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Accession Kit to the UNIDROIT Convention on Substantive Rules for Intermediated Securities ("Geneva Securities Convention")

Information for Contracting States in respect of the Convention's declarations and references to sources of law outside the Convention

Draft prepared by the Secretariat

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INTRODUCTION

1. This document addresses a certain number of practical matters that Contracting States are advised to consider in connection with the ratification, acceptance, approval of, or accession to, the UNIDROIT Convention on Substantive Rules for Intermediated Securities (official shorthand: "Geneva Securities Convention"; hereinafter: the "Convention").[1] The purpose of this document is to assist legislators, regulators and policymakers of Contracting States consider the legislative and treaty actions that may be needed to implement the Convention in a manner consistent with its provisions and with the policy choices it offers to Contracting States.

2. Part I ("Declarations Memorandum") provides information on the declarations set out in the Convention. Drawing on the *Official Commentary* to the Convention, it explains the scope, purpose and required content of the declarations contemplated by the Convention, as well the steps necessary for lodging them with the Depositary. Part II also takes into account the Practice of the UNIDROIT Secretariat as depositary of international conventions, as stated, for instance, in the Declarations Memoranda relating to the Cape Town Convention on International Interests in Mobile Equipment (the "Cape Town Convention") and the Protocols thereto.[2]

3. Part II identifies matters that are not harmonised by the Convention. It presents those issues where the Convention refers to sources of law outside the Convention. States implementing the Convention are invited to consider the manner in which their domestic laws address these issues, in order to create a comprehensive and coherent set of legal rules for intermediated securities.

4. It should be noted that this document is not intended to offer comprehensive interpretation of the Convention or to assist judges, arbitrators or practitioners understand its principles or implications. Comprehensive guidance of such nature is provided in the *Official Commentary* to the Convention, to which this document refers.

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[1] For the text of the Convention and official documents and information issued in relation thereto, see www.unidroit.org/english/conventions/2009intermediatedsecurities/main.htm.

[2] See the Declarations Memoranda issued in relation to the Cape Town Convention: UNIDROIT 2008 – DC9/DEP – Doc. 1 Rev. 2 (Aircraft Protocol) and UNIDROIT 2009 – DC10/DEP – Doc. 1 (Railway Protocol), available on http://www.unidroit.org/english/conventions/mobile-equipment/depositaryfunction/main.htm.

PART I

DECLARATIONS

Section 1. General remarks

5. Article 44 of the Convention[3] provides that no reservations may be made to the Convention.[4] However, the highly technical subject matter covered by the Convention, the variety of solutions offered under different legal traditions, and the sensitive nature of financial markets regulation, led to the formulation of an elaborate system of declarations so as to afford Contracting States and Regional Economic Integration Organisations[5] an adequate degree of flexibility in implementing the Convention. For a list of the Convention's declarations, see **Appendix A**.

6. The system of declarations provided for under the Convention gives Contracting States the possibility of making choices in respect of certain matters so as to better implement the policy objectives that they see fit to pursue in respect of intermediated securities and facilitate the coordination between the provisions of the Convention and their legal systems.

Section 2. Procedures for making and withdrawing declarations

A. Time and form of declarations

7. Article 40 of the Convention provides that instruments of ratification, acceptance, approval or accession are to be deposited with UNIDROIT, which is designated the Depositary. Declarations under the Convention must be made accordance with Article 45, which also sets forth the procedure for the modification or withdrawal of a declaration, as well as the time at which a declaration or its modification or withdrawal becomes effective. Under Article 45 of the Convention, any declaration or subsequent declaration or any withdrawal of a declaration made under the Convention is to be notified in writing to UNIDROIT, as Depositary.

8. Except for the declaration under Article 41(2), which may only be made by a Regional Economic Integration Organisation at the time of signature, acceptance, approval or accession, and the initial declaration under Article 43(1), which may only be made at the time of signature, ratification, acceptance, approval or accession, declarations may be made by a Contracting State at any time (Article 45(1)). Except for a declaration by a Regional Economic Integration Organisation Declarations made at the time of signature are subject to confirmation upon ratification, acceptance or approval (Article 45(3)). In the absence of confirmation such declarations will be without effect.

9. According to Article 45(2), declarations and confirmations of declarations must be in writing and formally notified to the Depositary. It should be noted that the Convention was drawn up in English and French, which are the only two authentic texts. The Depositary, therefore, is not able to accept instruments of ratification, acceptance, approval or accession, declarations or notification in a language other than English or French.

B. Entry into force of declarations

10. Article 45(3) lays down two rules of general application. The first sentence of Article 45(3), which provides that a declaration takes effect simultaneously with the entry into force of the

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[3] Hereinafter, references to Articles are to Articles of the Convention, unless specified otherwise.

[4] Cf. Articles 2(d) and 19-23 of the 1969 Vienna Convention on the Law of Treaties.

[5] References in this document to Contracting States include Regional Economic Integration Organisations, except where the context indicates otherwise.

Convention in respect of the State concerned, contemplates a declaration made (or in the case of a declaration made at the time of signature, confirmed) either at the same time as the State's ratification, acceptance, approval or accession, or after that time but prior to the entry into force of the Convention in respect of that State. In both cases, the declaration will take effect in relation to the Contracting State upon the entry into force of the Convention in respect of that State.

11. In accordance with the second sentence of Article 45(3), a declaration that is notified to the Depositary after the entry into force of the Convention in respect of the State concerned takes effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the Depositary, a rule which has the advantage of giving other Contracting States some time to become aware of the changes in the law of the State making the declaration, so as to provide a reasonable opportunity for parties to adjust business practices and to take into account the changes to be introduced by the declaration.

12. Article 45(4) constitutes a pendant to Article 45(2) and the second sentence of Article 45(3) in that it permits the modification or withdrawal by a State at any time of a declaration by formal notification in writing addressed to the Depositary, such modification or withdrawal taking effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the Depositary.

13. Article 45(5) makes it clear that despite Article 45(1) to (4), the Convention continues to apply to all rights and interests arising *prior to* the effective date of the declaration, modification or withdrawal (as if no declaration, modification or withdrawal of the declaration had been made). However, Article 45(5) does not apply to the declaration provided for in Article 39 (Article 39(4).

C. Use of the declaration forms

14. Declaration forms are provided for all declarations authorised by the Convention, but not for the notification of withdrawal of a declaration.

15. Contracting States may lodge declarations in any form that complies with the requirements of the Convention. However UNIDROIT, as Depositary, encourages all Contracting States to base their declarations on the declaration forms in this memorandum so as to ensure that their declarations comply with the requirements of the Convention. *Alternative* forms are provided for the declarations in respect of some of the articles, reflecting the different possibilities permitted under the provisions in question, as indicated in the relevant form.

D. Information about laws and policies relating to the matters covered by the Convention

16. In accordance with Article 48(2) (iii) and (iv) of the Convention, information about the declarations made by each Contracting State under the Convention is formally communicated by the Depositary to all other Contracting States. Information about the declarations is also made available on the UNIDROIT website.

17. Those wishing to ascertain the content of declarations made by a Contracting State will be able to do so by consulting the website of the Depositary, UNIDROIT, or by communicating directly with the Depositary or the relevant Contracting State.

Section 3. Types and choice of declarations

18. The question as to which declarations a Contracting State will make under the Convention is one for each Contracting State to determine in accordance with its own circumstances.

Furthermore, UNIDROIT in its capacity as Depositary under the Convention has no role in evaluating the competence of a Contracting State (having regard, for example, to its internal constitutional arrangements) to make a declaration, and UNIDROIT will accept a declaration that is deposited with it in compliance with the requirements of the Convention.

A. Types of declarations

19. There are various types of declarations depending also on their effect as regards the application of the Convention by a Contracting State:

(a) ***Opt-in declarations.*** Opt-in declarations are those declarations which must be lodged by a Contracting State in order for a provision of the Convention to have effect in relation to that State. The provisions of the Convention in respect of which opt-in declarations may be made are: **Article 1(n)(iii), Article 1(o)(iii), Article 5, Article 7, Article 12(5)(a), Article 43 and Article 45;**

(b) ***Opt-out declarations***. These, in turn, are declarations which must be lodged by a Contracting State in order for a provision of the Convention *not* to have effect within that State. The provisions of the Convention in respect of which opt-out declarations may be made are: **Article 5, Article 12(5)(b), Article 12(5)(c), Article 12(5)(d), Article 19(7), Article 22(3), Article 25(5), Article 36(2), Article 38, Article 39(2), Article 41(2), Article 43, Article 45; and**

(c) ***Declarations relating to a Contracting State's own laws***. Certain optional declarations are neither merely opt-in nor opt-out, but are also intended to allows for the provision of information on a Contracting States own laws, as in the case of the declarations contemplated in following provisions: **Article 1(n)(iii), Article 1(o)(iii), Article 5, Article 7, Article 12(5)(a) (and the mandatory clarification required by paragraphs 6 and 7), Article 22(3).**

20. There are, however, two declarations that do not fall within any of the above categories:

(a) ***Declarations relating to territorial units*.** This declaration allows a Contracting State to determine the domestic territorial scope of application of the Convention (**Article 43**); and

(b) ***Declaration by Regional Economic Integration Organisations.*** **Article 41(2)** of the Convention provides for a declaration to be made by Regional Economic Integration Organisations, at the time of their signature, acceptance, approval or accession, specifying the matters governed by the Convention in respect of which competence has been transferred to that Organisation by its Member States.

21. Except for the declaration that must be submitted by a Regional Economic Integration organisation, all declarations contemplated in the Convention are ***optional***.

B. Consistency of declarations

22. Contracting States should ensure that their declarations are consistent both internally and with each other. For instance, a Contracting State that chooses not to submit a declaration under article 12(5)(a) does not have the option to make a declaration under article 39(2).

23. Under Article 41(1) of the Convention, Regional Economic Integration Organisations which are constituted by sovereign States and have competence over certain matters governed by the Convention may sign, accept, approve or accede to those instruments in the same way as States and, where they do so, under Article 41(3) of the Convention, all references in the Convention to

"Contracting State" or "Contracting States" or "State Party" or "State Parties" are to apply equally to such Organisations where the context so requires. The capacity of the Organisation and of its member States of the Organisation to make declarations under the Convention is therefore affected by the extent to which competence has been transferred from the member States to the Organisation.

Section 4. Analysis of declarations in the Convention

24. This section offers an outline of the declarations in the Convention. [6] It lists all the declarations and identifies their scope and purpose. Where applicable, possible incompatibilities between declarations will be mentioned so as to assist Contracting States to ensure consistency between their declarations.

A. Articles 1(n)(iii) and 1(o)(iii): Securities clearing and settlement systems

1. Scope and purpose of the declaration

25. Article 1(n) defines a "securities settlement system" (SSS) as a system that settles, or clears and settles, securities transactions. It should also be operated by a central bank or central banks or be subject to regulation, supervision or oversight by a governmental or public authority in relation to its rules. In addition, it should have been identified as an SSS in a declaration made by the Contracting State the law of which governs the system on the ground of the reduction of risk to the stability of the financial system.

26. In Article 1(o), a "securities clearing system" (SCS) is defined along the same lines. Such a system clears, but does not settle, securities transactions through a central counterparty or otherwise. It should be operated by a central bank or central banks or be subject to regulation, supervision or oversight by a governmental or public authority in relation to its rules. In addition, it should have been identified as a SCS in a declaration by the Contracting State the law of which governs the system on the ground of the reduction of risk to the stability of the financial system.

2. Content of the declaration

27. Both an SSS and an SCS only qualify as such if they have been identified in a declaration by a Contracting State. The rationale for this requirement is explained in the official Commentary as follows:

> "The text of the Convention preserves *[in Articles 1(l), 9(1)(c), 10(2) 15(2), 16, 18(5), 23, 24(4), 26(3), 27 and 28[7]]*, the specific protection afforded by the uniform rules of an SSS, even if these rules might contain provisions that deviate from provisions of the Convention.

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[6] *Editorial Note: The information in this section is based on the latest version of the Official Commentary that takes into account the deliberations at the final session of the diplomatic Conference to adopt a Convention on Substantive Rules regarding Intermediated Securities (Geneva, 5-9 September 2009). This version, which has been recently circulated to negotiating States is, therefore, not identical with the text that was before the Conference (UNIDROIT 2009 – CONF. 11/2 – Doc. 5), in view of the need to reflect changes of substance made during that session to a number of the Convention's provisions. It should be noted, however, that Part I may still need to be reviewed in the light of adjustments, if any, that may still need to be made to the relevant portions of the Official Commentary as a result of comments received thereon from negotiating States. At that stage, it will be possible to provide further guidance to Contracting States on the exact formulation of, the implications of and additional technical details in relation to the declarations, and to elaborate upon the legal rules that a Contracting State, if it chooses to make a certain declaration, may need to enact in order to ensure the proper functioning of the Convention.*

[7] See also **Appendix E**.

Consequently, it is necessary to notify the exemption of specified systems from the application of certain rules of the Convention to all Contracting States. This is done by declaration [...]."

"The declaration must be made by the Contracting State the law of which governs the system and not, for example, the Contracting State the law of which governs the contractual relationships of the system with its participants or the Contracting State in whose jurisdiction the operator of the system is established."

[...]

"Further, the declaration must be made on the ground of the reduction of risk to the stability of the financial system. This is to make clear that not every SSS, but only systemically important ones, may benefit from the recognition of their uniform rules [...] by the provisions of the Convention."

[...]

"Whether or not there are grounds for the reduction of risk to the stability of the financial system is a matter to be judged by the declaring Contracting State. See in this respect also the principles for systemically important systems as established by the Committee on Payment and Settlement Systems of the Bank for International Settlements (see, for instance, the 2001 CPSS/IOSCO *Recommendations for securities settlement systems* and the 2004 CPSS/IOSCO *Recommendations for Central Counterparties*; cf. section 1-105 below)." (*Official Commentary*, sections 1-82, 1-83, 1-85 and 1-88)

3. Type of declaration

28. The declarations contemplated by Articles 1(n)(iii) and 1(o)(iii) are ***non-mandatory.*** They can be regarded as ***"opt-in"*** declarations, since their effect is to extend the recognition afforded by the Convention to uniform rules of a SSS or SCS to those systems specifically identified by the Contracting State. At the same time, however, this declaration will also mean that in some instances the uniform rules of the identified SCS and/or SSS may have precedence over a default rule contained in the Convention.

B. Article 5: Central bank and regulated intermediaries

1. Scope and purpose of the declaration

29. In principle, the Convention applies to any securities account maintained by an intermediary (see the definition of "securities account" in Article 1(c)). However, Article 5 "permits Contracting States to limit the scope of application of the Convention to the securities accounts maintained by "regulated" intermediaries and/or those maintained by a central bank. The purpose of the rule is to offer the possibility to exclude from the application of the Convention the securities accounts that are maintained by "unregulated" intermediaries, if and to the extent Contracting States deem it appropriate." (*Official Commentary*, section 5-1).

2. Content of the declaration

30. The content of this declaration is explained in the *Official Commentary* as follows:

"The Contracting State, in its declaration under Article 5(a), must describe the category or categories of intermediaries which maintain securities accounts to which the Convention shall apply with sufficient particularity so as to provide adequate notice. The Contracting State thus may declare that only intermediaries which are regulated ("subject to authorisation, regulation, supervision or oversight by a government or public authority in relation to the activity of maintaining securities accounts") are included in the category. The Contracting State is free to determine any category of intermediaries, so long as it is a regulated category."

"The requirement of being a regulated intermediary should be read against the purpose of Article 5. Therefore, Article 5 cannot be understood as permitting a general possibility to exclude all intermediaries from the scope of the Convention. Rather, the scope of application can be narrowed in order to accommodate a Contracting State's concerns regarding the modification, by the Convention, of the legal framework applicable to unregulated intermediaries. Article 5 is not intended to permit a Contracting State to exclude all or even the great majority of intermediaries from the application of the Convention rules. Such blanket exclusion would be inconsistent with the purpose of the Convention and thus is not permitted. In this sense, Article 5 is intended to permit a Contracting State to limit the application of the Convention to regulated intermediaries where intermediaries are regulated in that State." (*Official Commentary,* sections 5-9 – 5-10)

31. As regards the particular position of central banks in the context of a declaration under article 5, the *Official Commentary* notes that;

"Central banks regularly maintain securities accounts. Consequently, there should be the possibility to include central banks in the scope of the Convention where a declaration is made under Article 5. However, their status would not necessarily be adequately covered by paragraph a), because in most countries they are not regulated entities in that sense. Quite to the contrary, they very often have regulatory or oversight competencies themselves. Given that they form part of the "public authorities" category, there should be the possibility to include them in a declaration under Article 5."

"For the same reason noted in section 5-10 above in connection with the impermissible exclusion of all intermediaries, a Contracting State cannot make a declaration designating only its central bank as the only intermediary to which the Convention applies." (*Official Commentary,* sections 5-13 – 5-14)

3. Type of declaration

32. The declaration contemplated in article 5 is ***non-mandatory***. Such a declaration would limit the scope of application of the Convention in the Contracting State concerned, and may therefore be regarded as an ***"opt-out"*** declaration.

C. Article 7: Performance of functions of intermediaries by other persons

1. Scope and purpose of the declaration

33. As explained in the *Official Commentary*:

"The purpose of Article 7 is to clarify the identification and role of an intermediary in a situation where the task of "maintaining" a securities account is split between two, or even more, persons [...]. Article 7 is necessary in order to ensure the proper application of the Convention to the holding patterns where a third person [...] is involved in the relationship

between the relevant intermediary and its account holders, in particular in the scenario of a so-called "transparent" holding pattern." (*Official Commentary*, section 7-1)

2. Content of the declaration

34. In accordance with Article 7(2), the declaration contemplated in that article can be either general or in respect of intermediated securities, or securities accounts, of any category or description:

> "Sub-paragraph 7(2)(a) makes it clear that, where applicable, the declaration shall specify the categories (e.g. shares, bonds, etc.) or description (e.g. registered or bearer shares, dematerialised or certificated, etc.) of the intermediated securities. The sub-paragraph refers also to the categories of securities accounts that may be specified, which could, for example, either relate to the tier on which the accounts are located in the holding system, in particular those at a CSD, or accounts maintained for foreign account holders, or any other description." (*Official Commentary*, section 7-22)

35. As regards the content and effect of the declaration, it is important to note that, in accordance with sub-paragraph 7(2)(b):

> "the declaration shall identify the relevant intermediary in respect of the accounts as specified under sub-paragraph 7(2)(a), the parties to the account agreement on which the account is based and the third person performing functions as described in paragraph 7(1). A declaration has a constitutive effect in this regard, i.e., the roles of intermediary and other person as attributed by the declaration cannot be contested." (*Official Commentary*, section 7-23)

36. The *Official Commentary* further clarifies that such other person:

> "Typically [is] a privately or publicly owned entity which provides services in the financial market. However, it is conceptually irrelevant whether the person is a natural or a legal person. In addition, it is irrelevant whether the person exclusively performs intermediary functions or whether the person offers other services as well. It must be distinct from the relevant intermediary ("other than"). Consequently, subsidiaries or affiliate companies of the relevant intermediary can be such other person as far as they are legally distinct persons, because the economic or organisational relationship between the relevant intermediary and the other person is irrelevant." (*Official Commentary*, section 7-12)

37. It is important to note that:

> "It is not possible for the relevant intermediary to have *all* of its functions performed by another person or persons. If that were the case it would not be an intermediary at all and the other person or one of the other persons would be the relevant intermediary." (*Official Commentary*, section 7-15)

38. Therefore, according to Article 7(2)(c)(i), the declaration must "specify the function or functions for which the other person shall be responsible", but "[i]t is not necessary for the declaration to spell out any or all of the functions of the relevant intermediary itself. (*Official Commentary*, section 7-25). The declaration must further:

> "Specify the provisions of the Convention that apply to the other person instead of the relevant intermediary. This element of the declaration must be perfectly congruent with the specification of the function under letter (i). Otherwise, the declaration would be internally inconsistent and impossible to apply."

"Under the second part of paragraph 2(c)(ii), the declaration shall specify the provisions of the Convention that apply to the other person, 'including whether Article 9, Article 10, Article 15 or Article 23 applies to such person'. The declaration may specify articles other than the ones explicitly cited. The word "including" makes this clear."

"The text under Article 7(2)(c)(iii) prescribes that, if the declaration does not apply in a general manner (see also paragraph 7(1)), it must specify, with respect to each person, the relevant category or description of securities or securities accounts." (*Official Commentary*, sections 7-26 – 7-28).

3. Type of declaration

39. The declaration under Article 7 is ***non-mandatory***. It can be regarded as an ***"opt-in"*** declaration, since its purpose is to assimilate certain third parties to intermediaries for the purposes of the Convention.

D. Article 12(5)-(7): Methods for granting an interest in intermediated securities

1. General remarks

40. The Convention contains three provisions relating to the acquisition and disposition of intermediated securities: Articles 11, 12 and 13. Article 11 sets out the "universal" method of debit and credit. Article 12 relates to three other Convention methods for acquisition and disposition, which a Contracting State may declare applicable. Article 13 relates to methods envisaged under the non-Convention law.

41. Besides acquisitions and dispositions of intermediated securities by credits and debits, a Contracting State may declare, in accordance with Article 12, that one or more of the three methods specified below are sufficient to create an interest in intermediated securities under its law:

"(a) an account holder may grant an interest in intermediated securities to the relevant intermediary by entering into an agreement with that intermediary, and no further step is necessary to make that interest effective against third parties;"

"(b) an account holder may grant an interest in intermediated securities to another person by entering into an agreement with that person and by having a designating entry apply to those intermediated securities in its securities account, and no further step is necessary to make that interest effective against third parties;"

"(c) an account holder may grant an interest in intermediated securities to another person by entering into an agreement with that person and by entering into a control agreement in respect of these intermediated securities, and no further step is necessary to make that interest effective against third parties." (*Official Commentary*, section 12-1).

42. As indicated in the *Official Commentary*:

"None of these methods is compulsory and Contracting States are entirely at liberty to provide for one, two, all or none of these methods in their non-Convention law. For the sake of international transparency and legal predictability, paragraph 5 requires a Contracting State to make a declaration in respect of each such method that it wishes to make available to account holders under its law (*Official Commentary*, section 12-4)

43. For the purpose of enhancing international transparency and legal predictability, article 12 contemplates three different declarations:

(i) a declaration specifying which of the three methods applies in a Contracting State and in what way (see paragraphs 5(a), 6 and 7);

(ii) a declaration specifying categories of parties which are not permitted to grant an interest under Article 12 or to which an interest is not permitted to be granted under Article 12 (see paragraph 5(b)); and

(iii) a declaration relating to the application of paragraph 4 (see paragraphs 5(c) and 5(d)).

2. Declaration under Article 12(5)(a), (6) and (7)

(a) Scope and purpose

44. It follows from Article 12(1)(b) that, if a Contracting State wishes to apply the Convention to any of the methods listed in Article 12(3), it must make a declaration under *Article 12(5)(a)*. In such a declaration, a Contracting State specifies that under its law *any one or more of the methods listed in Article 12(3)* is sufficient to render an interest effective against third parties.

(b) Content of the declaration

45. Whenever a Contracting State makes a declaration in respect of control agreements or designating entries, that declaration must specify the type of control required (see Article 12(3), (6) and (7)). Therefore, as indicated in the *Official Commentary*:

> "The type of control required for control agreements and/or designating entries so as to make an interest effective against third parties may vary among jurisdictions based upon the declaration made by a Contracting State under Article 12(5). The declaration made by a Contracting State under Article 12(6) may require "negative control", so that the "the relevant intermediary is not permitted to comply with any instructions given by the account holder in respect of the intermediated securities […] without having received the consent of that other person" (see sub-paragraphs (i) of Article 1(k) and (l)). Alternatively, the declaration may require "positive control", so that "the relevant intermediary is obliged to comply with any instructions given by that other person in respect of the intermediated securities […] in such circumstances and as to such matters as may be provided […]" (see sub-paragraphs (ii) of Article 1(k) and (l)). Or, the declaration may require both positive and negative control." (*Official Commentary*, section 1-54)

46. It should be noted that a Contracting State that makes a declaration pursuant to 12 (5) (a) has further the possibility of declaring, pursuant to article 39 (2) that only interests in securities that are granted or repeated by one of those methods before a certain date will retain the priority they enjoyed before the entry into force of the Convention.

(c) Types of declarations

47. The declaration under ***Article 12(5)(a)*** is ***non-mandatory*** and can be regarded as an ***"opt-in"*** declaration, because the making of the declaration would mean that the satisfaction of any of the conditions listed in Article 12(3) will render an interest effective against third parties.

48. The information referred to in ***Articles 12(6) and 12(7) is mandatory when a declaration is made under Article 12(5) in relation to paragraph 3(b) or 3(c)*** respectively.

3. Declaration under Article 12(5)(b)

(a) Scope and purpose

49. Under *Article 12(5)(b)* a Contracting State may limit the scope of Article 12 by declaring that under its law this provision will not apply in relation to *interests in intermediated securities granted by or to parties falling within such categories as may be specified in the declaration*. A Contracting State may, for example, wish to preserve the possibility of establishing additional requirements for the effectiveness of interests granted by consumers on intermediated securities owned by them, or generally reserve the methods set forth in article 12 for professional counterparties only.

(b) Type of declaration

50. The declaration under ***Article 12(5)(b)*** is not mandatory and may be regarded as an ***"opt-out"*** declaration, because it limits the scope of application of Article 12.

4. Declaration under Article 12(5)(c)-(d)

51. Article 12(4) allows for the granting of an interest:

> "- in respect of a securities account generally, in which case the interest attaches to any and all intermediated securities from time to time credited to that securities account;"
>
> "- in respect of a specified category of intermediated securities, in which case the parties need to specify the class or classes of securities subject to the interest or any other method making it possible to determine at any given time which intermediated securities are subject to the interest, and which are not;"
>
> "- in respect of a specified quantity or value of intermediated securities, terms that are meant to make the granting of floating charges and similar interests possible." (*Official Commentary*, section 12-16)

52. However, "[n]ot all jurisdictions are familiar with or may want to include such determinations of the subject-matter of an interest" (*Official Commentary*, section 12-16).

(a) Content of the declaration

53. Article 12(5)(c) and (d) allow Contracting States to disapply paragraph 4(a) and/or paragraph 4(b), or to modify paragraph 4(b) as specified in the declaration. The declarations of a Contracting State should, of course, be consistent. If a Contracting State were to make a declaration under Article 12(5)(c) that excluded either Article 4 in its entirety or Article 4(b), no modifications would, of course, be able to be specified in a declaration under Article 12(5)(d).

(b) Type of declaration

54. The declarations permitted by ***Article 12(5)(c) and Article 12(5)(d)*** are ***non mandatory*** and may be regarded as ***"opt-out"*** declarations, as they limit the options given under Article 12(4) of the Convention.

E. Article 19(7): Priority of an interest granted by designating entry

1. Scope and purpose of the declaration

55. As indicated in the *Official Commentary*:

> "[Article 19(7)] provides a declaration mechanism that permits a Contracting State to make a declaration concerning the priority of an interest granted under Article 12 made by designating entry. A Contracting State may declare that such an interest has priority over interests granted by other methods under Article 12. If such a declaration is made, it is implicit in this priority scheme that the priorities as among competing designating entry interests *inter se* would be governed by the first-in-time priority rule of paragraph 3." (*Official Commentary*, section 19-17)

56. The differences between those methods, and thus the rationale for allowing a Contracting State to ensure priority of designating entries over other Article 12 interests, in particular control agreements, is explained in the *Official Commentary* as follows:

> "A designating entry is a "book-entry", or most often an electronic entry into an electronically maintained securities account. The notion of "an entry in a securities account" (see Article 1(l)) suggests that the entry is visible to whoever has access to the account. Several delegations considered that designating entries are superior to control agreements because they create an element of transparency, even though it is restricted to the persons who have access to the account and only provides a snapshot of existing interests at the time of the access." (*Official Commentary*, section 12-30)

2. Type of declaration

57. A declaration under Article 19(7) is ***non-mandatory***. To the extent that it permits a deviation from the first-in-time priority rule set out in Article 19(3), such a declaration may be regarded as an ***"opt-out"*** declaration.

F. Article 22(3): Prohibition of upper-tier attachment

1. Scope and purpose of the declaration

58. The declaration mechanism envisaged in ***Article 22(3)*** should be understood in the light of the baseline rule prohibiting ***upper-tier attachment*** of Article 22(1). The *Official Commentary* explains that basic rule as follows:

> "Paragraph 1 contains the general prohibition of upper-tier attachment. It is designed to make sure that an attachment of intermediated securities must happen 'at the right place' in the holding chain. It is built on the understanding that there are three parties involved in an attachment situation: (a) the debtor, who has securities credited to an account maintained by an intermediary and whose intermediated securities are the subject matter of the attachment; (b) the creditor, who tries to attach the debtor's intermediated securities with a view to satisfying its claim against the debtor; and, (c) the addressee of the attachment order (here the relevant intermediary) who is compelled to make the intermediated securities of the debtor available to the creditor."

> "Paragraph 1 reflects the logic that the intermediated securities of an account holder can only be attached at the level of the relevant intermediary, i.e. the intermediary maintaining the securities account of the account holder. An attachment which is not made at the right level, i.e. which would affect any other securities account than that maintained by the

relevant intermediary may hinder the ability of intermediaries to perform their function, creating inefficiencies and possible inconsistencies, especially in cross-border situations. Consequently, the rule ensures that the attachment affects the right account (the one of the debtor) and addresses the right person(s), i.e., the account holder, its relevant intermediary, or both." (*Official Commentary*, section 22-9 and 22-10)

59. However, Article 22(3) makes it possible for a Contracting State to make a declaration to the effect that *"an attachment of intermediated securities of an account holder made against or so as to affect a person other than the relevant intermediary has effect also against the relevant intermediary"* under its non-Convention law. As explained in the *Official Commentary*:

"Paragraph 3 [of Article 22] is intended to accommodate holding patterns where an attachment is permitted to be made against a person other than the relevant intermediary. This is often the case in the context of holding patterns (the so-called "transparent systems") where the relevant intermediary shares its functions with a third person [...]. However, the exception of paragraph 3 can also apply where there is no holding pattern built on such shared functions in the sense of Article 7 [...]."

[...]

"The rationale for this exception lies in the general purpose of the prohibition of upper-tier attachment, i.e., upper-tier attachment bears the risk of disrupting the holding chain. However, this detrimental effect can be avoided where the applicable law provides for special safeguards avoiding such disruption, in particular reconciliation mechanisms which allow the relevant intermediary and the other person to communicate with each other and have procedures in place which guarantee that an attachment made at the level of one entity is correctly reflected in the accounts maintained by the other entity." (*Official Commentary*, sections 22-19 and 22-20)

60. It follows from the above that:

"In many (probably most) cases, a Contracting State making a declaration under Article 22(3) will also have made a declaration under Article 7 with respect to the sharing of intermediary functions [...]. However, Article 22(3) does not limit its applicability to such Contracting States. It is based on the assumption that a Contracting State that elects to become a party to the Convention and that also elects to make a declaration under paragraph 3 will do so rationally. A Contracting State should make such a declaration only if a system is in place (through the use of information technology or otherwise) which ensures that the problems and risks that Article 22(1) is intended to prevent are adequately addressed [...]." (*Official Commentary*, section 22-21)

2. Content of the declaration

61. The *Official Commentary* describes the content of a declaration as follows:

"Where a declaration under Article 22(3) is made, it must identify the other person by name or description. Furthermore, it must specify the time at which such an attachment becomes effective against the relevant intermediary. The latter requirement shows that the decisive account to look at remains under all circumstances the one held for the debtor by the relevant intermediary. Only if and when the attachment of intermediated securities standing to the credit of that account takes legal effect, the intermediated securities are validly frozen, restricted or impounded. Until that point in time, the intermediated securities can be disposed of." (*Official Commentary*, section 22-22)

3. Type of declaration

62. The declaration contemplated by Article 22(3) is ***non-mandatory***. Since it allows for a limited exception to the baseline prohibition of upper-tier attachment set out in Article 22(1), it may be regarded as an ***"opt-out"*** declaration.

G. Article 25(5): Allocation of securities

1. Scope and purpose of the declaration

63. As explained in the *Official Commentary*:

> "Article 25 is a fundamental rule for investor protection, closely related to Article 24. Article 24(1)(a) imposes an obligation on the intermediary to hold sufficient securities or intermediated securities of each description for its account holders, other than itself. Article 25 provides that the securities or intermediated securities held by the intermediary under Article 24(1)(a) must first be allocated to its account holders. That is, the financial assets held by an intermediary are held for its account holders to the extent necessary to satisfy Article 24(1)(a). This allocation principle applies to the securities or intermediated securities of *each description* held by the intermediary for the benefits of the corresponding account holders, i.e., those in whose accounts the securities of that description have been credited, and not to other securities or intermediated securities that the intermediary may hold."
>
> "Paragraph 2 establishes the natural consequence of the allocation rule. If the securities or intermediated securities held by the intermediary belong to the account holders, they do not form part of the intermediary's estate available for creditors; i.e., creditors cannot realise their claims over the securities held by the intermediary on account of its account holders." (*Official Commentary*, section 25-12 and 25-13)

64. The *Official Commentary* notes further that:

> "The Convention presupposes that the segregation mechanism is a method of complying with the allocation rule of paragraph 1. But segregation itself cannot be invoked to frustrate that rule. Hence, if an intermediary has not segregated sufficient securities or intermediated securities to satisfy its account holders' rights, the allocation rule extends its application – *ex Conventione* – to the securities or intermediated securities of the same description that the intermediary may hold for itself." (*Official Commentary*, section 25-12 and 25-19)

65. Article 25(5) allows, however, Contracting States to make an exception to this solution by a declaration:

> "Under this provision, a Contracting State may declare that, where all securities and intermediated securities held by an intermediary for its account holders are in segregated form under arrangements such as are referred to in paragraph 4, under its non-Convention law the allocation required by paragraph 1 applies only to those securities and intermediated securities and does not apply to securities and intermediated securities held by an intermediary for itself. The option to make a declaration is expected to be particularly relevant for those jurisdictions that draw proprietary law consequences from the segregation mechanism." (*Official Commentary*, section 25-20)

2. Type of declaration

66. A declaration under Article 25(5) is ***non-mandatory***. By allowing an exception to the baseline rule of Article 25(1), it may be regarded as an ***"opt-out"*** declaration.

H. Article 36(2): Credit risk top-up of collateral

1. Scope and purpose of the declaration

67. As explained in the *Official Commentary*:

> "Collateral agreements in many instances contain provisions for "top-up" and substitution of collateral. Top-up refers to the situation where one of the parties to a collateral agreement delivers additional collateral or returns excess collateral in order to ensure that the outstanding obligations of the parties are balanced. An imbalance may occur as a result of price fluctuations in the financial market affecting the value of the collateral or the amount of the relevant obligations (see Article 36(1)(a)(i)). An obligation to transfer top-up collateral may also arise when credit ratings change (Article 36(1)(a)(ii)) or in other circumstances specified in the collateral agreement (Article 36(1)(a)(iii))."
>
> [...]
>
> "The purpose of Article 36 is to protect top-up and substitution arrangements against the "timing claw back rule" in insolvency law that is found in some jurisdictions. Specifically, it provides that the delivery of top-up or substitution collateral is not to be treated as invalid, reversed or declared void solely because such collateral is given during a prescribed period before, or on the day of but before the commencement of, an insolvency proceeding in respect of the collateral provider." (*Official Commentary*, sections 36-1 and 36-3)

68. Article 36(2) provides a Contracting State with the possibility to exclude the application of Article 36(1)(a)(ii), which recognises an obligation to deliver additional collateral securities, in order to take account of *"any circumstances giving rise to an increase in the credit risk incurred by the collateral taker as determined by reference to objective criteria relating to the creditworthiness, financial performance or financial condition of the collateral provider or other person by whom the relevant obligations are owed"* (*credit risk top-up of collateral*). This possibility is explained in the *Official Commentary* as follows:

> "A deteriorating general financial condition may be a prelude to insolvency. Article 36(2) recognises that a Contracting State may consider the protection of the provision of collateral in that circumstance to be undesirable, in particular in light of rules such as those relating to avoidance or preference in fraud of other creditors." (*Official Commentary*, section 36-20)

2. Type of declaration

69. The ***non-mandatory*** declaration contemplated in Article 36(2) disapplies the Convention rule set out in Article 36(1)(a)(ii), and may be regarded as an ***"opt-out"*** declaration.

I. Article 38: Declarations in relation to Chapter V

1. Scope and goal of the declaration

70. Chapter V contains a number of specific provisions that define the legal relationship between *collateral providers and collateral takers* where intermediated securities are provided as

collateral. Article 38 sets out a number of possible declarations that a Contracting State may make in respect of Chapter V, in addition to the declaration option envisaged in Article 36(2).

71. Under Article 38(1), a Contracting State may declare that it will *not apply Chapter V in its entirety*. The *Official Commentary* notes, in this respect, the following

> "Even though harmonisation of the rules relating to collateral transactions as set out in Chapter V is highly beneficial to ensuring legal certainty with respect to cross border transactions, the proper and sound functioning of the intermediated securities system envisaged in Chapters I-IV does not necessarily require the harmonisation of the rules on collateral transactions. Because Chapter V touches upon important public policy issues, notably consumer protection and insolvency, the opt-out option set out in Article 38(1) was introduced to permit Contracting States to opt out of the whole of Chapter V." (*Official Commentary*, section 38-7)

72. Contracting States wishing to apply Chapter V may nonetheless limit its scope in respect of the matters mentioned in Article 38(2). These possibilities are explained in the *Official Commentary* as follows:

> "Article 38(2)(a) provides Contracting States with the option to make a declaration to protect natural persons or other categories of persons by excluding them from the application of Chapter V. Chapter V has the goal of enhancing liquidity in the securities market and, to that end, gives a number of rights to collateral takers, e.g., in the form of enforcement without traditional procedural safeguards or the right of use. In some jurisdictions, there may be policy reasons to protect a natural person or another person which is in a weak bargaining position against the collateral taker. Article 38(2)(a) thus gives Contracting States the possibility to provide for such protection. [..]"
>
> "Article 38(2)(b) provides Contracting States with the option to make a declaration to not apply Chapter V to intermediated securities which are not permitted to be traded on an exchange or regulated market. This provision should be read together with the definition of "collateral securities" in Article 31(3)(e), which covers both tradable and non-tradable securities. The aim of most provisions of Chapter V is to enhance the liquidity of the securities market. This aim can be reached where rules on tradable securities are harmonised, but some jurisdictions may have a policy reason for excluding non-tradable securities from Chapter V."
>
> "Article 38(2)(c) should be read in close connection with the definition of "relevant obligations" in Article 31(3)(d), which specifies that relevant obligations are "any existing, future or contingent obligations of a collateral provider or a third person". Because different national policies can exist about what obligations should be secured, Article 38(2)(c) provides a declaration mechanism for Contracting States to limit the scope of Chapter V by specifying to what kind of relevant obligations it applies." (*Official Commentary*, sections 38-9 – 38-11)

2. Content of declarations

73. The declarations under Article 38 should be consistent. Where a Contracting State declares under Article 38(1) that Chapter V as a whole shall not apply, there is, of course, no room for the specific declarations under Article 38(2).

3. Type of declaration

74. The ***non-mandatory*** declarations under Article 38 may be regarded as ***"opt-out"*** declarations, because they allow for a full or partial opt-out of the rules set out in Chapter V of the Convention.

J. Article 39(2): Transitional provision

1. Scope and purpose of the declaration

75. The purpose of the transitional provision contained in Article 39(1) is explained in the *Official Commentary* as follows:

> "... the Convention does not affect the priority of interests granted under the law in force in a Contracting State before the date on which the Convention has entered into force in respect of that Contracting State. Under that law, priority may be based on the respective times when competing interests have been made effective or on some other criteria. It may also be the case that a Contracting State varies its priority rules over time, including at the time it proposes to ratify the Convention." (*Official Commentary*, section 39-11)

76. This general rules reflects the following policy concern:

> "[...] legal certainty requires that, unless it consents, the beneficiary of a collateral interest or other interest in intermediated securities should not face the risk of losing priority, that their interest enjoyed before the Convention's entry into force, to interests that are subsequently created by the account holder in the same intermediated securities after the Convention has entered into force." (*Official Commentary*, section 39-6)

77. The countervailing concern, however, is that:

> "[....] the international harmonisation promoted by this Convention for the creation of interests in intermediated securities requires that an acquirer of such interest should not need to investigate about interests that were created before the entry into force of the Convention and possibly a long time ago, in accordance with a method then recognised by the law of the relevant Contracting State. [...]"
>
> "Protecting the beneficiaries of the interests granted before the Convention's entry into force, irrespective of the method used, would require all collateral takers and acquirers of other interests after such date to research whether prior interests have been granted in the same securities under any method that was then applicable in the relevant State. This could be a quite difficult and costly task, given that the current rules governing security interests in many jurisdictions were promulgated a long time ago for movable assets and do not easily adapt to the operation and market practices of intermediated securities. Thus, protecting the priority of all interests acquired before the Convention's entry into force would produce significant inefficiencies and legal uncertainty for the parties which transact on intermediated securities after the Convention's entry into force." (*Official Commentary*, sections 39-7 – 39-8)

78. Article 39(2), therefore, allows a Contracting State to make a declaration and limit the duration of the protection afforded by Article 39(1) by setting a date ("the relevant date") after which Article 19(2) will apply to pre-Convention interests.

2. Content of the declaration

79. In accordance with Article 45(1), declarations under the Convention may be submitted at any time. Article 39(3)(b) defines "the relevant date" for the purposes of Article 39 as the date "stated by the Contracting State in the declaration made under this article". A Contracting State wishing to submit a declaration under article 39(2) has, therefore, ample freedom to set the time limit for the protection of pre-existing interests, provided that it is not later than 2 years after the time that the declaration becomes effective under Article 45. A declaration under article 39 is not affected by article 45(5).

80. It should be noted that declaration under Article 39(2) is only possible of the State has also made a declaration pursuant to article 12(5)(a).

4. Type of declaration

81. The ***non-mandatory*** declaration under Article 39(2) may be regarded as an ***"opt-out"*** declaration because it allows Contracting States to enact a rule differing from the baseline rule set out in Article 39(1).

K. Article 41(2): Regional Economic Integration Organisations

1. Scope and purpose of the declaration

82. Article 41 enables a Regional Economic Integration Organisation constituted by sovereign States to sign, accept, approve or accede to the Convention to the extent that it has competence over the matters governed by the Convention. The declaration specifies that competence.

2. Content of the declaration

83. The competence of the Regional Economic Integration Organisation over matters governed by the Convention must be described in a declaration that is made to the Depositary pursuant to Article 41(2), and which specifies the matters governed by the Convention in respect of which competence has been transferred to that Organisation by its Member States. Article 41(2) further requires the Organisation concerned to promptly notify the Depositary in writing of any changes to the distribution of competence between itself and its Member States, including new transfers of competence, to the Organisation.

3. Type of declaration

84. The declaration under Article 41(2) is ***mandatory*** in nature.

L. Article 43: Territorial units

1. Scope and goal of the declaration

85. Article 43 permits a Contracting State that has two or more territorial units in which different systems of law apply to declare, at the time of its signature, ratification, acceptance, approval or accession to the Convention, that the Convention is to extend to all of its territorial units or only to one or more of them. Article 43(1) does not require that the differences between systems of law in the relevant State must derive from that State's constitution.

2. Content of declaration

86. A declaration by a Contracting State under Article 43 can be made only at the time of that State's signature, ratification, acceptance or approval of, or accession to, the Convention, but the State concerned may amend its declaration by submitting another declaration at any subsequent time. Article 43(2) provides that the initial declaration must be made in writing and formally notified to the Depositary, and must state expressly the territorial units to which the Convention extends. Modifying declarations should also be made in writing and formally notified to the Depositary on the basis of Article 45(2).

87. Where a Contracting State has made a declaration under Article 43(1), the other declarations permitted to be made under the Convention may be made by that State in respect of all or only some of the territorial units to which the application of the Convention is extended, and those declarations may differ as between one of those territorial units and another (Article 43(4)).

3. Type of declaration

88. A declaration under Article 43 is ***non-mandatory***. If no declaration is submitted by a Contracting State at the time of its signature, ratification, acceptance, approval or accession, the Convention will extend to all territorial units of that State in accordance with Article 43(3).
89.

Annex I

Declaration Forms

Form No. 1 – Declarations under Article 1(n)(iii) and Article 1(o)(iii)

- **Identification of securities settlement system (Article 1(n)(iii))**

(Name of State)…….……

[, on the ground of the reduction of risk to the stability of the financial system], declares that *(insert description of the securities settlement system)* …….. is a securities settlement system.

- **Identification of securities clearing system (Article 1(o)(iii))**

(Name of State) ……..……

[, on the ground of the reduction of risk to the stability of the financial system], declares that *(insert description of the securities clearing system)* …….. is a securities clearing system.

UNIDROIT 2009 - CONF. 11/2 – Doc. 5 : paras. 1-75 and 1-81 et 1-92
Official Commentary : paras. 1-82 and 1-88 et 1-99

Form No. 2 – Declaration under Article 5

(Name of State) …….……

declares that the Convention shall apply only to securities accounts held by :

a) the following *category/categories* (*delete whichever is inapplicable*) of intermediaries (*insert description of the category/categories of intermediaries, which must be subject to authorisation, regulation, supervision or oversight by a government or public authority in relation to the activity of maintaining securities accounts*) ……..……

b) the following central bank *(insert, as applicable, the official designation of the central bank)* ……..……

UNIDROIT 2009 - CONF. 11/2 – Doc. 5 : paras. 4-6 and 4-13
Official Commentary : paras. 5-7 and 5-14

Form No. 3 A – Declaration under Article 7

(Name of State) ……..…… declares that under its non-Convention law a person other than the relevant intermediary is responsible for the performance of a function or functions[1] of the relevant intermediary under the Convention[2] for all intermediated securities and securities accounts, as follows: [3]

a) the relevant intermediary is (*describe the relevant intermediary by name or category*) ……..….

b) the parties to the account agreement are (*describe the parties to the account agreement by name or category*) ……..……..…..….

c) the person or persons other than the relevant intermediary who are responsible for exercising one or more functions of the relevant intermediary *is/are* (*delete whichever is inapplicable*) (*identify the person or persons by name or category*) ……..……..

d) for each such person:

   i) the function or functions that the person is entrusted with is/are (*delete whichever is inapplicable*):……..……..……

   ii) the provisions of the Convention which apply to the person[4] are : ……..…… *(Where more than one person is responsible for exercising one or more functions of the relevant intermediary, specify in the same way for the second person and any subsequent person their functions, and the applicable provisions of the Convention.)*

UNIDROIT 2009 - CONF. 11/2 – Doc. 5 : paras. 6-18 and 6-29
Official Commentary : paras. 7-19 and 7-30

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1 Pursuant to Article 7(1) of the Convention, a declaration made pursuant to Article 7 cannot provide that a person other than the relevant intermediary is responsible for the performance of all of the functions of the relevant intermediary.

2 Article 7(3) of the Convention provides : "Unless otherwise provided in this Convention, if a declaration under this Article applies, references in any provision of this Convention to an intermediary or the relevant intermediary are to the person or persons responsible for performing the function to which that provision applies."

3 This form should be used by a Contracting State that wishes to make a declaration under Article 7 of the Convention, and wishes that declaration to relate generally to intermediated securities or securities accounts. For a declaration that relates to specified categories or descriptions of intermediated securities or securities accounts, Form 3 B should be used.

4 The declaration, in specifying the provisions of the Convention which apply to the person, must *inter alia* specify whether Article 9, Article 10, Article 15 or Article 23 applies to the person (see Article 7(2)(c)(ii) of the Convention).

Form No. 3 B – Declaration under Article 7

(Name of State) ……..…… declares that under its non-Convention law a person other than the relevant intermediary is responsible for the performance of a function or functions[1] of the relevant intermediary under the Convention[2] for some categories of intermediated securities and securities accounts, as follows: [3]

a) the relevant intermediary is (*describe the relevant intermediary by name or category*) ……..…

b) the parties to the account agreement are (*describe the parties to the account agreement by name or category*) ……..……..…

c) the person or persons other than the relevant intermediary who are responsible for exercising one or more functions of the relevant intermediary *is/are* (*delete whichever is inapplicable*) (*identify the person or persons by name or category*) ……..…….

d) for each such person:

   i) the function or functions that the person is entrusted with is/are (*delete whichever is inapplicable*):……..……..……

   ii) the provisions of the Convention which apply to the person[4] are: ……..……

   iii) the category or description of intermediated securities or securities accounts (*specify the categories or description of intermediated securities or securities accounts*): ……..……..……

(Where more than one person is responsible for exercising one or more functions of the relevant intermediary, specify in the same way for the second person and any subsequent person their functions, and the applicable provisions of the Convention and, where appropriate, the categories or description of intermediated securities.)

UNIDROIT 2009 - CONF. 11/2 – Doc. 5 : paras. 6-18 and 6-29
Official Commentary : paras. 7-19 and 7-30

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1 Pursuant to Article 7(1) of the Convention, a declaration made pursuant to Article 7 cannot provide that a person other than the relevant intermediary is responsible for the performance of all of the functions of the relevant intermediary.

2 Article 7(3) of the Convention provides : "Unless otherwise provided in this Convention, if a declaration under this Article applies, references in any provision of this Convention to an intermediary or the relevant intermediary are to the person or persons responsible for performing the function to which that provision applies."

3 This form should be used by a Contracting State that wishes to make a declaration under Article 7 of the Convention, and wishes that declaration to intermediated securities or securities accounts of specified categories or descriptions. For a declaration that relates generally to intermediated securities or securities accounts, Form 3 A should be used.

4 The declaration, in specifying the provisions of the Convention which apply to the person, must *inter alia* specify whether Article 9, Article 10, Article 15 or Article 23 applies to the person (see Article 7(2)(c)(ii) of the Convention).

Form No. 4 A – Declaration under Article 12(5)(a)

(Name of State) …….……

declares that under its law,

(*delete whichever of the following are not applicable)*

- the requirement under Article 12(3)(a) of the Convention;
- the requirement under Article 12(3)(b) of the Convention;[1]
- the requirement under Article 12(3)(c) of the Convention;[2]

is/are (*delete whichever is inapplicable*) sufficient to render an interest effective against third parties.[3]

UNIDROIT 2009 - CONF. 11/2 – Doc. 5 :	paras. 12-32 and 12-34
Official Commentary :	paras. 12-32 and 12-35

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[1] Article 12(6) of the Convention provides : "A declaration in relation to paragraph 3(b) shall specify whether a designating entry has the effect described in Article 1(l)(i) or Article 1(i)(ii) or both." See Form No. 4 E.

[2] Article 12(7) of the Convention provides : "A declaration in relation to paragraph 3(c) shall specify whether a designating entry has the effect described in Article 1(l)(i) or Article 1(l)(ii) or both." See Form No. 4F.

[3] Article 39(2) of the Convention provides: "A Contracting State may declare that a pre-existing interest shall retain the priority it enjoyed before the relevant date only if, at any time before that date, the interest has become effective against third parties by satisfying a condition specified in the declaration made by that Contracting State in accordance with Article 12(5)(a).".

Form No. 4 B– Declaration under Article 12(5)(b)

(Name of State) …….……

declares that under its law, Article 12 shall not apply in relation to interests in intermediated securities granted by or to parties falling within the following category/categories (*delete whichever is inapplicable*) (*specify the category or categories*): ……..……

UNIDROIT 2009 - CONF. 11/2 – Doc. 5 :	paras. 12-32 and 12-34
Official Commentary :	paras. 12-32 and 12-35

Form No. 4 C – Declaration under Article 12(5)(c)

(Name of State) ……..……

declares that under its law,

(*delete whichever two of the following three options are not applicable)*

- Article 12(4) as a whole
- Article 12(4)(a)
- Article 12(4)(b)

does not apply.

UNIDROIT 2009 - CONF. 11/2 – Doc. 5 :	paras. 12-32 and 12-34
Official Commentary:	paras. 12-32 and 12-35

Form No. 4 D – Declaration under Article 12(5)(d)

(Name of State) …….……

declares that, under its law, Article 12(4)(b)[1] applies with the following modifications (*specify the modifications*) : …….

UNIDROIT 2009 - CONF. 11/2 – Doc. 5 :	paras. 12-32 and 12-34
Official Commentary :	paras. 12-32 and 12-35

[1] A Contracting State should not made a declaration as provided in this form if it has made a declaration under Article 12 (5)(c) of the Convention (Form No. 4 C) providing that Article 12(4) in general, or Article 12(4)(b) in particular, does not apply under its law.

Form No. 4 E – Declaration under Article 12(6)

(Name of State) …….……

declares that, in relation to its declarations in relation to Article 12(3)(b)[1] of the Convention, that a designating entry has the effect described in :

(*delete whichever two of the following three options are not applicable)*

- Article 1(l)(i) only;
- Article 1(l)(ii) only;
- both Article 1(l)(i) and Article 1(l)(ii).

UNIDROIT 2009 - CONF. 11/2 – Doc. 5 :	paras. 12-32 and 12-34
Official Commentary :	paras. 12-32 and 12-35

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[1] See Form No. 4 A..

Form No. 4 F – Declaration under Article 12(7)

(Name of State) …….……

declares that, in relation to its declarations in relation to Article 12(3)(c)[1] of the Convention, that a control agreement must include the provision described in:

(*delete whichever two of the following three options are not applicable)*

- Article 1(k)(i) only
- Article 1(k)(ii) only
- both Article 1(k)(i) and Article 1(k)(ii).

UNIDROIT 2009 - CONF. 11/2 – Doc. 5 :	paras. 12-32 and 12-34
Official Commentary :	paras. 12-32 and 12-35

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[1] See Form No. 4 A..

Form No. 5 – Declaration under Article 19(7)

(Name of State) …….……

declares that under its non-Convention law, and subject to Article 19(4) of the Convention, an interest granted by a designating entry has priority over an interest granted by any other method provided by Article 12 of the Convention.

UNIDROIT 2009 - CONF. 11/2 – Doc. 5 :	para. 19-16
Official Commentary :	para. 19-17

Form No. 6 – Declaration under Article 22(3)

(Name of State) …….……

declares that under its non-Convention law an attachment of intermediated securities of an account holder made against or so as to affect (*identify by name or description the person, other than the relevant intermediary*) ……

has effect also against the relevant intermediary, and that the time at which such attachment becomes effective against the relevant intermediary is (*specify the time at which the attachment becomes effective against the relevant intermediary*) ……..…….

UNIDROIT 2009 - CONF. 11/2 – Doc. 5 :	paras. 22-21 and 22-24
Official Commentary :	paras. 22-19 and 22-22

Form No. 7 – Declaration under Article 25(5)

(Name of State) …….……

declares that, in cases where all securities and intermediated securities held by an intermediary for its account holders, other than itself, are in segregated form under arrangements such as are referred to in Article 25(4) of the Convention, under its non-Convention law the allocation required by Article 25(1) of the Convention applies only to those securities and intermediated securities and does not apply to securities and intermediated securities held by an intermediary for its own account.

UNIDROIT 2009 - CONF. 11/2 – Doc. 5 :	paras. 25-18 and 25-19
Official Commentary :	paras. 25-19 and 25-21

Form No. 8 – Declaration under Article 36(2)

(Name of State) …….……

declares that Article 36(1)(a)(ii) of the Convention does not apply.

UNIDROIT 2009 - CONF. 11/2 – Doc. 5 :	para. 36-20
Official Commentary :	para. 36-20

Form No. 9 – Declaration under Article 38

(Name of State) ……..…… declares that

(*delete whichever one of the following two options is not applicable)*

- the whole of Chapter V of the Convention does not apply[1]

- the whole of Chapter V of the Convention does not apply:[2]

  (*delete whichever of the following options is not applicable)*

  a) in relation to collateral agreements entered into by natural persons or other persons falling within the following categories (specify the categories of persons) ……..……

  b) in relation to intermediated securities that are not permitted to be traded on an exchange or regulated marked

  c) in relation to collateral agreements that relate to relevant obligations falling within the following categories (specify the categories of obligations) ……

UNIDROIT 2009 - CONF. 11/2 – Doc. 5 :	para. 38-7 and 38-11
Official Commentary :	para. 38-7 and 38-11

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[1] Under Article 38(1) of the Convention.
[2] Under Article 38(2) of the Convention.

Form No. 10 – Declaration under Article 39(2)

(Name of State) ……..…… declares that, after (*specify the relevant date*)[1] ……..…… only:

(*delete any of the following options which are not applicable)*

- an interest granted to the relevant intermediary
- a designating entry in favour of another person
- a control agreement in favour of another person

that has/have (*strike out whichever is inapplicable*) become effective against third parties before that date shall retain the priority it/they (*strike out whichever is inapplicable*) enjoyed pursuant to the declaration made by (*name of State*) ……..…… under Article 12(5)(a).

UNIDROIT 2009 - CONF. 11/2 – Doc. 5 :	paras. 39-11 and 39-15
Official Commentary :	paras. 39-12 and 39-16

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[1] - Article 39(2) of the Convention provides: " A Contracting State may declare that a pre-existing interest shall retain the priority it enjoyed before the relevant date only if, at any time before that date, the interest has become effective against third parties by satisfying a condition specified in the declaration made by that Contracting State in accordance with Article 12(5)(a).".

- Article 39(3)(b) provides that in Article 39, "the relevant date" means "the date stated by a Contracting State in the declaration made under this Article and that date shall not be later than two years after the effective date of that declaration.".

- Article 45(3) of the Convention determines the date that a declaration made by a Contracting State shall take effect. Pursuant to Article 39(4) of the Convention, Article 45(5) of the Convention, dealing with rights and interests arising prior to the effective date of a declaration, does not apply in relation to a declaration made pursuant to Article 39.

Form No. 11 – Declaration under Article 41(2)

(Name of Regional Economic Integration Organisation) …… declares that its member states have transferred to it competence over the following matters governed by the Convention (*specify the matters for which competence has been transferred*): ……..…..

Form No. 12 – Declaration under Article 43(1)

(Name of State) ……..…… declares that

(*delete whichever of the following options is not applicable)*

- the Convention applies to all its territorial units

- the Convention applies to the following of its territorial units (*specify the relevant territorial units*) : [1]……..…

Official Commentary : paras. 43-4 and 43-7

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1 Article 43(4) of the Convention provides. "If a Contracting State extends this Convention to one or more of its territorial units, declarations permitted under this Convention may be made in relation to each such territorial unit, and the declarations made in relation to one territorial unit may be different from those made in relation to another territorial unit.".

Appendix A – Declarations

Article 1(n)(iii)
Article 1(o)(iii)
Article 5
Article 7
Article 12(1)(b) and 12(5)-(7)
Article 19(7)
Article 22(3)
Article 25(5)
Article 36(2)
Article 38
Article 39(2)
Article 41(2)
Article 43
Article 45
Article 48(2)(a)(iii) and (iv)

Part II

References to sources of law outside the Convention[1]

Section 1. General remarks

90. The Convention contains harmonised rules for intermediated securities in respect of a number of issues. Where the Convention does not envisage full harmonisation, but leaves specific issues to sources of law outside the Convention, it uses concepts such as the "non-Convention law" and the "applicable law". The principal goal of this section is to give Contracting States an insight into the issues that are not covered by the Convention and which should be regulated by the Contracting State itself.

91. Section 2 provides an overview of the different types of references in the Convention to sources of law outside the Convention.

92. Section 3 outlines the issues which are not or only partially harmonised by the Convention and which should therefore be considered by a Contracting State when implementing the Convention.

Section 2. Different sources of law outside the Convention referred to in the Convention.[2]

93. Generally, the Convention takes a ***minimum harmonisation approach***. This means that the Convention provides harmonised rules in respect of a number of key issues that reduce legal or systemic risk or promote market efficiency, but also leaves a considerable number of issues to be determined by other law outside of the Convention (depending on the context, the "non-Convention law" or "applicable law"). This approach recognises that, however desirable it is in principle to achieve fully harmonised rules, this is a complex process in practice, requiring technical compatibility and political consensus. For example, a considerable level of harmonisation has been reached in relation to the transfer of and collateral transactions in respect of intermediated securities and in relation to a number of issues which guarantee the integrity of the intermediated holding system. Other issues, such as corporate law and rules on supervision of financial markets are left almost entirely unregulated. In all cases where the Convention does not envisage full harmonisation of a certain issue, there may be interaction between Convention rules and different types of legal rules outside the Convention

A. Terminology used in the Convention

94. The first and most frequently mentioned category of law outside of the Convention is the "***non-Convention law***". In Article 1(m) the "non-Convention law" is defined as "the law in force in the Contracting State referred to in Article 2, other than the provisions in this Convention". In many instances, the non-Convention law works as a complement to a Convention rule. A list of references to "non-Convention law" made in the Convention is contained in **Appendix B**

95. In addition to the term "non-Convention law," the term "***applicable law***" is used in the Convention. The applicable law is the law applicable by virtue of the private international law rules of the forum. The applicable law may, or may not be, the non-Convention law. A list of references to the applicable law made in the Convention is contained in **Appendix C**.

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1 *[Editorial note: The Committee may wish to consider the usefulness for this document to elaborate upon the various legislative approaches and policy choices as regards matters left for other law outside the Convention].*

2 On the Convention's minimum harmonisation approach, see Study LXXVIII – Doc. 23 rev., sections 140, 143.

96. Furthermore, the Convention contains several references to rules outside the Convention which may apply in the context of ***insolvency***. Of course, insolvency law would be part of the non-Convention law or the applicable law, but insolvency is dealt with as a separate category because the commencement of insolvency proceeding may trigger the mandatory application of special rules of law of the jurisdiction where those proceedings are conducted that displace, or deviate from, the rules what would otherwise be applicable. The particularity of insolvency law in relation to some of the matters covered by the Convention justifies its treatment as a special category, for purposes of clarity. In some instances the Convention sets out harmonised rules intended to apply also in insolvency proceedings (see, for example, Articles 11(2), 12(2), 14(1) and 21(1)). In other cases, the application of insolvency law as part of the non-Convention law has been preserved (see, for example, Articles 14(2), 21(2) and 26(1)). A list of references to rules relating to insolvency made in the Convention is contained in **Appendix D**.

97. In a number of instances, the Convention gives recognition to the ***uniform rules of securities clearing systems* (SCSs) *and securities settlement systems* (SSSs)** (see Article 1(n)-(p)). These may derogate from or supplement the content of the rules of the Convention[3]. It should be noted that Contracting States will in many cases have only limited or indirect influence on the content of the uniform rules of SCSs and SSSs. Such rules are often promulgated by private entities, which are, however, in many instances subject to regulation, supervision or oversight. Through such regulation, etc., for which the Convention provides no rules, a Contracting State could influence the content of the rules of SCSs and SSSs. For an overview of the references in the Convention to the rules of SCSs and SSSs, see **Appendix E**.

98. ***Other references*** in the Convention to rules outside the Convention will not be examined in this document. For example, references to account agreements will not be discussed, because an account agreement is a contractual arrangement between an account holder and its intermediary, the contents of which, in principle, are not determined by a Contracting State.[4] This also applies to other sources of contractual rules referred to in the Convention, such as the references to "control agreement" (for the definition thereof, see Article 1(k)), to "the terms of the securities" (e.g., in Articles 9(1)(c) and 9(2)(b)), etc.

B. Information on sources of law outside the Convention

99. The Convention does not require Contracting States to provide the Depositary with information on their domestic laws and policies. However, information on domestic laws and policies relating to intermediated securities could potentially promote the understanding of the application of the Convention in a particular Contracting State. UNIDROIT therefore welcomes any information that a Contracting State, at its discretion, may choose to provide to it about their laws and policies relating to the matters covered by the Convention. Any such information provided to UNIDROIT by a Contracting State would be separate and distinct from any declarations that the Contracting State may make under the Convention. The following format is recommended for the transmission of any such information to UNIDROIT:

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[3] For example, whereas the Convention assumes that securities, as a principle, cannot be taken out of the intermediated holding system, the uniform rules of a SSS may permit doing so (Article 9(1)(c)). The importance of SCS and SSS rules is also apparent from Article 1(l) (designating entries), Article 10 (measures to enable the exercise of rights), Article 15 (unauthorised dispositions), Article 16 (invalidity, reversal and conditions), Article 18 (acquisition by an innocent person), Article 23 (instructions to the intermediary), Article 24 (holding or availability of sufficient securities), Article 26 (loss sharing in case of insolvency of the intermediary), Article 27 (insolvency of system operator or participant) and Article 28 (obligations and liability of intermediaries).

[4] See the definition of "account agreement" in Article 1(f), and the references in Articles 1(l), 7(2)(b)(ii), 9(1)(c), 10(2)(c), 10(2)(e), 10(2)(f), 15(2), 16, 18(5), 23(2)(a), 24(4), 28(1), 28(2) and 28(3).

"[Name of State] makes available to UNIDROIT the following information about the laws and policies relating to the matters covered by the Convention:]"

100. Such information, which may include references to, or copies of, laws and policies and which may be either general or specific to a particular topic or issue covered by the Convention, would be made available on the UNIDROIT website in order to provide Contracting States with an opportunity to promote understanding of the situation with respect to their rights and obligations under the Convention.

Section 3. Analysis of the Convention

A. Preamble

101. Recitals 9, 10 and 11 of the Preamble highlight a number of issues in relation to intermediated securities, which are not dealt with in the Convention (or dealt with only to a limited extent) and which Contracting States will therefore need to address themselves.

102. ***Recital 9*** sets out the basic approach that the Convention is not intended to harmonise or otherwise affect ***insolvency law*** except to the extent necessary to provide for the effectiveness of rights and interests governed by the Convention. Examples of harmonised provisions which guarantee the effectiveness of rights and interests governed by the Convention in insolvency are Articles 11(2), 12(2), 14(1) and 21(1). Insolvency rules which are not fully harmonised can be found in Articles 14(2), 14(4), 21(2), 21(3) and 26(1). For a further discussion of the latter provisions, see below.

103. ***Recitals 10 and 11*** relate to ***regulation, supervision and oversight***. It follows from recital 10 that, generally, the Convention does not limit or otherwise affect the powers of Contracting States to regulate, supervise or oversee the holding and disposition of intermediated securities or any other matters expressly covered by the Convention. The Convention only limits or affects such powers in so far as regulation, supervision or oversight would contravene the provisions of the Convention. More specifically, recital 11 stresses the importance of the role of intermediaries and the need to regulate, supervise or oversee their activities. However, the regulation of intermediaries is not further addressed in the Convention, and is therefore an issue that would need to be dealt with by each individual Contracting State. The topics of regulation, supervision and oversight therefore largely remain subjects to be regulated as determined by each Contracting State.

B. Chapter I: Sphere of application

104. Apart from the declarations envisaged in Article 1(n)(iii), 1(o)(iii), 5 and 7 (all discussed in Part I above) there are a few other provisions in Chapter I that may require Contracting States to take action to complement the Convention.

1. Article 1(k), (l) – "control agreement" / "designating entry"

105. Article 1(k) contemplates the possibility for the non-Convention law to recognise not only a "tripartite" control agreement (i.e. between an account holder, the relevant intermediary and another person) but also two "bilateral" forms of control agreements (i.e., between an account holder and the relevant intermediary or between an account holder and another person of which the relevant intermediary receives notice).

106. Article 1(l) provides that the effects of a designating entry are determined by the account agreement, a control agreement, the uniform rules of an SSS or the non-Convention law. In particular, these non-Convention methods of determining the effects of a designating entry may specify: (i) that the relevant intermediary may not comply with instructions from the account

holder without the consent of the grantee of an interest (so-called "negative control"; see Article 1(l)(i)); (ii) that the grantee can give instructions to the relevant intermediary without any further consent of the account holder ("positive control"; see Article 1(l)(ii)); or (iii) both. Pursuant to Article 12(6), a Contracting State that makes a declaration in relation to Article 12(3)(b) must specify one of these effects of a designating entry in a declaration (see section II.3.4(ii) above).

2. Articles 2 (Sphere of application) and 3 (Applicability of declarations)

107. Pursuant to Article 2, the Convention applies whenever the conflict of laws rules of the forum State point to the law in force in a Contracting State as the applicable law. However, as indicated in the Official Commentary, the Convention is not a private international law convention and does not set out the conflict of laws rules that a Contracting State will apply. These rules are left to be determined by the law of the Contracting State outside the Convention (*Official Commentary*, section 2-7). As a corollary to that principle, Article 3 provides that whenever the law of the forum State is not the applicable law, the forum State must apply the Convention and the declarations, if any, made by the Contracting State the law of which applies.

108. Not all States have specific conflict of laws rules dealing with the law applicable to rights in respect of intermediated securities. Contracting States may therefore wish to consider the desirability of ascertaining whether their existing conflict of laws rules would lead to satisfactory results for the purpose of determining the applicable law as regards the subject matters governed by the Convention.

3. Article 8 (Relationship with issuer)

109. In relation to Article 8, the Official Commentary provides the following clarification:

> "Article 8(1) provides that the Convention does not affect any right of the account holder against the issuer of the securities. This rule is subject to an exception located in Article 29(2), which requires Contracting States to recognise a so-called nominee holding structures and the splitting of voting and other rights related to the securities held in the intermediated holding system [...]"
>
> "Article 8(2) puts another limitation on the scope of the subject matter covered by the Convention by providing that the Convention does not determine whom the issuer of the securities is required to recognise: (i) as the shareholder, bondholder or other person entitled to the rights attached to the securities, which are specifically spelled out in Article 9(1)(a); or (ii) for any other purposes. Note that Article 8(1) is subject to Article 29(2) but Article 29(2) cannot override Article 8(2). [...]" (*Official Commentary*, sections 8-7 and 8-8)

110. This limitation has to be understood against the broad scope of application of the Convention.

111. As explained in the Official Commentary, the definition of "securities" includes "any financial assets which are capable of being held in the intermediated holding system and governed by the Convention" (*Official Commentary*, section 1-7), provided that they are "capable of being credited to securities accounts (Article 1(c)) maintained by an intermediary (Article 1(d))" and "capable of being acquired and disposed of in accordance with the provisions of the Convention, in particular Articles 11 and 12." (*Official Commentary*, section 1-8)

112. Securities come in many different forms, including bonds and other debt instruments traded in the capital markets; shares and other equity instruments, whether or not they are traded on an exchange; and transferrable units (other than shares) in collective investment schemes (unit trusts, *fonds communs de placement*, *Anlagefonds*, etc.). They may also include some forms of

securitised derivative instruments (*Official Commentary*, section 1-10). While several types of securities may primarily represent a financial asset owned by their holder, some types of securities place the holder in a particular relationship with the issuer of the securities under a body of law that, for purposes of convenience, may be referred to as "corporate law".

113. The Convention is not generally concerned with "corporate law" matters. However, as indicated in the *Official Commentary,* "It is not easy to draw a line in precise language between

what is covered and what is not covered by the Convention. In particular, it is obvious that using the notion "corporate law" would not work, because the coverage of corporate law varies from jurisdiction to jurisdiction. The Convention follows the functional approach. It delineates the coverage of the subject matter not by using the notion "corporate law" but by directly spelling out (in functional terms) what is not covered by the Convention (*Official Commentary*, section 8-2).

C. Chapter II: Rights of the account holder

114. As to the rights of account holders ***Articles 9 and 10*** harmonise a number of issues relating to: the rights flowing from a credit (see Article 9(1)); against whom such rights may be exercised (see Article 9(2)), and measures that an intermediary must take in order to enable its account holders to exercise the rights conferred by Article 9(1) (see Article 10). There are, however, also a number of issues that have not been harmonised by the Convention. Contracting States are invited to consider whether those issues are adequately addressed by their non-Convention law.

115. Generally, the Convention does not harmonise the ***legal qualification of the rights of account holders***. The Convention, therefore, does not determine whether, for example, an account holder has a proprietary interest against its intermediary, such as an ownership or a co-ownership interest, whether the account holder qualifies as a beneficiary under a trust, has a contractual claim against the intermediary or has a *sui generis* interest. The UNIDROIT Committee of Governmental Experts eventually adopted a ***functional approach*** so as to accommodate these different doctrines, as explained in the Official Commentary:

> "As the Convention is built on the functional approach it cannot have recourse to terms like "acquisition of property" or "ownership", which would have a different value in each jurisdiction as soon as it comes to detailed analysis. Therefore, Article 9(1) of the Convention sets out, in functional terms, what should be the features of the legal position acquired under the applicable law (be the concrete legal position in that Contracting State "property", "joint shared property in a pool of securities", "equitable interest", "security entitlement", etc.)" (*Official Commentary*, section 9-1).

115. In addition, Articles 9 and 10 refer to a number of other issues that are also left to sources of law outside the Convention:

(a) Article 9(1)(a)(ii): cases of credit of securities to a securities account other than those mentioned in Article 9(1)(a)(i), where a credit confers on the account holder the right to receive and exercise any rights attached to the securities (e.g. income and voting rights) (see Official Commentary, section 9-16);

(b) Article 9(1)(c): the right to cause securities to be held otherwise than through a securities account, i.e., the right to take securities out of the intermediated system (see Official Commentary, section 9-21 – 9-26);

(c) Article 9(1)(d): the exercise of other rights than those mentioned in Article 9(1)(a)-(c) (see Official Commentary, sections 9-27 – 9-30);

(d) Article 9(2)(b): the determination of against whom the rights mentioned in Article 9(1)(a) may be exercised, i.e., against the relevant intermediary, the issuer, or both; see Official Commentary, section 9-17);

(e) Article 9(3): the limits on the rights mentioned in Article 9(1)(a) in those cases where an account holder acquires a security interest or a ***limited interest*** other than a security interest (see *Official Commentary*, section 9-31 – 9-33);

(f) Article 10(2)(c): the ***effect to be given by an intermediary to instructions*** given by the account holder or other authorised person;

(g) Article 10(2)(e): the regular passing on of ***information relating to intermediated securities*** by an intermediary to account holders, including information necessary for account holders to exercise rights;

(h) Article 10(2)(f): the regular ***passing on of dividends and other distributions*** received in relation to intermediated securities by an intermediary to account holders.

D. Chapter III: Transfer of intermediated securities

116. ***Article 11(5)*** provides that nothing in the Convention limits the effectiveness of ***debits and credits*** to securities accounts which are effected ***on a net basis*** in relation to securities of the same description. This means that a Contracting State's policy choice whether to allow net book entries.

117. Article 12 addresses a number of issues that may be subject to declarations by a Contracting State. Apart from these issues, the applicable law determines the circumstances in which a ***non-consensual security interest*** in intermediated securities may arise and become effective against third parties (***Article 12(8)***), and Contracting States should therefore consider how that issue is dealt with by the non-Convention law.

118. ***Article 13*** relates to ***acquisition and disposition in line with non-Convention law methods***. It allows for the non-Convention law to provide for methods for acquisition and disposition other than those set out in Articles 11 and 12:

> "Because the Convention aims at minimal harmonisation rather than full harmonisation, the methods provided by Articles 11 and 12 for the transfer of intermediated securities or for the grant of an interest in the same are not exclusive of other methods available under the non-Convention law. Acquisitions made and interests granted according to such other methods are not eligible for the protection of an innocent acquirer under Article 18, though they may be protected by a similar provision of the non-Convention law. Their priorities are determined by the non-Convention law, except that they are subordinated to all interests that become effective against third parties under Article 12 (see Article 19(5))"(*Official Commentary*, section 13-5).

119. While Article 14(1) contains the baseline rule that rights and interests that have become effective against third parties under Article 11 or 12 are effective against the insolvency administrator and creditors in any insolvency proceeding, ***Article 14(2)*** contains an important carve-out from this rule. It lists a number of examples of ***substantive or procedural rules of law applicable by virtue of an insolvency proceeding*** that are not affected by Article 14(1). The examples mentioned are rules relating to (a) the ranking of categories of claims; (b) the avoidance of a transaction as a preference or a transfer in fraud of creditors; and (c) the enforcement of rights to property that is under the control or supervision of the insolvency administrator. This means that if a Contracting State has existing rules it would not need to change such existing rules when implementing the Convention, and may enact or moderate them afterwards.

120. ***Article 14(4)*** states that nothing in the Convention impairs the effectiveness of an interest in intermediated securities against the insolvency administrator and creditors in any insolvency proceeding if that interest has become effective by any method referred to in Article 13. A Contracting State in which the methods for an interest to become effective include ***Article 13***

methods should review its laws with a view to understanding the effectiveness of interests acquired by such a method in case of an ***insolvency*** (see the comparable rule in Article 21(3) which applies in the specific situation of the insolvency of the relevant intermediary).

121. In respect of the ***authorisation of dispositions by an intermediary*** (Article 15) Contracting States are invited to consider two issues. First, under ***Article 15(1)(e)*** a Contracting State should consider whether the non-Convention law does or should authorise an intermediary to make a debit of securities to a securities account, to make or remove a designating entry or to otherwise dispose of intermediated securities. Any such authorisation provided for in the non-Convention law would be in addition to the modes of authorisation referred to in Article 15(1)(a)-(d) (For more information, see the *Official Commentary*, section 15-17). Second, on the basis of ***Article 15(2)***, a Contracting State should give consideration to the regulation of the consequences of unauthorised dispositions, which are to be determined by the non-Convention law and, to the extent permitted by the non-Convention law, by the account agreement or the uniform rules of a securities settlement system. The consequences of an unauthorised designating entry are to be determined subject to Article 18(2) (For more information, see the *Official Commentary*, section 15-18 – 15-21).

122. ***Article 16*** relates to ***invalidity, reversal and conditionality***, which are left almost entirely for other law outside the Convention. Subject to Article 18, the non-Convention law and, to the extent permitted by the non-Convention law, the account agreement or the uniform rules of a securities settlement system, determine whether and in what circumstances a debit, credit, designating entry or removal of a designating entry is invalid, liable to be reversed or may be subject to a condition, and the consequences thereof. When implementing the Convention, a Contracting State should therefore give consideration to how those issues are dealt with in its law.

123. Articles 18(1)-(3) provide a minimum level of harmonisation relation to the protection of the rights of an innocent acquirer. It follows from ***Article 18(4)*** that these "safe harbour" protections may be further supplemented by the applicable law, for example by the applicable law providing that an innocent acquirer is also protected in cases that are not covered by the Convention. Contracting States should also consider whether the non-Convention law should, as Article 18(5) says it may, permit deviation from the protection offered by Article 18(2) in the uniform rules of an SSS or an account agreement (see ***Article 18(5)***).

124. ***Articles 19(5) and (6)*** are relevant for the ***priority status of non-consensual security interests***. Article 19(5) determines that a non-consensual security interest in intermediated securities arising under the applicable law has such priority as is afforded to it by that law. Article 19(6) states, in relation to non-consensual security interests, that the priority afforded under Article 19(5) may be varied by the parties by agreement, but only if the applicable law permits doing so. When implementing the Convention, Contracting States are therefore advised to consider not only the circumstances in which a non-consensual security interest in respect of intermediated securities may arise and become effective against third parties (see the discussion of Article 12(8) in section 120), but also to determine the priority regime in respect of such security interests.

125. ***Article 20(1)*** provides that the issue of the priority of the relative rights and interests between the account holders of an intermediary and interests granted by that intermediary so as to be effective against third parties under Article 12 or 13 is not determined by the Convention. Although Article 20(2) contains an important exception to this rule in relation to interests granted by an intermediary so as to become effective under Article 12, it leaves at least the ***priority contest between account holders of an intermediary and those to whom the intermediary granted an Article 13 interests*** unregulated. This is, therefore, one of the issues that a Contracting State whose non-Convention law allows Article 13 interests should consider (see also the discussion of Article 13 in section 121 above).

E. Chapter IV: Integrity of the intermediated holding system

126. ***Article 21(2)*** contains two exceptions to the general rule of Article 21(1) that rights and interests that have become effective under Articles 11 or 12 are enforceable in the event of the insolvency of the relevant intermediary. Those two exceptions are: (a) rules of law applicable in the insolvency proceeding relating to the ***avoidance of a transaction*** as a preference or a transfer in fraud of creditors; and (b) any rule of procedure relating to the ***enforcement of rights to property that is under the control or supervision of the insolvency administrator***. A Contracting State cannot decide to introduce any exceptions to Article 21(1) in addition to the two exceptions mentioned in Article 21(2), but it may review or modify any of its rules that fall within Article 21(2)(a) and (b). Cf. the rule set out in Article 14(2), discussed above.

127. ***Article 21(3)*** provides that Article 21 does not impair the effectiveness of ***Article 13 interests*** in the event of the ***insolvency of the relevant intermediary***. A Contracting State in which Article 13 methods exist, should therefore determine its position as to the effectiveness of interests acquired by such a method in case of the insolvency of a relevant intermediary. Cf. the comparable rule set out in Article 14(4), discussed above.

128. Article 23(1) sets out the general rule that an intermediary is neither bound nor entitled to ***give effect to*** any ***instructions*** in relation to intermediated securities of an account holder given by any person other than that account holder. ***Article 23(2)*** contains several exceptions to this rule, of which the exceptions relating to the non-Convention law (subsection (d)) and the uniform rules of an SSS (subsection (e)) should be considered by Contracting States when determining how to implement the Convention (for more information, see the *Official Commentary*, section 23-16 – 23-28).

129. Article 24 essentially requires that an intermediary must hold or have available sufficient securities for its account holders other than itself, and, if applicable, for itself. The following issues in relation to this requirement have not been harmonised by the Convention: the ***method of complying with the requirement to hold or have available sufficient securities*** (see ***Articles 24(2)(e) and 24(4)***); the ***time permitted to take action*** to ensure such compliance (***Article 24(3)***); and the ***allocation of the cost*** of ensuring compliance or otherwise relating to the consequences of failure to comply (***Article 24(4)***) (For more information, see the *Official Commentary*, section 24-16 – 24-22). Contracting States should therefore consider how these issues are dealt with in their non-Convention law.

130. Article 25 relating to the allocation of securities to account holders' rights addresses several issues that should be considered by Contracting States. On the basis of ***Article 25(3)*** a Contracting State should determine how the non-Convention law affects ***the allocation to account holder's rights*** (and whether the non-Convention law requires or allows the relevant intermediary to affect the allocation). Article 25(4) provides a non-exhaustive list of examples possible arrangements to effect the allocation.

131. Article 26(2) contains a ***loss sharing rule***. Two important exceptions apply in relation to this rule. ***Article 26(1)*** provides that any conflicting rule applicable in an insolvency proceeding prevails. Further, ***Article 26(3)*** provides that to the extent permitted by the non-Convention law, a shortfall shall be borne in accordance with the uniform rules of an SSS if the intermediary is the operator of the system. A Contracting State should therefore examine its insolvency rules concerning shortfalls as well as the issue of whether the non-Convention law should allow rules of SSSs that deviate from the standard solution set out in Article 26(2).

132. ***Article 27*** contains rules relating to the ***finality of instructions or resulting book entries in SCSs or SSSs***. These rules, however, apply only to the extent permitted by the law governing the system. A Contracting State should therefore review and possibly amend its laws in

accordance with whether it wishes to ensure the finality of instructions and book entries in this context.

133. ***Articles 28(1) and (2)*** relate to the ***obligations of an intermediary*** under the Convention. They make clear that the non-Convention law and, to the extent permitted by the non-Convention law, the account agreement or the uniform rules of an SSS may specify such obligations. If the substance of any such obligation is specified by the non-Convention law (or, if permitted, the account agreement or the uniform rules of the SSS), compliance therewith satisfies that obligation. These provisions would seem to provide considerable flexibility for Contracting States in structuring their non-Convention law, etc., in relation to how the obligations of an intermediary that are set out in the Convention may be satisfied.. The basic Convention obligations of an intermediary, however, cannot be reduced or modified on the basis of this provision.

134. ***Articles 28(3) and (4)*** relate to the ***liability of intermediaries***. This issue should be regulated by Contracting States as it is referred by the Convention to the non-Convention law or, to the extent permitted by the non-Convention law, the account agreement or the uniform rules of an SSS. The non-Convention law would, however, need to take into account the harmonised minimum requirement that an intermediary may not exclude liability for its gross negligence or wilful misconduct.

135. ***Article 29(1)*** provides that the law of a Contracting State must permit…… A Contracting State should therefore consider whether its non-Convention law will require that all securities that are permitted to be traded on an exchange or regulated market should be ***held through intermediaries*** and, in that case, that the rights attached to such securities can effectively be exercised in accordance with Article 9, or whether there may also be securities that need not be held through intermediaries. On the basis of ***Article 29(2)*** a Contracting State has the right to determine the conditions under which a person is authorised to exercise rights in the case of ***nominee holding and split voting arrangements*** (For more information, see the *Official Commentary*, section 29-20 – 29-26).

136. The last provision of Chapter IV relates to ***set-off*** and also this provision leaves policy room to Contracting States. The harmonised rule in ***Article 30*** is that the fact that securities are held in intermediated form should not, of itself, put the account holder in a less favourable position as regards rights of set-off in an insolvency proceeding against the issuer, in comparison to the situation where the securities would not have been held in intermediated form. The exact set-off regime is, however, to be determined by the non-Convention law.

F. Chapter V: Special provisions in relation to collateral transactions

137. In comparison with other parts of the Convention Chapter V contains only few references to sources of law outside the Convention. This reflects the optional character of this chapter: States can opt out of it entirely or in part (see Articles 36(2) and 38, discussed in sections II.3.8 and II.3.9 above). This made it possible for the Convention text to contain precise rules without numerous references to sources of law outside of the Convention. Besides the declarations mentioned in Articles 36(2) and 38, the following issues should nonetheless be further considered by Contracting States.

138. First, ***Article 31(2)*** makes it clear that the provisions in Chapter V, while containing a ***minimum level of harmonisation***, also allows the non-Convention law to determine that a collateral taker has additional rights or powers and that a collateral provider has additional obligations. Article 34(4) is similar in this respect: the exercise of a right of use shall not render invalid or unenforceable any right of the collateral taker under the relevant security collateral agreement or the non-Convention law. Pursuant to these provisions, it is clear that the non-Convention law may contain additional provisions favouring the position of collateral takers

139. Second, ***Article 35*** provides that the non-Convention law may determine that the ***realisation*** or ***valuation*** of collateral securities or the ***calculation*** of any obligations pursuant to Articles 33 or 34 must be conducted ***in a commercially reasonable manner***. With a view to guaranteeing an equilibrium between the interests of collateral takers and providers, it would seem advisable that Contracting States consider promulgating such a requirement, if it is not already in place.

140. Third, ***Article 36(1)(a)(iii)*** refers to the possibility that the non-Convention law may allow the ***protection of top-up and substitution of collateral*** against timing claw-back rules not only in case of, in short, price fluctuations on the financial markets (Article 36(1)(a)(i)) or changes in credit rating (Article 36(1)(a)(ii); see also Article 36(2)), but also in any other circumstances specified in the collateral agreement. For example, where an extension of credit relies on the current management of the debtor company or the presence of certain important assets, a change of the management or the sale of the assets may trigger a top-up provision in the collateral agreement.

141. As has been illustrated above, the Convention leaves a number of issues in respect of intermediated securities unregulated, including issues relating to secured transactions concerning intermediated securities. When implementing the Convention Contracting States should consider the extent to which the general framework for security interests adequately addresses the issues that are not governed by the Convention.[5] Those issues include, for example, the following:

(a) The ***creation of a security interest in intermediated securities so as to be effective between the parties***, which, depending on the jurisdiction involved, may require (i) an underlying security agreement, (ii) authority to dispose of the assets concerned and/or (iii) certain procedural steps to be fulfilled for vesting the security interest;

(b) The ***ranking of Article 13 interests among themselves***. The Convention regulates the priority contest between an interest created under Articles 11 or 12 and an interest created under Article 13, as the Article 13 interest would be subordinate on the basis of the priority rule of Article 19(2) of the Convention. The Convention, however, does not regulate the ranking of Article 13 interests among themselves; and

(c) Generally, the applicable framework for secured transactions involving intermediated securities when a Contracting State ***opts out of Chapter V***.

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[5] An important source of inspiration for the development of a modern legal framework for secured transactions can be found in the *Legislative Guide on Secured Transactions* adopted by the United Nations Commission on International Trade Law in 2007 (United Nations publication, Sales No. Sales No. E.09.V.1, New York, 2010; also available from<www.uncitral.org/uncitral/en/uncitral_texts.html>, hereafter referred to as the "Guide"). The Guide intends to give comprehensive legislative guidance in respect of transactions entailing the provision of security interests in all types of movable assets with limited exceptions. Securities are currently excluded from the Guide. In considering whether and to what extent the Guide can offer a meaningful supplement to the Convention, it is important to take into account that many of the rules in Chapter V of the Convention are exceptions to general rules and principles of civil or insolvency law (e.g. the Chapter V rules concerning title transfers, the right to "use" collateral assets, the methods for rapid enforcement of security interests without formalities and the exception to zero hour insolvency rules). These exceptions are justified by the goal of guaranteeing liquid securities markets. In particular insofar as the Guide contains recommendations that are tailored to comparable liquid assets, such recommendations would seem to have added value in this context.

ANNEX II

Appendix B – References to non-Convention law (other than in connection with a declaration)

Preamble, recital 7
Article 1(k)
Article 1(l)
Article 1(m)
Article 1(p)
Article 9(1)(a)(ii)
Article 9(1)(c)
Article 9(1)(d)
Article 9(3)
Article 10(2)(c)
Article 10(2)(e)
Article 10(2)(f)
Article 11(2)
Article 12(2)
Article 13
Article 15(1)(e)
Article 15(2), twice
Article 16, twice
Article 18(5)
Article 19(2)
Article 23(2)(d)
Article 24(3)
Article 24(4), twice
Article 25(3), twice
Article 26(3)
Article 28(1), twice
Article 28(2), twice
Article 28(3), twice
Article 31(2)
Article 34(4)
Article 35
Article 36(1)(a)(iii)

Appendix C - References to applicable law

Article 2(a)
Article 3
Article 9(1)(c)
Article 9(2)(b)
Article 12(8)
Article 18(4)
Article 19(5)
Article 19(6)

Appendix D - References to rules relating to insolvency

Preamble, recital 9

Article 11(2): "rule of law applicable in an insolvency proceeding"

Article 12(2): "rule of law applicable in an insolvency proceeding"

Article 14(2): "substantive or procedural rule of law applicable by virtue of an insolvency proceeding" and the examples in sub-paragraphs (a), (b) and (c)

Article 21(2)

Article 26(1): "any conflicting rule applicable in that [insolvency] proceeding"

Article 27: "any rule applicable in an insolvency proceeding"

Appendix E - References to uniform rules of SCSs and SSSs

References to the uniform rules of SCSs:

Article 1(o)
Article 1(p)
Article 27(a)

References to uniform rules of SSSs:

Article 1(l), heading
Article 1(l)(ii)
Article 1(n)
Article 1(p)
Article 9(1)(c)
Article 10(2)(c)
Article 10(2)(e)
Article 10(2)(f)
Article 15(2)
Article 16
Article 18(5)
Article 23(2)(e)
Article 24(4)
Article 26(3)
Article 27(a)
Article 27(b)
Article 28(1)
Article 28(2)
Article 28(3)

Appendix F. Work of other organisations

1. Several other international organisations and associations have carried out work that is relevant for, or specifically dealing with, emerging capital markets. The outline below of relevant activities of some of these organisations is intended as a basis for further work and research.

1. World Bank Group[1]

2. The World Bank Group (WBG) conducts its capital market operations through the Securities Markets Group (SMG), its global product group for securities markets. SMG advises emerging market countries and provides intellectual leadership on trends, issues, and operations related to securities market development. The demand for domestic securities markets is growing in emerging market countries to improve fiscal and monetary management, strengthen yield curves and benchmarks, finance key development areas such as housing and infrastructure, and provide investment outlets for growing institutional investors like pension funds. SMG works closely with government and private sector institutions to strengthen relevant areas, such as policies and regulations; market infrastructure (trading, clearing and settlement); and market participants (issuers, investors). It also assists countries with regional capital market integration, where appropriate. Current country operations include both government and non-government bond market projects in various countries around the world. Thought leadership activities include production of books[2], other publications[3], conferences, workshops, and training materials[4].

2. European Bank for Reconstruction and Development[5]

3. Since its establishment in 1991, the European Bank for Reconstruction and Development (EBRD) has become the largest financial investor in its region of operations which stretches from central Europe and the Western Balkans to central Asia. Headquartered in London, the EBRD is owned by 61 countries and two international institutions. The Bank invests only in projects that could not otherwise attract financing on similar terms. It invests mainly in private enterprises, usually together with commercial partners. EBRD provides project financing for banks, industries and businesses, both in case of new ventures and existing companies.

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1 The information in this section was kindly provided by Ms Alison Harwood and Ms Tamuna Loladze of the World Bank Group.

2 See, for example: "Public Debt: the Brazilian Experience", WB (2010); "South Asian Bond Markets. Developing Long Term Finance for Growth", WB (2008); "Developing Government Debt Markets: From Diagnostics to Reform Implementation", WB (2007); "Developing Government Debt Markets: A Handbook", WB and IMF (2001); "Building Local Bond Markets: An Asian Perspective", WBG (2000).

3 See, for example, the following papers, notes and articles: "The Development of Deeper and More Liquid Local Currency Bond Markets" in Euromoney Emerging Markets Handbook 2009/10, WB (2009); "Unlocking Debt Market Development in Times of Crisis" in Euromoney Emerging Markets Handbook 2008/09, WB (2008); "Broadening the Offering Choice of Corporate Bonds in Emerging Markets: Cost-Effective Access to Debt Capital", WB (2008); "How to Build an Efficient Exchange for Small Firms", Financing Innovation Viewpoint, WBG (2007); Handbooks on repo markets, primary dealers, and liability management. WB (forthcoming).

4 Think of the Securities Markets Conference, this year focusing on "Emerging Local Bond Markets Post-Crisis: Challenges and Next Steps"; the World Bank-OECD-IMF Global Bond Forum; the Gemloc Advisory Services Workshop and Investor Country Conference; the Workshop on the Development of Securities Markets for the US SEC Spring Institute; and the Course on Implementing Government Debt Management Strategies.

5 The information in this section was kindly provided by Frederique Dahan (EBRD).

4. The activities of the EBRD as an investor are at the core of the EBRD mission and directly feed into its work at the legal, regulatory and institutional level. The EBRD plays a dual role in capital markets development in its countries of operations.

5. First, the EBRD widens access to local currency resources. The EBRD has been successful in enhancing investor access to local products by: (i) syndicating local currency loans; (ii) acting as an anchor investor in local currency bonds, including securitisations; (iii) working on clearing and settlement to establish a bridge between international clearing and depository systems and local systems and to get currencies accepted by international clearing and depository systems; and (iv) improving and developing money-market indices to stimulate activity in local currency.

6. Second, the EBRD assists in reforming the legal and regulatory environment. The EBRD has helped to improve capital market legislation and regulation in a number of jurisdictions in respect of a number of specific areas: (i) securities market laws; (ii) disclosure requirements; (iii) listing regulations; (iv) secondary trading; and (v) broadening eligible instruments for institutional investors. The EBRD is also working to clarify the derivatives environment in partnership with the International Swaps and Derivatives Association through the recognition of swaps, netting opinions, and treatment in insolvency. Moreover, the EBRD is working on improving investor friendly practices. In particular, it participated in the development of the Regional CIS Model Investor Protection Law and the 2002 Russia Corporate Governance Code.[6]

3. UNCITRAL[7]

7. In 2007, UNCITRAL adopted its Legislative Guide on secured Transactions. Chapter I, section 37, of the Guide states:

> "The Guide does not apply to security rights in securities because the nature of securities and their importance for the functioning of financial markets raise a broad range of issues that merit special legislative treatment. In addition, the substantive law issues relating to security rights and other rights in securities held with an intermediary are not addressed in the Guide, because they are dealt with in the Unidroit Convention on Substantive Rules for Intermediated Securities (Geneva, 2009). The law applicable to rights in securities is not addressed in the Guide, since it is dealt with in the Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary, prepared by the Hague Conference on Private International Law."

8. Now that the Geneva Securities Convention has been adopted, UNCITRAL considers adding an Annex to the Guide relating to non-intermediated securities, which may play an important role in commercial financing transactions, notably where a bank extends a loan to an enterprise against a security interest in securities issued by that enterprise or by wholly-owned subsidiaries of that enterprise, which have not been entered into the intermediated holding system.[8]

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[6] For further details, see http://www.ebrd.com/pages/workingwithus/capital.shtml and http://www.ebrd.com/pages/sector/legal/securities.shtml.

[7] The information in this section was kindly provided by Spyridon Bazinas (UNCITRAL).

[8] For the historical development and the different considerations raised in relation to the issues set out in sections 146-148, see also: the report of the 34th session of UNCITRAL (2001), A/56/17, section 356; the report of the 35th session of UNCITRAL (2002), A/57/17, section 200; the report of the 4th session of Working Group VI (2003), A/CN.9/543, section 84; the report of the 6th session of Working Group VI (2004), A/CN.9/570, section 20; the report of the 9th session of Working Group VI (2006), A/CN.9/593, section 68; the Note by the UNCITRAL Secretariat concerning the 10th session of Working Group VI (2006), A/CN.9/WG.VI/WP.26/Add.7, sections 3-4; the report of the 39th session of UNCITRAL (2006), A/61/17, sections 15-16; the Note by the UNCITRAL Secretariat concerning the 11th session of Working Group VI (2006), A/CN.9/WG.VI/WP.29, section 5; the Note by the UNCITRAL Secretariat concerning the 12th session of Working Group VI (2007), A/CN.9/WG.VI/WP.31/Add.1, sections 39, 41-44; the report of the 12th session of

4. International Organization of Securities Commissions

9. The International Organization of Securities Commissions (IOSCO) has an Emerging Markets Committee, which has prepared several papers on issues relating to emerging markets and which has also delivered input in other IOSCO work. The papers of the Emerging Markets Committee address important issues such as: collective investment schemes[9]; financial risk management[10]; clearing and settlement[11]; the development of corporate bond markets[12]; cross-border activities of market intermediaries[13]; exchange demutualisation[14]; factors influencing liquidity[15]; and corporate governance practices[16].

5. Trade Association for the Emerging Markets[17]

10. The Trade Association for the Emerging Markets (EMTA), as an association of entities trading and investing in emerging market debt and other instruments, generally serves as a forum for market participants to share information on issues they face in their trading and investment activities, in both the international and local emerging market capital markets. If market participants have a problem in a particular market, EMTA will bring it to the attention of the association and if others share the same concerns, EMTA will work to clarify the issue, or if necessary, convey this information to the appropriate representatives of local governments or

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Working Group VI (2007), A/CN.9/620, sections 99-107; the report of the fourth session of the UNIDROIT Committee of Governmental Experts, UNIDROIT 2007 – Study LXXVIII – Doc. 95, sections 98-105; the report of the first part of the 40th session of UNCITRAL (2007), A/62/17 (Part I), in particular sections 145-147 and 160, as well as the documents issued in connection with this session by the UNCITRAL Secretariat (A/CN.9/631, section 4(c) of Part II; A/CN.9/637, section 4(c) of Part II; A/CN.9/637/Add.2, section 70) and the European Community and its Member States (A/CN.9/633); the report of the 15th session of Working Group VI (2009), A/CN.9/670, sections 124(a) and 125; the report of the 42nd UNCITRAL session (2009), A/64/17, sections 314 and 318; and the report of the 17th session of Working Group VI (2010), A/CN.9/689, section 61; and the Note by the UNCITRAL Secretariat for UNCITRAL's 43rd session (2010), A/CN.9/702, sections 1-43. The Report of UNCITRAL's 43rd session is yet to be published at the moment this document is being written.

[9] See the Report by the Emerging Markets Committee on "Collective Investment Schemes in Emerging Markets" (September 1996); the Joint Report by the Technical Committee and the Emerging Markets Committee concerning "A Comparison between the Technical Comittee Report and the Emerging Markets Committee Report on Valuation and Pricing of Collective Investment Schemes" (May 1999); the Report by the Emerging Markets Committee on "Collective Investment Schemes in Emerging Markets" (July 2006); the Report by the Emerging Markets Committee on "Collective Investment Schemes Administration in Emerging Markets" (December 2007); and the Report by the Emerging Markets Committee on "Collective Investment Schemes in Emerging Markets – Update of Database" (December 2007).

[10] See the Final Report by the Emerging Markets Committee on "Financial Risk Management in Emerging Markets" (November 1997).

[11] See "Clearing and Settlement – A Blueprint", issued by the Development Committee (October 1992); and the Emerging Markets Report "Towards a Legal Framework for Clearing and Settlement in Emerging Markets" (November 1997).

[12] See the Report by the Emerging Markets Committee on "The Development of Corporate Bond Markets in Emerging Market Countries" (May 2002). On this issue, see also: *Philip Turner*, "Bond markets in emerging economies: an overview of policy issues", June 2002, BIS Papers No 11.

[13] See the Report by the Emerging Markets Committee on "Cross-Border Activities of Market Intermediaries in Emerging Markets" (March 2005).

[14] See the Report by the Emerging Markets Committee on "Exchange Demutualization in Emerging Markets" (April 2005).

[15] See the Report by the Emerging Markets Committee on "Factors Influencing Liquidity in Emerging Markets" (December 2007).

[16] See the Report by the Emerging Markets Committee on "Corporate Governance Practices in Emerging Markets" (December 2007).

[17] The information in this section was kindly provided by Sandra Rocks and Starla Griffin (EMTA).

other international organisations. In the past, EMTA has had local capital markets initiatives focusing on specific issues in Latin America and Eastern Europe; and more recently, as part of a larger focus on Africa, on certain markets in Sub-Saharan Africa. EMTA does not generally act as a legal reform participant, although from time to time it does work closely with other associations and institutions undertaking this work, such as the World Bank and the Commonwealth Secretariat. For example, EMTA is currently working together with the WB SMG to assist in guiding their technical assistance relating to developing local bond markets in a number of African countries. Teaming with the WB SMG in some of the Latin American markets may occur in the future. EMTA's role is to provide international market participant expertise to help prioritise issues and make recommendations for improving local market infrastructure, the regulatory environment, etc. (but generally as derived from the experience of non-local investors). EMTA is a resource to assist in the process of developing rules for emerging capital markets, at least to ensure that the approaches taken are sensitive to issues of importance to international traders and investors.[18]

6. International Swaps and Derivatives Association[19]

11. The efforts of the International Swaps and Derivatives Association (ISDA) in emerging market jurisdictions across Europe/Middle East/Africa, Asia-Pacific and the Americas focus on law reform efforts in order to increase legal certainty for capital markets transactions, especially with regard to derivatives transactions. The areas of law most relevant in this context are insolvency (e.g., netting and cross-border insolvency issues), property (e.g., collateral arrangements), securities, private international law (e.g., conflict of law rules), dispute resolution and a wide range of regulatory matters (e.g., conduct of business rules, capital adequacy requirements, accounting). ISDA regularly provides drafting suggestions to regulators and legislators in individual jurisdictions on proposed laws and regulations. Currently, ISDA is involved in such projects in around 16 emerging market jurisdictions in Europe (Central Eastern Europe, Southern Eastern Europe, Commonwealth of Independent States), 7 in the Middle East, 7 in Africa, 10 in Asia-Pacific and 8 in the Americas. The various ISDA submissions and proposals to the various jurisdictions across the regions are available at the ISDA website.[20] These efforts also include the Islamic finance area.[21] ISDA has developed model provisions on certain aspects of insolvency law, e.g. the enforceability of close-out netting (see the ISDA Model Netting Act and Memorandum on Implementation[22]); and published a number of research papers and surveys[23]. ISDA also publishes a library of global standard industry opinions covering more than 55 jurisdictions worldwide, including both developed and emerging market jurisdictions.[24] Moreover, ISDA actively participates in the drafting of international legal instruments on the various areas of law that are relevant to derivatives trading (e.g., UNIDROIT, UNCITRAL, Hague Conference on Private International Law and a number of regional bodies). ISDA's efforts are coordinated by its Financial Law Reform Committee.[25]

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[18] A list of EMTA Local Markets Documentation is available at http://www.emta.org/Documentation.aspx?id=2575. See also the EMTA Africa Workshop Report, Financing African Development Post-HIPC: What Role for the Private Sector?, April 18, 2008, in particular, Section 5 on developing local capital markets (http://www.emta.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=2838).

[19] The information in this section was kindly provided by Peter Werner and Ed Murray (ISDA).

[20] See http://www.isda.org/c_and_a/asia_pacific.html; http://www.isda.org/c_and_a/eastern_eur.html; and http://www.isda.org/c_and_a/latin_amer.html.

[21] See http://www.isda.org/c_and_a/islamfwg.html.

[22] See http://www.isda.org/docproj/model_netting.html

[23] See http://www.isda.org/statistics/stat_nav.html; and http://www.isda.org/researchnotes/isdaresearch.html.

[24] See http://www.isda.org/docproj/stat_of_net_opin.html; http://www.isda.org/docproj/stat_of_coll.html.

[25] See http://www.isda.org/c_and_a/collateral-financial.html.