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
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COMMENTS BY GOVERNMENTS AND INTERNATIONAL ORGANISATIONS

(*Comments by the Federative Republic of Brazil)*

After having analyzed the text of the Convention on Harmonised Substantive Rules Regarding Intermediated Securities, the Government of the Federative Republic of Brazil hereby makes the following comments:

1. Article 5 – Acquisition and disposition of intermediated securities

Paragraph 2

Concerning such provision, which deals with the requirements necessary for acquisition and disposition of intermediated securities, we suggest the insertion of the following text at the beginning of the paragraph: "If the domestic non-Convention law so permits", in order to preserve the neutrality of the convention in connection with legal systems that, such as the Brazilian one, establish, as a requirement for the validity of the acquisition and disposition of securities, publicity through registration of the operation of acquisition and disposition in the book maintained by the issuer / registrar of the securities or in the systems maintained by the CSD.

Paragraph 5

In countries where identification of the final investor is mandatory, as is the case of Brazil, the wording of such paragraph would permit debit or credit of the securities to be made on a net basis, even by intermediaries, and this, no doubt, would be in conflict with the referred pattern. Accordingly, we suggest to include in the paragraph: "Without prejudice to any rule of the domestic non-Convention law requiring that no credit or debit in respect of securities of the same description be made on a net basis, a debit or credit of securities to a securities account is not ineffective because it has been effected on a net basis."

Paragraph 6

We suggest deletion of the final part of this paragraph, "but the priority of an interest created by any such other method is subject to the rules in Article 10", for the reasons given in paragraph 2 above.

2. Article 6 – Security interests in intermediated securities

Paragraph 1

In our internal legal system the publicity of the granting of a security interest (which shall be made by means of registration of the security interest in the relevant securities account) is a requirement for its validity before third parties. Nevertheless, such requirement is not reflected in Paragraph 1.

In order to solve such conflict, we suggest insertion of a subparagraph (c), establishing the need of registration of the granted security interests, which shall be made according to the domestic non-convention law.

Paragraph 2

As an alternative to the above suggestion for Paragraph 1 and in order to reach the same purpose, we suggest the following:

(i) amendment to the Paragraph 2, in order to include the following provisions at the end of subparagraphs "a" and "b":

Subparagraph (a): "and such credit is specified in a declaration by the relevant Contracting State under paragraph 4 as sufficient to result, under the law of the Contracting State, in the intermediated securities being in the possession or control of the collateral taker";

Subparagraph (b): "and such condition is specified in a declaration by the relevant Contracting State under paragraph 4 as sufficient to result, under the law of the Contracting State, in the intermediated securities being in the possession or control of the collateral taker";

(ii) deletion of the word "or" at the end of subparagraph (d), and

(iii) maintainance of the full text of subparagraph (f).

Paragraph 3

The expression "if the domestic non-Conventional law so permits" should be placed in the beginning of Paragraph 3, since our internal legal system requires that security interests be granted on specifically identified assets.

Paragraph 4

The full text of the Paragraph should be accepted.

In view of the suggestions made in Paragraph 2, the rule of statement of the requirements to characterize a transfer in subparagraph (a) should be expanded. Accordingly, the beginning of such subparagraph (a) should have the following wording: "(a) state which of the conditions specified in paragraph 2 (a) to (e) is sufficient..."

The full text of subparagraph (b) should be maintained.

3. Article 7 – Authorization, timing, conditionality and reversal of debits, credits, etc.

Paragraph 4

The suggested text: "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 debt or credit was made conditionally" should be rejected, since it is not in conformity with the general rule existing in our internal legal system on the effects of the

precedent condition. Thus, should such provision be maintained, it could bring legal uncertainty concerning title on securities.

4. Article 8 – Overriding effect of certain rules of clearing or settlement systems

The part of Article 8, which establishes: "which is directed to the stability of system or the finality of dispositions effected through the system" should be deleted. Should such provision be maintained, it could cause legal uncertainty, since there is no objective criterion to define when a provision has or not as purpose "the stability of system and effectiveness of the operations carried out therein".

5. Article 13 – Effectiveness of debits, credits etc, and instructions on insolvency of operator or participant in securities clearing or settlement system

The text "which is directed to the stability of system or the finality of dispositions effected through the system" should be deleted for the same reasons mentioned in the comments to Article 8 hereinabove.

6. Article 19 – Position of issuers of securities

Paragraph 2, subparagraph (c)

According to our internal rules, the intermediary and/or nominee may only exercise voting rights in the name of its clients or investors when they have granted him a power of attorney for such purpose. Accordingly, such provision could cause legal uncertainty.

Paragraph 2, subparagraph (d)

In our understanding such provision could be an eventual obstacle to a future and probable standardization of the legislation of Contracting states, to the effect of requiring that custody and registration of securities only be made under the book entry manner.

7. Article 22 - Enforcement

Paragraph 1

We find it convenient not to restrict such provisions to legal entities since individuals could have a relevant market participation and be the holders of accounts with intermediaries. Therefore, we suggest deletion of the expression "other than a natural person".

We suggest that the sentence: "financial obligations of any kind referred to in paragraph 2", should be maintained, especially since it will restrict the cases where the special rule of appropriation of guarantees will be admitted by the internal legal system.

Paragraph 2

We suggest acceptance of the whole Paragraph.