



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

*(submitted by UNCITRAL)*

1. On the basis of the Paper of the Chairman of the informal Working Group on Insolvency-related Issues (Study LXXVIII - Doc. 97), UNCITRAL raised a number of issues with respect to insolvency-related articles of the draft Convention (Study LXXVIII - Doc. 115). The treatment of some of those issues in the UNCITRAL Legislative Guide on Insolvency Law points to some potential uncertainty or a lack of clarity in the draft Convention.

#### **Article 18**

2. Article 18 is based upon Article 30(3) of the Cape Town Convention, which includes provisions similar to the articles currently numbered 17 and 18 in the draft Convention. The Official Commentary of the Cape Town Convention indicates that Article 30(3) is intended to preserve the effect of certain specific rules of insolvency law relating to avoidance and enforcement (including, for example, rules on application of a stay of proceedings etc.)

3. The scope of Article 18 appears to be unclear in several respects. The first question is whether the Convention overrides all insolvency law except for the specific provisions in Article 18 or whether those specific provisions are intended only to modify the rules on effectiveness in Article 17, which is not specifically subject to Article 18. Secondly, it is not clear whether the carve-out of insolvency provisions with respect to the stay (Article 18(b)) would include insolvency provisions establishing exceptions to application of a stay and avoidance of certain transactions, e.g. financial contracts, such as recommended by the Legislative Guide (recommendations 101-105). It is desirable that these matters be clarified in the explanatory material to the future Convention. UNCITRAL also notes the language distinction between paragraphs (a) and (b) of Article 18, which reflects the language of Article 30(3) of the Cape Town Convention, one paragraph referring to rules of law and the other to rules of procedure. No explanation of the distinction appears to have been included in the Official Commentary to the Cape Town Convention. UNCITRAL suggests that such explanation might be helpful here, especially where the stay applies by application of a specific rule of insolvency law.

4. The third issue with respect to Article 18 which is not clear is the relationship between Article 18 and Article 30, particularly as it concerns the application of the stay or of an *ipso facto* clause that might be rendered unenforceable by the insolvency law and therefore operate to prevent enforcement as contemplated under Article 30. Article 18 is subject to Articles 24 and 33, but not to Article 30. It would be helpful if the relationship between the two articles could be clarified in the draft Convention.

5. A final point on Article 18 relates to the types of avoidance provisions that would be saved under Article 18. UNCITRAL suggests that an explanation along the lines of that included in the Official Commentary to the Cape Town Convention, paragraph 6 to Article 30, be included in the explanatory material to the future Convention.