 2004. The revision of the text was designed to reflect discussion in the ongoing session of the CGE.

3. - The Drafting Committee held its first meeting on 14 May 2005 and its last meeting on 19 May 2005. On 20 May 2005 the text of the preliminary draft Convention, including amendments proposed by the Drafting Committee, was laid before the CGE meeting in plenary.⁴ Following an explanation of the proposed amendments by the Chairman of the Drafting Committee the CGE decided to take the amended text as a basis for further discussion.⁵

4. - On the basis of these amendments, the preliminary draft instrument was renamed the *Preliminary draft Convention on Harmonised Substantive Rules regarding Intermediated Securities*.

5. - After the meeting, the UNIDROIT Secretariat reviewed the text from an editorial perspective. The numbering of the articles has been changed.

6. - The revised text is set out in a marked up version (as against UNIDROIT 2004 Study LXXXVIII Doc. 18) in APPENDIX 1 *infra* and in a clean version in APPENDIX 2 *infra*. A table of concordance is included as APPENDIX 3 *infra*.

¹ Cf. UNIDROIT 2005 - Study LXXVIII - Doc. 23 (Report on the session), paragraph 78.

² UNIDROIT 2004 - Study LXXVIII - Doc. 18 (Preliminary draft Convention).

³ Cf. UNIDROIT 2004 - Study LXXVIII - Doc. 19 (Explanatory notes), 1 et seq.

⁴ UNIDROIT 2005 - C.G.E./Securities/1/W.P. 5 (incorporated in Appendix 2 and 3 of the present document).

⁵ Cf. UNIDROIT 2005 - Study LXXVIII - Doc. 23 (Report on the session), paragraphs 175-191.

APPENDIX 1

PRELIMINARY DRAFT CONVENTION ON HARMONISED SUBSTANTIVE RULES
REGARDING INTERMEDIATED SECURITIES HELD WITH AN INTERMEDIARY

CHAPTER I - DEFINITIONS, SCOPE OF APPLICATION AND INTERPRETATION

Article 1

~~[Definitions and interpretation]~~

1. In this Convention:

(a) “*securities*” means any shares, bonds or other transferable financial instruments or financial assets (other than cash) or any interest therein;

(b) “*securities account*” means an account maintained by an intermediary to which securities may be credited or debited;

(c) “*intermediary*” means a person that in the course of a business or other regular activity maintains securities accounts for others or both for others and for its own account and is acting in that capacity;

(d) “*account holder*” means a person ~~(including another intermediary)~~ in whose name an intermediary maintains a securities account, whether that person is acting for its own account or for others (including in the capacity of intermediary);

(e) “*account agreement*” means, in relation to a securities account, the agreement with the relevant intermediary governing that securities account;

(f) “*intermediated securities held with an intermediary*” means the rights of an account holder resulting from a credit of securities to a securities account;

(g) “*relevant intermediary*” means, with respect to an account holder, the intermediary that maintains the securities account for the account holder;

(h) {“*disposition*” means an act of an account holder disposing of ~~securities held with an intermediary~~ intermediated securities and includes a transfer of title, whether outright or by way of security, and a grant of a security interest;}

(i) “*adverse claim*” means, with respect to any securities, a claim that a person has an interest in those securities that is effective against third parties and that it is a violation of the rights of that person for another person to hold or dispose of those securities;

(j) “*insolvency proceeding*” means a collective judicial or administrative proceeding, including an interim proceeding, in which the assets and affairs of the debtor are subject to control or supervision by a court or other competent authority for the purpose of reorganisation or liquidation;

(k) “*insolvency administrator*” means a person (including a debtor in possession where applicable) authorised to administer an insolvency proceeding, including one authorised on an interim basis;

(l) securities are “*of the same description*” as other securities if they are issued by the same issuer and:

(i) they are of the same class of shares or stock; or

(ii) in the case of securities other than shares or stock, they are of the same currency and denomination and form part of the same issue;

(m) “control agreement” means an agreement between an account holder, the relevant intermediary and a collateral taker, or, if so permitted by the domestic non-Convention law, an agreement between an account holder and a collateral taker of which notice is given to the relevant intermediary, which includes either or both of the following provisions:

(i) that the relevant intermediary is not permitted to comply with any instructions given by the account holder in respect of the intermediated securities to which the agreement applies without having received the consent of the collateral taker;

(ii) that the relevant intermediary is obliged to comply with any instructions given by the collateral taker in respect of the intermediated securities to which the agreement applies in such circumstances and as to such matters as may be provided by the account agreement or the domestic non-Convention law, without any further consent of the account holder;

(n) “designating entry” means an entry in favour of a collateral taker in a securities account in respect of specified intermediated securities which, under the account agreement, a control agreement or the domestic non-Convention law, has either or both of the following effects:

(i) that the relevant intermediary is not permitted to comply with any instructions given by the account holder in respect of the intermediated securities in relation to which the entry is made without having received the consent of the collateral taker;

(ii) that the relevant intermediary is obliged to comply with any instructions given by the collateral taker in respect of the intermediated securities in relation to which the entry is made in such circumstances and as to such matters as may be provided by the account agreement, a control agreement or the domestic non-Convention law, without any further consent of the account holder;

(o) “domestic non-Convention law” means the domestic provisions of law of the State whose law is applicable under Article 2, other than those provided in this Convention.

~~2.— In the implementation, interpretation and application of this Convention, regard is to be had to its purposes, to its international character and to the need to promote uniformity and predictability in its application.~~

~~3.— For the purposes of implementation, interpretation and application of this Convention in a Contracting State, “the applicable law” means the provisions of the law of that Contracting State, other than those provided by this Convention, in relation to the subject matter of this Convention.~~

~~4.— Questions concerning matters governed by this Convention which are not expressly settled in the Convention are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the applicable law.~~

~~5.— For the purposes of the application and interpretation of this Convention by the courts of a Contracting State, references to the applicable law are to the domestic rules of the law applicable by virtue of the rules of private international law of the forum State.~~

Article 2

[Scope of application]

This Convention applies where rules of private international law of the forum state designate the law of a Contracting State.

Article 3
[Principles of interpretation]

1. - In the implementation, interpretation and application of this Convention, regard is to be had to its purposes, to its international character and to the need to promote uniformity and predictability in its application.

2. - Questions concerning matters governed by this Convention which are not expressly settled in the Convention are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the domestic non-Convention law.

**CHAPTER II – RIGHTS RESULTING FROM THE CREDIT OF SECURITIES
TO A SECURITIES ACCOUNT INTERMEDIATED SECURITIES**

Article 4-2
[Rights resulting from the credit of securities to a securities account]
[Intermediated securities]

1. - ~~The credit of securities to a securities account with an intermediary confers on the account holder the following rights:~~

(a) ~~subject to paragraph 2 where the account holder is acting for its own account with respect to the securities, the right to receive and exercise the rights attached to the securities enjoy the fruits of ownership of the securities, including in particular dividends, and other distributions and the exercise of voting rights;~~

(b) ~~the right, by instructions to the relevant intermediary, to cause to dispose of the securities to be debited to the securities account in accordance with under Articles 53 and credited to a securities account of another account holder (whether with the relevant intermediary or another intermediary) or to be delivered into the possession or control of a collateral taker and under Article 64;~~

(c) ~~the right, by instructions to the relevant intermediary, to cause the securities to be debited to the securities account under Article 5 and credited to a securities account of held by the account holder with a different intermediary;~~

(d) ~~the right, by instructions to the relevant intermediary, to withdraw the securities so as to be held by the account holder otherwise than through a securities account with an intermediary, to the extent permitted under the applicable law under which the securities are constituted, the terms of the securities and the account agreement;~~

(e) ~~subject to this Convention, such other rights as may be conferred by the domestic applicable non-Convention law.~~

2. - Where securities are credited to a securities account of an account holder who is acting in the capacity of intermediary with respect to those securities, that account holder has the rights specified in paragraph 1(a) only if that account holder, or another intermediary through which, directly or indirectly, it holds the relevant securities, is entitled to those rights against the issuer under the terms of the relevant securities and the law under which the relevant securities are constituted.

23. - ~~Without prejudice to Articles 15-13 and Article 19-17, the rights referred to in the preceding paragraph 1f:~~

(a) are effective against the relevant intermediary and third parties; ~~and but~~

(b) ~~except as otherwise provided by this Convention, by the terms of issue of any securities or by the law under which any securities are constituted, may be enforced only against the relevant intermediary and, to the extent provided by this Convention, the terms of the relevant securities and the law under which the relevant securities are constituted, the issuer of the relevant securities.~~

~~3. — To the extent that the rights referred to in paragraph 1(a) are dependent on the assistance of the relevant intermediary:~~

~~(a) — the rights do not entitle the account holder to receive or effect more than can be received or effected through such assistance as is within the power of the relevant intermediary to provide; and~~

~~(b) — the manner of performance of the obligations of the relevant intermediary in providing such assistance and the extent of the liability of the relevant intermediary for any failure to perform those obligations are governed by the account agreement [and the applicable law].~~

4. - Subject to paragraph 5 and paragraph 6, an intermediary must take appropriate measures to enable its account holders to receive and exercise the rights specified in paragraph 1.

[Version A:

5. - Where the enjoyment of any of the rights referred to in paragraph 1 depends on the actions of the relevant intermediary, the scope of those rights is limited to such an extent as is necessary to ensure that the relevant intermediary is not required to take any action that is not within its power. This does not affect any right of the account holder against the issuer of the relevant securities conferred by this Convention, the terms of the relevant securities and the law under which the relevant securities are constituted.

6. - The manner of performance of any obligations of the relevant intermediary in respect of the rights of an account holder under paragraph 1, and the extent of the liability of the relevant intermediary for any failure to perform such obligations, are governed by the account agreement, the law by which the account agreement is governed and any applicable provision of the domestic non-Convention law.]

[Version B:

5. - To the extent that the rights referred to in paragraph 1 are dependent on the actions of the relevant intermediary, the account holder is not entitled to any such right to the extent that giving effect to the right:

(a) is not within the power of the relevant intermediary;

(b) would require the relevant intermediary to act in a manner that is [more burdensome than reasonable commercial standards or that is] not permitted by any applicable law or by the terms of the relevant securities;

(c) would require the relevant intermediary to establish a securities account with another intermediary; or

(d) is waived by the account holder in a manner permitted by the domestic non-Convention law.

6. - Subject to any applicable provision of the domestic non-Convention law, any obligation of the relevant intermediary in respect of the rights of the account holder under paragraph 1 shall be satisfied if the relevant intermediary acts with respect to that obligation:

(a) in accordance with the account agreement or, if there is no account agreement, in accordance with [reasonable commercial standards];

(b) in accordance with any other agreement between the account holder and the relevant intermediary; or

(c) by placing the account holder in a position itself to exercise any relevant right referred to in paragraph 1.]

[7. - Where securities are credited to a securities account of an account holder in the capacity of collateral taker under Article 6, the domestic non-Convention law determines any limits on the rights described in paragraph 1.]

Article 5-3

*[Acquisition and disposition of intermediated securities held with an intermediary
by debits and credits to securities accounts]*

1. - Intermediated securities held with an intermediary are acquired by an account holder by the credit of those securities to a securities account of that account holder's securities account.

2. - No further step or event is necessary, or may be required by the applicable law domestic non-Convention law, to render such an the acquisition or disposition of intermediated securities effective against third parties.

3. - Intermediated securities held with an intermediary are disposed of by an account holder by the debit of those securities to a securities account of that account holder's securities account.

4. - Without prejudice to any rule of the domestic non-Convention law requiring that no credit or debit be made without a corresponding debit or credit, a debit or credit of securities to a securities account is not ineffective because it is not possible to identify a securities account to which a corresponding credit or debit has been made.

5. - Debits and credits to securities accounts in respect of securities of the same description may be effected on a net basis.

6. - Securities held with an intermediary may be disposed of and acquired under this Article by way of security. The applicable law determines in what circumstances an acquisition or disposition made under this Article is made by way of security.

7. - This Article does not preclude any other method provided by the applicable domestic non-Convention law for the acquisition or disposition of intermediated securities held with an intermediary, but provided that the priority of an interest created by any such other method is subject to the rules in Article 10-9.

*Article 4_6**[Creation of security interests over securities held with an intermediary]*

~~1. — A security interest over securities held with an intermediary, or over a securities account, may be created:~~

~~(a) — in favour of the relevant intermediary, by an agreement between the account holder and the relevant intermediary;~~

~~(b) — in favour of a person other than the relevant intermediary, by the designation of the securities or the securities account in a manner such that the relevant intermediary is committed to complying with any requirements which that other person may impose with respect to those securities or that securities account.~~

~~2. — A security interest created under paragraph 1[(b)] is not effective against third parties unless the relevant intermediary makes arrangements for the securities account and any account statements issued in respect of the securities account to be so annotated as to indicate the existence of the security interest.~~

~~3. — A security interest created with respect to a securities account under this Article has effect with respect to all securities from time to time credited to that securities account, without the need for any further identification of particular securities.~~

~~4. — No further step or event is necessary to render a security interest created under this Article effective against third parties.~~

~~5. — This Article does not preclude any other method provided by the applicable law for the creation of a security interest over securities held with an intermediary or over a securities account, provided that the priority of an interest created by any such other method is subject to the rules in Article 9.~~

[Security interests in intermediated securities]

1. - An account holder may grant to another person (“the collateral taker”) a security interest in intermediated securities held by that account holder so as to be effective against third parties by:

(a) entering into an agreement with the collateral taker providing (in whatever terms) for the grant of such a security interest; and

(b) delivering the intermediated securities into the possession or control of the collateral taker in accordance with paragraph 2;

and no further step is necessary, or may be required by the domestic non-Convention law, to render a security interest so granted effective against third parties.

2. - Intermediated securities shall be treated as delivered into the possession or control of a collateral taker if:

(a) the relevant securities are credited to a securities account of the collateral taker [(in which case the provisions of Article 5 apply)];

(b) the relevant intermediary is itself the collateral taker;

(c) a designating entry in favour of the collateral taker has been made in the securities account in respect of the relevant intermediated securities and the making of such a designating entry is specified in a declaration by the relevant Contracting State under paragraph 4 as sufficient to result, under the law of that Contracting State, in the intermediated securities being in the possession or control of the collateral taker;

(d) a control agreement with the collateral taker applies to the relevant intermediated securities and the application of such a control agreement is specified in a declaration by the relevant Contracting State under paragraph 4 as sufficient to result, under the law of that Contracting State, in the intermediated securities being in the possession or control of the collateral taker; [or]

(e) the conditions referred to in both sub-paragraph (c) and sub-paragraph (d) are fulfilled and the fulfilment of both those conditions is specified in a declaration by the relevant Contracting State under paragraph 4 as sufficient to result, under the law of that Contracting State, in the intermediated securities being in the possession or control of the collateral taker]; or

(f) the relevant securities are held or designated in such other manner as is specified in a declaration made by the relevant Contracting State under paragraph 4 as being sufficient to result, under the law of that Contracting State, in the intermediated securities being in the possession or control of the collateral taker].

3. - A security interest may be granted under this Article in terms such that it extends to all intermediated securities from time to time standing to the credit of the relevant securities account or, if the domestic non-Convention law so permits, to a specified category, quantity, proportion or value of such intermediated securities. Such a security interest is effective without the need for further identification of particular securities.

4. - A Contracting State may by declaration]:

(a)] state which of the conditions specified in paragraph 2(c) to (e) is sufficient, under the law of that Contracting State, to result, under the law of that Contracting State, in intermediated securities being in the possession or control of a collateral taker and describe the requirements under the law of that Contracting State for an effective designating entry or an effective control agreement]; and, or alternatively

(b) describe the manner of holding or designation of securities credited to a securities account which, under the law of that Contracting State, is sufficient to result in the corresponding intermediated securities being in the possession or control of a collateral taker for the purposes of paragraph 2(f)].

5. - A Contracting State may by declaration elect that this Article shall not apply in relation to security interests in intermediated securities granted by or to parties of such descriptions as may be specified in the declaration.

6. - The domestic non-Convention law determines:

(a) whether and in what circumstances a security interest in intermediated securities may arise by operation of law; and

(b) whether such an agreement as is referred to in paragraph 1(a) or the delivery of intermediated securities into the possession or control of a collateral taker is required to be evidenced in writing or in a legally equivalent manner and whether such evidence must permit the identification of intermediated securities so delivered.

7. - This Article does not preclude any other method provided by the domestic non-Convention law for the grant of a security interest in intermediated securities, but the priority of a security interest granted by any such other method is subject to the rules in Article 10.

Article 7.5

[Authorisation, timing, conditionality and reversal/Effectiveness of debits, credits etc.]

1. - ~~A debit or credit of securities to a securities account, and or a designation designating entry made under Article 4,~~ is not effective ~~[against third parties]~~ unless it is made with the authority of the account holder, the relevant intermediary is authorised to make that debit, credit, or designating entry:

(a) by the account holder and, in the case of a debit or designating entry that relates to intermediated securities which are subject to a security interest granted under Article 6, by the collateral taker; or

(b) by the domestic non-Convention law.

2. - Except as otherwise provided by paragraph 4, a debit or credit of securities to a securities account or a designating entry takes effect when it is made.

3. - The time at which intermediated securities shall be treated as delivered into the possession or control of a collateral taker is as follows:

(a) in the circumstances specified in Article 6(2)(a), when the relevant securities are credited to a securities account of the collateral taker;

(b) in the circumstances specified in Article 6(2)(b), when the agreement between the account holder and the relevant intermediary by which the security interest is granted is entered into;

(c) in the circumstances specified in Article 6(2)(c), (d) or (e), when the relevant condition is fulfilled[;]

(d) in the circumstances specified in Article 6(2)(f), when the relevant securities are held or designated in the manner described in the declaration of the relevant Contracting State referred to in Article 6(4)].

4. - ~~A debit or credit of securities to a securities account, and a designation made under Article 4,~~ which is made conditionally under the terms of ~~an~~ the account agreement, ~~or the rules of a securities clearing or settlement system or the domestic non-Convention law~~ is effective against third parties when, and only when, the condition is satisfied[; but if the condition is satisfied, the relevant disposition or acquisition of intermediated securities an interest created by such a credit or designation is treated for the purposes of Article ~~10~~9 as having become effective against third parties been created at the time when the relevant debit or credit or designation was made conditionally].

5. - ~~An account agreement, the rules of a clearing or settlement system or the domestic non-Convention applicable~~ law may provide that a debit or credit of securities or a designating entry is liable to be reversed ~~on the ground of fraud or misrepresentation or any other ground.~~ [The ~~applicable domestic non-Convention~~ law determines whether such a debit, or credit or designating entry which is so liable to be reversed has any effect against third parties during the period before it is reversed and, if so, what that effect is.]

6. - Notwithstanding ~~the preceding~~ paragraphs ~~5,~~ if:

(a) securities have been credited to a securities account of an account holder, or have been designated in favour of another person in the manner described in Article ~~6~~4, in circumstances such that the credit or ~~designation~~ designating entry is not effective or is liable to be reversed; and

(b) before that credit or ~~designation-designating entry~~ has been [cancelled or] reversed, the securities are credited to a securities account of a third party, or are designated in the manner described in Article ~~6-4~~ in favour of a third party (such a third party being in either case referred to in this sub-paragraph as “*the acquirer*”), under a further disposition,

the fact that the initial credit or ~~designation-designating entry~~ was made in circumstances such that it is not effective or is liable to be reversed does not make the further credit or ~~designation-designating entry~~ ineffective, in favour of the acquirer, against the person making the further disposition, the relevant intermediary or third parties unless:

(i) the further credit or ~~designation-designating entry~~ is made conditionally and the condition has not been satisfied;

(ii) the acquirer has knowledge, at the time when the further credit or ~~designation-designating entry~~ is made, that it is made as a result of the further disposition and that the further disposition is made in the circumstances referred to in this paragraph; or

(iii) the further disposition is made by way of gift or otherwise gratuitously.

~~57.~~ - For the purposes of ~~the preceding~~ paragraph ~~6~~ the acquirer has knowledge that the further credit or ~~designation-designating entry~~ is made as a result of a purported disposition made in the circumstances referred to in that paragraph if the acquirer has actual knowledge that it is so made, or has knowledge of facts sufficient to indicate that there is a significant probability that it is so made and deliberately avoids information that would establish that that is the case.

Article 6

{Finality of debits, credits etc.}

~~Except as otherwise provided by Article 5, a debit, credit or designation of securities held with an intermediary is effective when it is made.~~

[Article 8-7

{Overriding effect of certain rules of clearing ~~and~~ settlement systems}

Any provision of the rules or agreements governing the operation of a securities clearing or settlement system which is directed to the stability of the system or the finality of dispositions effected through the system shall, to the extent of any inconsistency, prevail over [any provision in Article ~~7-5 or Article 6~~] [any provision of this Convention].]

Article 9-8

[Prohibition of upper-tier attachment]

1. - No attachment of or in respect of intermediated securities ~~credited to a securities account~~ of an account holder shall be granted or made against the issuer of these relevant securities or against any intermediary other than the relevant intermediary.

2. - In this Article “*attachment*” means any judicial, administrative or other act or process for enforcing or satisfying a judgment, award or other judicial, arbitral, administrative or other decision against or in respect of the account holder or for freezing, restricting or impounding securities property of the account holder in order to ensure ~~their~~ its availability to enforce or satisfy any future such judgment, award or decision.

Article 10-9

[Priority among competing interests]

1. - Interests arising under Articles ~~5-3~~ and Article 6-4:
 - (a) have priority over any interest created by any method permitted by the ~~applicable law~~ domestic non-Convention law other than those provided by Article ~~5-3~~ or Article ~~6-4~~; and
 - (b) rank among themselves in the order in which they were created.

2. - An interest in ~~securities held with an intermediary~~ intermediated securities arising by operation of law under any ~~mandatory~~ rule of the ~~applicable law~~ domestic non-Convention law has such priority as is afforded to it by the rule in question.

3. - Subject to ~~the preceding~~ paragraphs 1 and paragraph 2, the priority of any competing interests in intermediated securities ~~held with an intermediary~~ is determined by the domestic non-Convention ~~applicable~~ law.

4. - As between persons entitled to any interests referred to in this Article, the priorities provided by the preceding paragraphs may be varied by agreement between those persons.

CHAPTER III – PROTECTION OF INNOCENT ACQUIRER

Article 11-10

[Acquisition by an innocent person of intermediated securities ~~held with an intermediary~~]

1. - A person who acquires intermediated securities ~~held with an intermediary~~ by credit to a securities account under Article ~~5-3~~, or who acquires a security interest in such securities by an agreement or designation under Article ~~6-4~~, and who does not at the time of acquisition have knowledge of an adverse claim with respect to the securities is not subject to that adverse claim.

2. - ~~The preceding p~~Paragraph 1 does not apply in respect of an acquisition of securities made[, or the creation of a security interest effected,] by way of gift or otherwise gratuitously.

3. - For the purposes of this Article a person acts with knowledge of an adverse claim if that person:
 - (a) has actual knowledge of the adverse claim; or
 - (b) has knowledge of facts sufficient to indicate that there is a significant probability that the adverse claim exists and deliberately avoids information that would establish the existence of the adverse claim;

and knowledge received by an organisation is effective for a particular transaction from the time when it is or ought reasonably to have been brought to the attention of the individual conducting that transaction.

CHAPTER IV - INSOLVENCY

Article ~~12-11~~

[Rights of account holders on insolvency of intermediary]

The rights of an account holder constituted by the credit of securities to a securities account, and the rights of a person holding a security interest created under Article ~~6-4~~, are effective against the insolvency administrator and creditors in any insolvency proceeding in respect of the relevant intermediary.

[Article ~~13-12~~

{Effectiveness of debits, credits etc. and instructions on insolvency of operator or participant in securities clearing or settlement system}

1. - Any provision of the rules or agreements governing the operation of a securities clearing or settlement system which is directed to the stability of the system or the finality of acquisitions or dispositions effected through the system shall have effect notwithstanding the commencement of an insolvency proceeding in respect of the operator of the system or any participant in the system to the extent that that provision:

(a) precludes the invalidation or reversal of any acquisition or disposition effected by a ~~credit, debit or credit of securities to, or a designation-designating entry in,~~ a securities account which forms part of the system after the time at which that acquisition or disposition is treated as final under the rules of the system;

(b) precludes the revocation of any instruction given by a participant in the system for making a disposition of securities, or for making a payment relating to an acquisition or disposition of securities, after the time at which that instruction is treated under the rules of the system as having been entered irrevocably into the system.

2. - ~~The preceding p~~Paragraph 1 applies notwithstanding that any invalidation, reversal or revocation referred to in that paragraph would otherwise occur by mandatory operation of the insolvency law of a Contracting State.]

Article 14

[Effects of insolvency]

Subject to Article 13 and Article 24, nothing in this Convention affects:

(a) any rules of law applicable in insolvency proceedings relating to the avoidance of a transaction as a preference or a transfer in fraud of creditors; or

(b) any rules of procedure relating to the enforcement of rights to property which is under the control or supervision of an insolvency administrator.

CHAPTER V – DUTIES OF INTERMEDIARY

Article ~~15-13~~

[Duties of intermediary Instructions]

1. - Subject to paragraph 2 ~~[and Article 7-5(1)]~~, an intermediary is neither bound nor entitled to give effect to any instructions with respect to intermediated securities credited to a securities account of an account holder given by any person other than that account holder.

2. - ~~The preceding p~~Paragraph 1 is subject to:

(a) the provisions of the account agreement, any other agreement between the intermediary and the account holder or any other agreement entered into by the intermediary with the consent of the account holder;

(b) the rights of any person (including the intermediary) who holds a security interest created under Article ~~6-4~~;

(c) subject to Article ~~9-8~~, any judgment, award, order or decision of a court, tribunal or other judicial or administrative authority of ~~the~~ competent jurisdiction;

(d) any mandatory rule of the domestic non-Convention applicable law; and

(e) where the intermediary is the operator of a clearing or settlement system, the rules of that system.

Article ~~14~~ 16¹

[Duty of intermediary with respect to holding or credit of securities]

[1. - An intermediary may not:

(a) make any credit of securities to a securities account maintained by it; or

(b) dispose of securities held by it or credited to a securities account which it holds with another intermediary,

if upon that credit or disposition becoming effective there would not be sufficient securities of the same description held by it or credited to securities accounts which it holds with another intermediary.]

2. - If at any time sufficient securities of any description are not held by an intermediary or credited to securities accounts which it maintains with another intermediary, it must [immediately] [promptly] take such action as is required to ensure that sufficient securities of that description are so held or credited.

3. - In the preceding paragraphs "*sufficient securities*" of any description means securities of an aggregate number or amount at least equal to the aggregate number or amount of securities of that description credited to securities accounts maintained by the intermediary.

4. - Paragraph 2 does not affect any provision of the domestic non-Convention law, or, subject to the domestic non-Convention law, any provision of the rules of a securities clearing or settlement system or of an account agreement, relating to the allocation of the cost of ensuring compliance with the requirements of that paragraph.

¹ Articles 16-14, 17-15 and 18-16 are subject to modification in the light of further discussion of and possible changes to Articles 7-5, 10-9 and 11-10.

~~4. – Nothing in this Article affects any provision of the rules of a securities clearing or settlement system or other system involving the holding of securities with an intermediary relating to the allocation of the cost of ensuring compliance with the requirements of paragraph 2, including without limitation any provision:~~

~~(a) — entitling the system operator [or other relevant intermediary] to debit securities to an account holder's securities account in circumstances where a credit of securities to that securities account is not or does not become effective, or is reversed, under Article 5;~~

~~(b) — requiring an account holder to procure, or indemnify the system operator or other relevant intermediary against the cost of procuring, the credit of further securities to a securities account of that account holder in circumstances where securities have been or may be debited to that securities account under sub-paragraph (a); or~~

~~(c) — requiring participants in the system to contribute to the cost of making good any failure by any particular participant to comply with its obligations under sub-paragraph (b) or otherwise to contribute to the cost of ensuring compliance with the requirements of paragraph 2.~~

~~5. — Nothing in this Article affects any provision of an account agreement relating to the allocation of the cost of any action taken by an intermediary to ensure compliance with paragraph 2 in a case where:~~

~~(a) — the action is required because the intermediary holds or has held securities with another intermediary (~~“the higher-tier intermediary”~~) in circumstances where the intermediary is obliged by its agreements with its account holders to hold securities of the relevant description with the higher-tier intermediary or there is no intermediary other than the higher-tier intermediary with which the intermediary is able to hold securities of the relevant description]; and~~

~~(b) — the number or amount of the securities so held has been reduced under Article 16 as a result of the insolvency of the higher-tier intermediary.~~

[56. - The fact that a credit or disposition is made in contravention of paragraph 1 does not render that credit or disposition ineffective, but:

(a) the intermediary must ~~immediately~~ comply with paragraph 2; and

(b) this paragraph does not affect any liability of the intermediary to compensate an account holder for any loss arising from the contravention.]

Article ~~17~~ 15

~~[Appropriation Allocation of securities to account holders' rights: securities so allocated appropriated not property of the intermediary]~~

[1. - Securities of each description held by an intermediary or credited to securities accounts held by an intermediary with another intermediary shall be ~~appropriated~~ allocated to the rights of the account holders of that intermediary to the extent necessary to ensure that the aggregate number or amount of the securities of that description so ~~appropriated~~ allocated is equal to the aggregate number or amount of such securities credited to securities accounts maintained by the intermediary.]

[2. - Securities ~~allocated~~ appropriated under the ~~preceding~~ paragraph 1 shall not form part of the property of the intermediary available for distribution among or realisation for the benefit of its creditors in the event of an insolvency proceeding in respect of the intermediary or be otherwise subject to claims of creditors of the intermediary.]

3. - ~~Subject to paragraph 4, the allocation~~ appropriation required by paragraph 1+

~~(a) may shall be effected by the domestic non-Convention law and, subject to the domestic non-Convention law, appropriate by arrangements made by the relevant intermediary, in accordance with the applicable law;~~

~~(b) if and to the extent that it is not effected by such arrangements, shall be effected by operation of law in accordance with the applicable law.~~

4. - A Contracting State may by declaration elect that the allocation required by paragraph 1 shall be effected by arrangements for the segregation of securities held by the relevant intermediary or credited to securities accounts held by the relevant intermediary with another intermediary sufficient to ensure, under the law of that Contracting State, that the securities so segregated are allocated to the rights of the account holders of the relevant intermediary.

Article ~~18-16~~

[Effect of insufficiency of securities held in respect of account holders' rights]

1. - If the aggregate number or amount of securities of any description held by an intermediary or credited to a securities account that it holds with another intermediary is less than the aggregate number or amount of securities of that description credited to securities accounts, the shortfall:

(a) where the intermediary is the operator of a securities clearing or settlement system and the rules of the system make provision for the ~~elimination~~allocation of the shortfall, shall be allocated in the manner so provided; and

(b) ~~subject to sub-paragraph (a) in any other case~~, shall be allocated among the account holders to whose securities accounts securities of the relevant description are credited, in proportion to the respective numbers or amounts of securities so credited.

2. - [Unless otherwise provided by the ~~domestic non-Convention~~applicable law,] [I]n any allocation required under paragraph 1(b) no account shall be taken of:

(a) the origin of, or any past dealings in, any securities held by the intermediary or credited to securities accounts held by the intermediary with another intermediary; or

(b) the order in which or time at which any securities are credited or debited to the respective securities accounts of account holders.

CHAPTER VI – RELATIONS WITH ISSUERS OF SECURITIES

Article ~~19-17~~

[Position of issuers of securities]

1. - Any rule of law of a Contracting State, and any provision of the terms of issue of securities constituted under the law of a Contracting State, which would prevent the holding of securities with an intermediary or the effective exercise by an account holder of rights in respect of intermediated securities ~~held with an intermediary~~ shall be modified to the extent required to make possible the holding of such securities with an intermediary and the effective exercise of such rights.

2. - Without limiting the generality of ~~the preceding~~ Paragraph 1, that paragraph applies in particular to any rule or provision:

(a) which restricts the ability of a holder of securities to exercise voting or other rights in different ways in respect of different parts of a holding of securities of the same description;

[(b) which does not include adequate provision for making available to account holders holding intermediated securities ~~with an intermediary~~, or to intermediaries for transmission to such account holders:

(i) copies of notices, accounts, circulars and other materials addressed by the issuer to holders of such intermediated securities; and

(ii) means of exercising the rights ~~attached~~ ing to ~~the such~~ securities either in person or through a proxy or other representative;]

(c) which prohibits or fails to recognise the holding of securities by a person acting in the capacity of nominee or intermediary;

(d) under which recognition of the holding of securities by an intermediary or the exercise of rights by an account holder holding intermediated securities ~~with an intermediary~~ is conditional on the maintenance of records in a particular medium;

(e) which imposes restrictions on the holding of securities or the exercise of rights ~~attached~~ ing to securities by reference to the identity, status, residence, nationality, domicile or other characteristics or circumstances of any person acting in the capacity of intermediary.

[3. - Subject to ~~the preceding~~ paragraphs 1 and paragraph 2, nothing in this Convention makes an issuer of securities bound by, or compels such an issuer to recognise, a right or interest of any person in or in respect of such securities if the issuer is not bound by or compelled to recognise that right or interest under the law under which the securities are constituted and the terms ~~of issue~~ of the securities.]

Article 20 18
[Rights of ~~s~~Set-off]

1. - As between an account holder ~~to whose securities account~~ who holds intermediated securities are credited for its own account and the issuer of those securities, the fact that the account holder holds the securities with an intermediary shall not of itself, in any insolvency proceeding in respect of the issuer, preclude the existence or prevent the exercise of any rights of set-off which would have existed and been exercisable if the account holder had held the securities ~~directly~~ otherwise than through an intermediary.

2. - This Article does not affect any express provision of the terms ~~of issue~~ of the relevant securities.

CHAPTER VII – SPECIAL PROVISIONS WITH RESPECT TO COLLATERAL TRANSACTIONS

Article ~~21-19~~

[Interpretation of terms used in Chapter VII]

In this Chapter:

(a) ~~“relevant collateral agreement”~~, “collateral provider”, “collateral taker”, “collateral securities” and “secured obligations” have the meanings respectively given in Article ~~{22-20}~~(1);

(b) “enforcement event” means, in relation to a ~~relevant~~ collateral agreement, an event on the occurrence of which, under the terms of ~~the relevant~~ that collateral agreement, the collateral taker is entitled to enforce its security.

Article ~~22-20~~

[Special provisions on ~~e~~Enforcement]

1. - This Article applies in respect of an agreement (a ~~“relevant collateral agreement”~~) under which a person [other than a natural person] (the “collateral provider”) creates a security interest in favour of another person (the “collateral taker”) in ~~securities held with an intermediary~~ intermediated securities which are of a kind regularly traded on a financial market (the “collateral securities”) in order to secure the performance of [any existing or future obligations of the collateral provider or a third person] [financial obligations of any kind referred to in paragraph_2] (the “secured obligations”).

[2. - The secured obligations may consist of or include any obligation of a financial character, including:

(a) present or future, actual or contingent or prospective obligations (including obligations arising under a master agreement, whether under a provision for the acceleration or close-out of obligations or otherwise);

(b) obligations to deliver securities or other property;

(c) obligations owed to the collateral taker by a person other than the collateral provider;

(d) obligations of a specified description arising from time to time.]

3. - On the occurrence of an enforcement event, the collateral taker may realise the collateral securities:

(a) by selling them and applying the net proceeds of sale in or towards the discharge of the secured obligations;

(b) by appropriating the collateral securities as the collateral taker’s own property and setting off their value against, or applying their value in or towards the discharge of, the secured obligations, provided that the ~~relevant~~ collateral agreement provides for realisation in this manner and specifies the basis on which collateral securities are to be valued for this purpose.

4. - Collateral securities may be realised under ~~the preceding paragraph 3:~~

(a) subject to any contrary provision of the ~~relevant~~ collateral agreement, without any requirement that:

- (i) prior notice of the intention to realise shall have been given;
 - (ii) the terms of the realisation be approved by any court, public officer or other person; or
 - (iii) the realisation be conducted by public auction or in any other prescribed manner; and
- (b) notwithstanding the commencement or continuation of an insolvency proceeding in respect of the collateral provider or the collateral taker.

~~5. — Realisation under paragraph shall be effected in a commercially reasonable manner.~~

5. - Paragraph 3 and paragraph 4 are without prejudice to any requirement of the domestic non-Convention law to the effect that the realisation or valuation of financial collateral and the calculation of the relevant financial obligations must be conducted in a commercially reasonable manner.

Article 23-24

~~[Special provisions on the r]Right to use collateral securities]~~

1. - If and to the extent that the terms of a ~~relevant~~ collateral agreement so provide, the collateral taker shall have the right to use and dispose of the collateral securities as if it were the owner of them (a “right of use”).

2. - Where a collateral taker exercises a right of use, it thereby incurs an obligation to replace the collateral securities originally transferred (the “original collateral securities”) by transferring ~~the same number or amount of securities of the same description~~ to the collateral provider, not later than the performance discharge of the secured obligations, securities of the same issuer or debtor, forming part of the same issue or class and of the same nominal amount, currency and description or, where the collateral agreement provides for the transfer of other assets [following the occurrence of any event relating to or affecting any securities provided as collateral], those other assets.

3. - Securities transferred under ~~the preceding paragraph 2 at a time~~ before the secured obligations have been fully discharged:

(a) shall, in the same manner as the original collateral securities, be subject to a security interest under the relevant collateral agreement, which shall be treated as having been created at the same time as the security interest in respect of the original collateral securities was created; and

(b) shall in all other respects be subject to the terms of the relevant collateral agreement.

4. - The exercise of a right of use shall not render invalid or unenforceable any right of the collateral taker under the relevant collateral agreement.

5. - ~~The relevant A~~ collateral agreement may provide that, if an enforcement event occurs before the secured obligations have been fully ~~discharged~~ performed, either or both of the following shall occur, or may at the election of the collateral taker occur, whether through the operation of netting or set-off or otherwise:

(a) the respective obligations of the parties are accelerated so as to be immediately due and expressed as an obligation to pay an amount representing their estimated current value or are terminated and replaced by an obligation to pay such an amount;

(b) an account is taken of what is due from each party to the other in respect of such obligations, and a net sum equal to the balance of the account is payable by the party from whom the larger amount is due to the other party.

Article ~~24~~ 22

[Protection of certain provisions relating to ~~t~~Op-up or substitution of collateral]

Where a ~~relevant~~ collateral agreement includes:

(a) an obligation to deliver collateral securities or additional collateral securities ~~in circumstances specified in the relevant collateral agreement~~ [in order to take account of changes in the value of the collateral provided under the relevant collateral agreement or in the amount of the secured obligations] [in order to take account of any circumstances giving rise to an increase in the credit risk of the collateral taker] [or, to the extent permitted by the applicable law as determined by the private international law rules of the forum, in any other circumstances specified in the relevant collateral agreement]; or

(b) a right to withdraw collateral securities or other ~~asset~~ collateral on providing, ~~by way of substitution or exchange,~~ collateral securities or other assets of substantially the same value,

the provision of ~~such collateral~~ securities or other assets as described in paragraph (a) and paragraph (b) ~~additional, substitute or replacement collateral securities~~ shall not be treated as invalid, reversed or declared void solely on the basis that they are provided ~~it occurs after,~~ or during a prescribed period before, or on the day of but before, the commencement of an insolvency proceeding in respect of the collateral provider, or after the secured obligations have been incurred.

Article ~~25~~ 23

[Declarations in respect of Chapter VII]

1. - A Contracting State may, ~~at the time of signature, ratification, acceptance, approval or accession, make a~~ by declaration elect that this Chapter shall not apply in respect of the law of that Contracting State.

2. - A Contracting State may by declaration elect that this Chapter shall not apply in relation to security interests in intermediated securities granted by or to parties of such descriptions as may be specified in the declaration.

APPENDIX 2

PRELIMINARY DRAFT CONVENTION ON HARMONISED SUBSTANTIVE RULES
REGARDING INTERMEDIATED SECURITIES

CHAPTER I - DEFINITIONS, SCOPE OF APPLICATION AND INTERPRETATION

Article 1
[Definitions]

In this Convention:

(a) “*securities*” means any shares, bonds or other transferable financial instruments or financial assets (other than cash) or any interest therein;

(b) “*securities account*” means an account maintained by an intermediary to which securities may be credited or debited;

(c) “*intermediary*” means a person that in the course of a business or other regular activity maintains securities accounts for others or both for others and for its own account and is acting in that capacity;

(d) “*account holder*” means a person in whose name an intermediary maintains a securities account, whether that person is acting for its own account or for others (including in the capacity of intermediary);

(e) “*account agreement*” means, in relation to a securities account, the agreement with the relevant intermediary governing that securities account;

(f) “*intermediated securities*” means the rights of an account holder resulting from a credit of securities to a securities account;

(g) “*relevant intermediary*” means, with respect to an account holder, the intermediary that maintains the securities account for the account holder;

(h) “*disposition*” means an act of an account holder disposing of intermediated securities and includes a transfer of title, whether outright or by way of security, and a grant of a security interest;

(i) “*adverse claim*” means, with respect to any securities, a claim that a person has an interest in those securities that is effective against third parties and that it is a violation of the rights of that person for another person to hold or dispose of those securities;

(j) “*insolvency proceeding*” means a collective judicial or administrative proceeding, including an interim proceeding, in which the assets and affairs of the debtor are subject to control or supervision by a court or other competent authority for the purpose of reorganisation or liquidation;

(k) “*insolvency administrator*” means a person (including a debtor in possession where applicable) authorised to administer an insolvency proceeding, including one authorised on an interim basis;

(l) securities are “*of the same description*” as other securities if they are issued by the same issuer and:

(i) they are of the same class of shares or stock; or

(ii) in the case of securities other than shares or stock, they are of the same currency and denomination and form part of the same issue;

(m) “*control agreement*” means an agreement between an account holder, the relevant intermediary and a collateral taker, or, if so permitted by the domestic non-Convention law, an agreement between an account holder and a collateral taker of which notice is given to the relevant intermediary, which includes either or both of the following provisions:

(i) that the relevant intermediary is not permitted to comply with any instructions given by the account holder in respect of the intermediated securities to which the agreement applies without having received the consent of the collateral taker;

(ii) that the relevant intermediary is obliged to comply with any instructions given by the collateral taker in respect of the intermediated securities to which the agreement applies in such circumstances and as to such matters as may be provided by the account agreement or the domestic non-Convention law, without any further consent of the account holder;

(n) “*designating entry*” means an entry in favour of a collateral taker in a securities account in respect of specified intermediated securities which, under the account agreement, a control agreement or the domestic non-Convention law, has either or both of the following effects:

(i) that the relevant intermediary is not permitted to comply with any instructions given by the account holder in respect of the intermediated securities in relation to which the entry is made without having received the consent of the collateral taker;

(ii) that the relevant intermediary is obliged to comply with any instructions given by the collateral taker in respect of the intermediated securities in relation to which the entry is made in such circumstances and as to such matters as may be provided by the account agreement, a control agreement or the domestic non-Convention law, without any further consent of the account holder;

(o) “*domestic non-Convention law*” means the domestic provisions of law of the State whose law is applicable under Article 2, other than those provided in this Convention.

Article 2
[Scope of application]

This Convention applies where rules of private international law of the forum state designate the law of a Contracting State.

Article 3
[Principles of interpretation]

1. - In the implementation, interpretation and application of this Convention, regard is to be had to its purposes, to its international character and to the need to promote uniformity and predictability in its application.

2. - Questions concerning matters governed by this Convention which are not expressly settled in the Convention are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the domestic non-Convention law.

CHAPTER II – INTERMEDIATED SECURITIES

Article 4 *[Intermediated securities]*

1. - The credit of securities to a securities account confers on the account holder:
 - (a) subject to paragraph 2, the right to receive and exercise the rights attached to the securities, including in particular dividends, other distributions and voting rights;
 - (b) the right, by instructions to the relevant intermediary, to cause the securities to be debited to the securities account under Article 5 and credited to a securities account of another account holder (whether with the relevant intermediary or another intermediary) or to be delivered into the possession or control of a collateral taker under Article 6;
 - (c) the right, by instructions to the relevant intermediary, to cause the securities to be debited to the securities account under Article 5 and credited to a securities account of the account holder with a different intermediary;
 - (d) the right, by instructions to the relevant intermediary, to withdraw the securities so as to be held by the account holder otherwise than through a securities account, to the extent permitted under the law under which the securities are constituted, the terms of the securities and the account agreement;
 - (e) subject to this Convention, such other rights as may be conferred by the domestic non-Convention law.

2. - Where securities are credited to a securities account of an account holder who is acting in the capacity of intermediary with respect to those securities, that account holder has the rights specified in paragraph 1(a) only if that account holder, or another intermediary through which, directly or indirectly, it holds the relevant securities, is entitled to those rights against the issuer under the terms of the relevant securities and the law under which the relevant securities are constituted.

3. - Without prejudice to Article 15 and Article 19, the rights referred to in paragraph 1:
 - (a) are effective against the relevant intermediary and third parties; and
 - (b) may be enforced against the relevant intermediary and, to the extent provided by this Convention, the terms of the relevant securities and the law under which the relevant securities are constituted, the issuer of the relevant securities.

4. - Subject to paragraph 5 and paragraph 6, an intermediary must take appropriate measures to enable its account holders to receive and exercise the rights specified in paragraph 1.

[Version A:

5. - Where the enjoyment of any of the rights referred to in paragraph 1 depends on the actions of the relevant intermediary, the scope of those rights is limited to such an extent as is necessary to ensure that the relevant intermediary is not required to take any action that is not within its power. This does not affect any right of the account holder against the issuer of the relevant securities conferred by this Convention, the terms of the relevant securities and the law under which the relevant securities are constituted.

6. - The manner of performance of any obligations of the relevant intermediary in respect of the rights of an account holder under paragraph 1, and the extent of the liability of the relevant intermediary for any failure to perform such obligations, are governed by the account agreement, the law by which the account agreement is governed and any applicable provision of the domestic non-Convention law.]

[*Version B:*

5. - To the extent that the rights referred to in paragraph 1 are dependent on the actions of the relevant intermediary, the account holder is not entitled to any such right to the extent that giving effect to the right:

- (a) is not within the power of the relevant intermediary;
- (b) would require the relevant intermediary to act in a manner that is [more burdensome than reasonable commercial standards or that is] not permitted by any applicable law or by the terms of the relevant securities;
- (c) would require the relevant intermediary to establish a securities account with another intermediary; or
- (d) is waived by the account holder in a manner permitted by the domestic non-Convention law.

6. - Subject to any applicable provision of the domestic non-Convention law, any obligation of the relevant intermediary in respect of the rights of the account holder under paragraph 1 shall be satisfied if the relevant intermediary acts with respect to that obligation:

- (a) in accordance with the account agreement or, if there is no account agreement, in accordance with [reasonable commercial standards];
- (b) in accordance with any other agreement between the account holder and the relevant intermediary; or
- (c) by placing the account holder in a position itself to exercise any relevant right referred to in paragraph 1.]

[7. - Where securities are credited to a securities account of an account holder in the capacity of collateral taker under Article 6, the domestic non-Convention law determines any limits on the rights described in paragraph 1.]

Article 5

[Acquisition and disposition of intermediated securities]

1. - Intermediated securities are acquired by an account holder by the credit of securities to that account holder's securities account.

2. - No further step is necessary, or may be required by the domestic non-Convention law, to render the acquisition of intermediated securities effective against third parties.

3. - Intermediated securities are disposed of by an account holder by the debit of securities to that account holder's securities account.

4. - Without prejudice to any rule of the domestic non-Convention law requiring that no credit or debit be made without a corresponding debit or credit, a debit or credit of securities to a securities account is not ineffective because it is not possible to identify a securities account to which a corresponding credit or debit has been made.

5. - Debits and credits to securities accounts in respect of securities of the same description may be effected on a net basis.

6. - This Article does not preclude any other method provided by the domestic non-Convention law for the acquisition or disposition of intermediated securities, but the priority of an interest created by any such other method is subject to the rules in Article 10.

Article 6

[Security interests in intermediated securities]

1. - An account holder may grant to another person (“the collateral taker”) a security interest in intermediated securities held by that account holder so as to be effective against third parties by:

(a) entering into an agreement with the collateral taker providing (in whatever terms) for the grant of such a security interest; and

(b) delivering the intermediated securities into the possession or control of the collateral taker in accordance with paragraph 2;

and no further step is necessary, or may be required by the domestic non-Convention law, to render a security interest so granted effective against third parties.

2. - Intermediated securities shall be treated as delivered into the possession or control of a collateral taker if:

(a) the relevant securities are credited to a securities account of the collateral taker [(in which case the provisions of Article 5 apply)];

(b) the relevant intermediary is itself the collateral taker;

(c) a designating entry in favour of the collateral taker has been made in the securities account in respect of the relevant intermediated securities and the making of such a designating entry is specified in a declaration by the relevant Contracting State under paragraph 4 as sufficient to result, under the law of that Contracting State, in the intermediated securities being in the possession or control of the collateral taker;

(d) a control agreement with the collateral taker applies to the relevant intermediated securities and the application of such a control agreement is specified in a declaration by the relevant Contracting State under paragraph 4 as sufficient to result, under the law of that Contracting State, in the intermediated securities being in the possession or control of the collateral taker; [or]

(e) the conditions referred to in both sub-paragraph (c) and sub-paragraph (d) are fulfilled and the fulfilment of both those conditions is specified in a declaration by the relevant Contracting State under paragraph 4 as sufficient to result, under the law of that Contracting State, in the intermediated securities being in the possession or control of the collateral taker[; or

(f) the relevant securities are held or designated in such other manner as is specified in a declaration made by the relevant Contracting State under paragraph 4 as being sufficient to result, under the law of that Contracting State, in the intermediated securities being in the possession or control of the collateral taker].

3. - A security interest may be granted under this Article in terms such that it extends to all intermediated securities from time to time standing to the credit of the relevant securities account or, if the domestic non-Convention law so permits, to a specified category, quantity, proportion or value of such intermediated securities. Such a security interest is effective without the need for further identification of particular securities.

4. - A Contracting State may by declaration[:

(a)] state which of the conditions specified in paragraph 2(c) to (e) is sufficient, under the law of that Contracting State, to result, under the law of that Contracting State, in intermediated securities being in the possession or control of a collateral taker and describe the requirements under the law of that Contracting State for an effective designating entry or an effective control agreement[; and, or alternatively

(b) describe the manner of holding or designation of securities credited to a securities account which, under the law of that Contracting State, is sufficient to result in the corresponding intermediated securities being in the possession or control of a collateral taker for the purposes of paragraph 2(f)].

5. - A Contracting State may by declaration elect that this Article shall not apply in relation to security interests in intermediated securities granted by or to parties of such descriptions as may be specified in the declaration.

6. - The domestic non-Convention law determines:

(a) whether and in what circumstances a security interest in intermediated securities may arise by operation of law; and

(b) whether such an agreement as is referred to in paragraph 1(a) or the delivery of intermediated securities into the possession or control of a collateral taker is required to be evidenced in writing or in a legally equivalent manner and whether such evidence must permit the identification of intermediated securities so delivered.

7. - This Article does not preclude any other method provided by the domestic non-Convention law for the grant of a security interest in intermediated securities, but the priority of a security interest granted by any such other method is subject to the rules in Article 10.

Article 7

[Authorisation, timing, conditionality and reversal of debits, credits etc.]

1. - A debit or credit of securities to a securities account or a designating entry is not effective unless the relevant intermediary is authorised to make that debit, credit, or designating entry:

(a) by the account holder and, in the case of a debit or designating entry that relates to intermediated securities which are subject to a security interest granted under Article 6, by the collateral taker; or

(b) by the domestic non-Convention law.

2. - Except as otherwise provided by paragraph 4, a debit or credit of securities to a securities account or a designating entry takes effect when it is made.

3. - The time at which intermediated securities shall be treated as delivered into the possession or control of a collateral taker is as follows:

(a) in the circumstances specified in Article 6(2)(a), when the relevant securities are credited to a securities account of the collateral taker;

(b) in the circumstances specified in Article 6(2)(b), when the agreement between the account holder and the relevant intermediary by which the security interest is granted is entered into;

(c) in the circumstances specified in Article 6(2)(c), (d) or (e), when the relevant condition is fulfilled[;

(d) in the circumstances specified in Article 6(2)(f), when the relevant securities are held or designated in the manner described in the declaration of the relevant Contracting State referred to in Article 6(4)].

4. - A debit or credit of securities which is made conditionally under the terms of an account agreement, the rules of a securities clearing or settlement system or the domestic non-Convention law is effective against third parties when, and only when, the condition is satisfied[; but if the condition is satisfied, the relevant disposition or acquisition of intermediated securities is treated for the purposes of Article 10 as having become effective against third parties when the relevant debit or credit was made conditionally].

5. - An account agreement, the rules of a clearing or settlement system or the domestic non-Convention law may provide that a debit or credit of securities or a designating entry is liable to be reversed. [The domestic non-Convention law determines whether such a debit, credit or designating entry has any effect against third parties during the period before it is reversed and, if so, what that effect is.]

6. - Notwithstanding paragraph 5, if:

(a) securities have been credited to a securities account of an account holder, or have been designated in favour of another person in the manner described in Article 6, in circumstances such that the credit or designating entry is not effective or is liable to be reversed; and

(b) before that credit or designating entry has been [cancelled or] reversed, the securities are credited to a securities account of a third party, or are designated in the manner described in Article 6 in favour of a third party (such a third party being in either case referred to in this sub-paragraph as "*the acquirer*"), under a further disposition,

the fact that the initial credit or designating entry was made in circumstances such that it is not effective or is liable to be reversed does not make the further credit or designating entry ineffective, in favour of the acquirer, against the person making the further disposition, the relevant intermediary or third parties unless:

(i) the further credit or designating entry is made conditionally and the condition has not been satisfied;

(ii) the acquirer has knowledge, at the time when the further credit or designating entry is made, that it is made as a result of the further disposition and that the further disposition is made in the circumstances referred to in this paragraph; or

(iii) the further disposition is made by way of gift or otherwise gratuitously.

7. - For the purposes of paragraph 6 the acquirer has knowledge that the further credit or designating entry is made as a result of a purported disposition made in the circumstances referred to in that paragraph if the acquirer has actual knowledge that it is so made, or has knowledge of facts sufficient to indicate that there is a significant probability that it is so made and deliberately avoids information that would establish that that is the case.

[Article 8

Overriding effect of certain rules of clearing or settlement systems

Any provision of the rules or agreements governing the operation of a securities clearing or settlement system which is directed to the stability of the system or the finality of dispositions effected through the system shall, to the extent of any inconsistency, prevail over [any provision in Article 7] [any provision of this Convention].]

Article 9

[Prohibition of upper-tier attachment]

1. - No attachment of or in respect of intermediated securities of an account holder shall be granted or made against the issuer of the relevant securities or against any intermediary other than the relevant intermediary.

2. - In this Article "*attachment*" means any judicial, administrative or other act or process for enforcing or satisfying a judgment, award or other judicial, arbitral, administrative or other decision against or in respect of the account holder or for freezing, restricting or impounding property of the account holder in order to ensure its availability to enforce or satisfy any future such judgment, award or decision.

Article 10

[Priority among competing interests]

1. - Interests arising under Article 5 and Article 6:

(a) have priority over any interest created by any method permitted by the domestic non-Convention law other than those provided by Article 5 or Article 6; and

(b) rank among themselves in the order in which they were created.

2. - An interest in intermediated securities arising by operation of law under any rule of the domestic non-Convention law has such priority as is afforded to it by the rule in question.

3. - Subject to paragraph 1 and paragraph 2, the priority of any competing interests in intermediated securities is determined by the domestic non-Convention law.

4. - As between persons entitled to any interests referred to in this Article, the priorities provided by the preceding paragraphs may be varied by agreement between those persons.

CHAPTER III – PROTECTION OF INNOCENT ACQUIRER

Article 11

[Acquisition by an innocent person of intermediated securities]

1. - A person who acquires intermediated securities by credit to a securities account under Article 5, or who acquires a security interest in such securities by an agreement or designation under Article 6, and who does not at the time of acquisition have knowledge of an adverse claim with respect to the securities is not subject to that adverse claim.

2. - Paragraph 1 does not apply in respect of an acquisition of securities made[, or the creation of a security interest effected,] by way of gift or otherwise gratuitously.

3. - For the purposes of this Article a person acts with knowledge of an adverse claim if that person:

(a) has actual knowledge of the adverse claim; or

(b) has knowledge of facts sufficient to indicate that there is a significant probability that the adverse claim exists and deliberately avoids information that would establish the existence of the adverse claim;

and knowledge received by an organisation is effective for a particular transaction from the time when it is or ought reasonably to have been brought to the attention of the individual conducting that transaction.

CHAPTER IV - INSOLVENCY

Article 12

[Rights of account holders on insolvency of intermediary]

The rights of an account holder constituted by the credit of securities to a securities account, and the rights of a person holding a security interest created under Article 6, are effective against the insolvency administrator and creditors in any insolvency proceeding in respect of the relevant intermediary.

[Article 13

Effectiveness of debits, credits etc. and instructions on insolvency of operator or participant in securities clearing or settlement system

1. - Any provision of the rules or agreements governing the operation of a securities clearing or settlement system which is directed to the stability of the system or the finality of acquisitions or dispositions effected through the system shall have effect notwithstanding the commencement of an insolvency proceeding in respect of the operator of the system or any participant in the system to the extent that that provision:

(a) precludes the invalidation or reversal of any acquisition or disposition effected by a debit or credit of securities to, or a designating entry in, a securities account which forms part of the system after the time at which that acquisition or disposition is treated as final under the rules of the system;

(b) precludes the revocation of any instruction given by a participant in the system for making a disposition of securities, or for making a payment relating to an acquisition or disposition of securities, after the time at which that instruction is treated under the rules of the system as having been entered irrevocably into the system.

2. - Paragraph 1 applies notwithstanding that any invalidation, reversal or revocation referred to in that paragraph would otherwise occur by mandatory operation of the insolvency law of a Contracting State.]

Article 14
[Effects of insolvency]

Subject to Article 13 and Article 24, nothing in this Convention affects:

- (a) any rules of law applicable in insolvency proceedings relating to the avoidance of a transaction as a preference or a transfer in fraud of creditors; or
- (b) any rules of procedure relating to the enforcement of rights to property which is under the control or supervision of an insolvency administrator.

CHAPTER V – DUTIES OF INTERMEDIARY

Article 15
[Instructions]

1. - Subject to paragraph 2 [and Article 7(1)], an intermediary is neither bound nor entitled to give effect to any instructions with respect to intermediated securities of an account holder given by any person other than that account holder.

2. - Paragraph 1 is subject to:

- (a) the provisions of the account agreement, any other agreement between the intermediary and the account holder or any other agreement entered into by the intermediary with the consent of the account holder;
- (b) the rights of any person (including the intermediary) who holds a security interest created under Article 6;
- (c) subject to Article 9, any judgment, award, order or decision of a court, tribunal or other judicial or administrative authority of competent jurisdiction;
- (d) any mandatory rule of the domestic non-Convention law; and
- (e) where the intermediary is the operator of a clearing or settlement system, the rules of that system.

Article 16¹
[Duty of intermediary with respect to holding or credit of securities]

[1. - An intermediary may not:

- (a) make any credit of securities to a securities account maintained by it; or
- (b) dispose of securities held by it or credited to a securities account which it holds with another intermediary,

if upon that credit or disposition becoming effective there would not be sufficient securities of the same description held by it or credited to securities accounts which it holds with another intermediary.]

¹ Articles 16, 17 and 18 are subject to modification in the light of further discussion of and possible changes to Articles 7, 10 and 11.

2. - If at any time sufficient securities of any description are not held by an intermediary or credited to securities accounts which it maintains with another intermediary, it must [immediately] [promptly] take such action as is required to ensure that sufficient securities of that description are so held or credited.

3. - In the preceding paragraphs “*sufficient securities*” of any description means securities of an aggregate number or amount at least equal to the aggregate number or amount of securities of that description credited to securities accounts maintained by the intermediary.

4. - Paragraph 2 does not affect any provision of the domestic non-Convention law, or, subject to the domestic non-Convention law, any provision of the rules of a securities clearing or settlement system or of an account agreement, relating to the allocation of the cost of ensuring compliance with the requirements of that paragraph.

[5. - The fact that a credit or disposition is made in contravention of paragraph 1 does not render that credit or disposition ineffective, but:

- (a) the intermediary must comply with paragraph 2; and
- (b) this paragraph does not affect any liability of the intermediary to compensate an account holder for any loss arising from the contravention.]

Article 17

[Allocation of securities to account holders’ rights: securities so allocated not property of the intermediary]

[1. - Securities of each description held by an intermediary or credited to securities accounts held by an intermediary with another intermediary shall be allocated to the rights of the account holders of that intermediary to the extent necessary to ensure that the aggregate number or amount of the securities of that description so allocated is equal to the aggregate number or amount of such securities credited to securities accounts maintained by the intermediary.]

[2. - Securities allocated under paragraph 1 shall not form part of the property of the intermediary available for distribution among or realisation for the benefit of its creditors in the event of an insolvency proceeding in respect of the intermediary or be otherwise subject to claims of creditors of the intermediary.]

3. - Subject to paragraph 4, the allocation required by paragraph 1 shall be effected by the domestic non-Convention law and, subject to the domestic non-Convention law, by arrangements made by the relevant intermediary.

4. - A Contracting State may by declaration elect that the allocation required by paragraph 1 shall be effected by arrangements for the segregation of securities held by the relevant intermediary or credited to securities accounts held by the relevant intermediary with another intermediary sufficient to ensure, under the law of that Contracting State, that the securities so segregated are allocated to the rights of the account holders of the relevant intermediary.

Article 18

[Effect of insufficiency of securities held in respect of account holders’ rights]

1. - If the aggregate number or amount of securities of any description held by an intermediary or credited to a securities account that it holds with another intermediary is less than the aggregate number or amount of securities of that description credited to securities accounts, the shortfall:

(a) where the intermediary is the operator of a securities clearing or settlement system and the rules of the system make provision for the elimination of the shortfall, shall be allocated in the manner so provided; and

(b) subject to sub-paragraph (a), shall be allocated among the account holders to whose securities accounts securities of the relevant description are credited, in proportion to the respective numbers or amounts of securities so credited.

2. - [Unless otherwise provided by the domestic non-Convention law,] [I]n any allocation required under paragraph 1(b) no account shall be taken of:

(a) the origin of, or any past dealings in, any securities held by the intermediary or credited to securities accounts held by the intermediary with another intermediary; or

(b) the order in which or time at which any securities are credited or debited to the respective securities accounts of account holders.

CHAPTER VI – RELATIONS WITH ISSUERS OF SECURITIES

Article 19

[Position of issuers of securities]

1. - Any rule of law of a Contracting State, and any provision of the terms of issue of securities constituted under the law of a Contracting State, which would prevent the holding of securities with an intermediary or the effective exercise by an account holder of rights in respect of intermediated securities shall be modified to the extent required to make possible the holding of such securities with an intermediary and the effective exercise of such rights.

2. - Without limiting the generality of Paragraph 1, that paragraph applies in particular to any rule or provision:

(a) which restricts the ability of a holder of securities to exercise voting or other rights in different ways in respect of different parts of a holding of securities of the same description;

(b) [which does not include adequate provision for making available to account holders holding intermediated securities, or to intermediaries for transmission to such account holders:

(i) copies of notices, accounts, circulars and other materials addressed by the issuer to holders of such intermediated securities; and

(ii) means of exercising the rights attached to the securities either in person or through a proxy or other representative;]

(c) which prohibits or fails to recognise the holding of securities by a person acting in the capacity of nominee or intermediary;

(d) under which recognition of the holding of securities by an intermediary or the exercise of rights by an account holder holding intermediated securities is conditional on the maintenance of records in a particular medium;

(e) which imposes restrictions on the holding of securities or the exercise of rights attached to securities by reference to the identity, status, residence, nationality, domicile or other characteristics or circumstances of any person acting in the capacity of intermediary.

[3. - Subject to paragraph 1 and paragraph 2, nothing in this Convention makes an issuer of securities bound by, or compels such an issuer to recognise, a right or interest of any person in or in respect of such securities if the issuer is not bound by or compelled to recognise that right or interest under the law under which the securities are constituted and the terms of the securities.]

Article 20
[Set-off]

1. - As between an account holder who holds intermediated securities for its own account and the issuer of those securities, the fact that the account holder holds the securities with an intermediary shall not of itself, in any insolvency proceeding in respect of the issuer, preclude the existence or prevent the exercise of any rights of set-off which would have existed and been exercisable if the account holder had held the securities otherwise than through an intermediary.

2. - This Article does not affect any express provision of the terms of the relevant securities.

**CHAPTER VII – SPECIAL PROVISIONS WITH RESPECT TO
COLLATERAL TRANSACTIONS**

Article 21
[Interpretation of terms used in Chapter VII]

In this Chapter:

(a) “*collateral agreement*”, “*collateral provider*”, “*collateral taker*”, “*collateral securities*” and “*secured obligations*” have the meanings respectively given in Article 22(1);

(b) “*enforcement event*” means, in relation to a collateral agreement, an event on the occurrence of which, under the terms of that collateral agreement, the collateral taker is entitled to enforce its security.

Article 22
[Enforcement]

1. - This Article applies in respect of an agreement (a “*collateral agreement*”) under which a person [other than a natural person] (the “*collateral provider*”) creates a security interest in favour of another person (the “*collateral taker*”) in intermediated securities which are of a kind regularly traded on a financial market (the “*collateral securities*”) in order to secure the performance of [any existing or future obligations of the collateral provider or a third person] [financial obligations of any kind referred to in paragraph 2] (the “*secured obligations*”).

[2. - The secured obligations may consist of or include any obligation of a financial character, including:

(a) present or future, actual or contingent or prospective obligations (including obligations arising under a master agreement, whether under a provision for the acceleration or close-out of obligations or otherwise);

(b) obligations to deliver securities or other property;

- (c) obligations owed to the collateral taker by a person other than the collateral provider;
- (d) obligations of a specified description arising from time to time.]

3. - On the occurrence of an enforcement event, the collateral taker may realise the collateral securities:

- (a) by selling them and applying the net proceeds of sale in or towards the discharge of the secured obligations;
- (b) by appropriating the collateral securities as the collateral taker's own property and setting off their value against, or applying their value in or towards the discharge of, the secured obligations, provided that the collateral agreement provides for realisation in this manner and specifies the basis on which collateral securities are to be valued for this purpose.

4. - Collateral securities may be realised under paragraph 3:

- (a) subject to any contrary provision of the collateral agreement, without any requirement that:
 - (i) prior notice of the intention to realise shall have been given;
 - (ii) the terms of the realisation be approved by any court, public officer or other person; or
 - (iii) the realisation be conducted by public auction or in any other prescribed manner; and
- (b) notwithstanding the commencement or continuation of an insolvency proceeding in respect of the collateral provider or the collateral taker.

5. - Paragraph 3 and paragraph 4 are without prejudice to any requirement of the domestic non-Convention law to the effect that the realisation or valuation of financial collateral and the calculation of the relevant financial obligations must be conducted in a commercially reasonable manner.

Article 23

[Right to use collateral securities]

1. - If and to the extent that the terms of a collateral agreement so provide, the collateral taker shall have the right to use and dispose of the collateral securities as if it were the owner of them (a "*right of use*").

2. - Where a collateral taker exercises a right of use, it thereby incurs an obligation to replace the collateral securities originally transferred (the "*original collateral securities*") by transferring to the collateral provider, not later than the discharge of the secured obligations, securities of the same issuer or debtor, forming part of the same issue or class and of the same nominal amount, currency and description or, where the collateral agreement provides for the transfer of other assets [following the occurrence of any event relating to or affecting any securities provided as collateral], those other assets.

3. - Securities transferred under paragraph 2 before the secured obligations have been fully discharged:

(a) shall, in the same manner as the original collateral securities, be subject to a security interest under the relevant collateral agreement, which shall be treated as having been created at the same time as the security interest in respect of the original collateral securities was created; and

(b) shall in all other respects be subject to the terms of the relevant collateral agreement.

4. - The exercise of a right of use shall not render invalid or unenforceable any right of the collateral taker under the relevant collateral agreement.

5. - A collateral agreement may provide that, if an enforcement event occurs before the secured obligations have been fully discharged, either or both of the following shall occur, or may at the election of the collateral taker occur, whether through the operation of netting or set-off or otherwise:

(a) the respective obligations of the parties are accelerated so as to be immediately due and expressed as an obligation to pay an amount representing their estimated current value or are terminated and replaced by an obligation to pay such an amount;

(b) an account is taken of what is due from each party to the other in respect of such obligations, and a net sum equal to the balance of the account is payable by the party from whom the larger amount is due to the other party.

Article 24

[Top-up or substitution of collateral]

Where a collateral agreement includes:

(a) an obligation to deliver collateral securities or additional collateral securities [in order to take account of changes in the value of the collateral provided under the relevant collateral agreement or in the amount of the secured obligations] [in order to take account of any circumstances giving rise to an increase in the credit risk of the collateral taker] [or, to the extent permitted by the applicable law as determined by the private international law rules of the forum, in any other circumstances specified in the relevant collateral agreement]; or

(b) a right to withdraw collateral securities or other assets on providing collateral securities or other assets of substantially the same value,

the provision of securities or other assets as described in paragraph (a) and paragraph (b) shall not be treated as invalid, reversed or declared void solely on the basis that they are provided during a prescribed period before, or on the day of but before, the commencement of an insolvency proceeding in respect of the collateral provider, or after the secured obligations have been incurred.

Article 25

[Declarations in respect of Chapter VII]

1. - A Contracting State may by declaration elect that this Chapter shall not apply in respect of the law of that Contracting State.

2. - A Contracting State may by declaration elect that this Chapter shall not apply in relation to security interests in intermediated securities granted by or to parties of such descriptions as may be specified in the declaration.

Table of Concordance

<i>UNIDROIT - Study LXXVIII - Doc.24 Preliminary Draft Convention on Harmonised Substantive Rules regarding Intermediated Securities (May/June 2005)</i>	<i>UNIDROIT- Study LXXVIII - Doc.18 Preliminary draft Convention on Harmonised Substantive Rules regarding Securities Held with an Intermediary (November 2004)</i>
Article 1	Article 1(1)
Article 2	Article 1(5)
Article 3	Article 1(2), (4)
Article 4(1)	Article 2(1)
Article 4(2)	Article 2(1)(a)
Article 4(3)	Article 2(2)
Article 4(4)-(6)	Article 2(3)
Article 4(7) – new provision	
Article 5	Article 3(1)-(5), (7)
Article 6(1), (2), (4), (7)	Article 4(1), (5)
	Article 4(2) – provision deleted
Article 6(3)	Article 4(3)
Article 6(5), (6) - new provision	
Article 7(1)	Article 5(1)
Article 7(2)	Article 6
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Article 7(4)-(7)	Article 5(2)-(5)
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