



**DIPLOMATIC CONFERENCE TO ADOPT A  
CONVENTION ON SUBSTANTIVE RULES  
REGARDING INTERMEDIATED SECURITIES  
Final session**  
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## Comments

*(submitted by UNCITRAL)*

### **Additional comments with respect to the changes proposed in CONF. 11/2 – Doc. 6 Corr. 2**

1. As we saw the Corrigenda to CONF. 11/2 - Doc. 6 on the UNIDROIT website after having sent our comments, we now had the opportunity to consider the impact of these provisions and also the extent to which our previous comments of 24 August (CONF. 11/2 – Doc. 15) may have been superseded by the changes proposed. In so far as those comments related to the drafting of Articles 7, 14 and 21, we seek to make no changes. We do, however, wish to make the following additional comments with respect to the changes proposed in Corr.2.

#### **Article 1**

##### *Subparagraph (q)*

2. Subparagraph (q) of this Article has now been deleted. However, our concerns relating to the treatment of some types of avoidance powers under Article X and others under Article Y, set out in our letter of 24 August, remain.

#### **Article X**

##### *Paragraph 1*

3. Paragraph 1 states the general principle of effectiveness of rights and interests against third parties being recognized in insolvency proceedings. We agree with that principle. The principle is subject to paragraphs 2 and 3 and Article Y.

##### *Paragraph 2*

4. We understand the principle under paragraph 2 to be that where an account holder grants an interest to its intermediary, that interest is effective against the account holder in the intermediary's insolvency or, to put it another way, the account holder's rights in the insolvency of the intermediary are subject to the interest granted to the intermediary. However, in our view, that principle is not clear from the drafting of paragraph 2. Firstly, paragraph 2 appears to state a principle that is different from paragraph 1 and therefore is not a qualification of paragraph 1 (as is suggested by the opening words of paragraph 1).

5. Moreover, it is a little difficult to see how paragraph 1 can be subject to a paragraph that opens with the words “This Article does not apply”. Secondly, it is not clear what the words “This Article does not apply to” is intended to mean – is it that such an interest granted by an account holder is not intended to be effective in insolvency, since that is what the Article deals with? If so, that is not what the commentary indicates. It might be preferable to include the explanation in the commentary to this Article.

6. We reiterate our comments about use of the terms “rights” and “interests”.

#### *Paragraph 3*

7. This paragraph is unchanged from its previous iteration in Article 14. We reiterate the comment, mentioned in our previous comments, about the use of the words “rules of law” and “rules of procedure”. If this distinction is to be retained, it may be better to refer in subparagraph (3(b) to “rules of law relating to the procedural aspects of enforcement”, although this will create the difficulties we already mentioned and will not result in uniformity, as what is a procedural and what is a substantive issue of enforcement will differ from State to State.

#### *Paragraph 4*

8. This paragraph is unchanged and we have no comments.

### **Article Y**

#### *Paragraph 1*

9. We have some difficulty understanding the drafting of paragraph 1(a), but presume it is intended to mean that a Contracting State may make a declaration to the effect that priorities and privileges applicable under insolvency law shall either take precedence over any interest that has become effective under Article 11 or 12 or be subject to any interest that has become effective under Article 11 or 12. In other words, the declaration is intended to indicate what applies – domestic law or the law of the Convention – with respect to priorities and privileges applicable under insolvency law. We agree that the relationship between the Convention regime and national law needs to be clear, particularly in the area of insolvency.

10. We reiterate the previous comments with respect to the use of the words “priorities” and “privileges”. We would add that the clarification or definition needs to explain whether these terms mean the same thing but reflect it in a different way or whether each one of them has a different meaning. We query the use of the phrase “shall have priority” in paragraph 1(a)(i). We also note that Article X refers to “rights and interests” becoming effective under Article 11 or 12, while Article Y refers only to “interests”. We note from the commentary that this use of terminology is intended to ensure that priorities or privileges competing with Article 11 or 12 interests may not involve property rights or real rights of the beneficiary class. We query whether this usage is sufficient to achieve the desired result, given the overlap in many legal systems between rights and interests. We note, in particular, that the UNCITRAL Insolvency Law Guide uses the term “security interest” to refer to certain rights.

11. With respect to paragraph 1(b), we reiterate our previous comments with respect to the distinction in terms of treatment drawn between those avoidance powers included in Article X and those in Article Y.