



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

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

Geneva, 1 to 13 September 2008

UNIDROIT 2008  
CONF. 11 – Doc. 40  
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**REPORT  
OF THE FINAL CLAUSES COMMITTEE**

(submitted by the Chairman of the Final Clauses Committee)

The Final Clauses Committee submits to the Plenary a second draft of the final clauses which takes into account the decisions made by the Plenary and the observations made by some delegations on the draft submitted on 5 September (Doc. 27). Comments on the proposed changes are appended to each provision.

## DRAFT FINAL PROVISIONS

capable of embodiment in the  
draft Convention on Substantive Rules regarding Intermediated Securities

### CHAPTER VII – FINAL PROVISIONS

#### Article A

##### Signature, ratification, acceptance, approval or accession

1. This Convention shall be open for signature in Geneva on [....~~13 September 2008~~] by States participating in the Diplomatic Conference to adopt a Convention on Substantive Rules regarding Intermediated Securities held at Geneva from [....~~1 to 13 September 2008~~]. After [....~~13 September 2008~~] this Convention shall be open to all States for signature at [the Headquarters of UNIDROIT in Rome] until it enters into force in accordance with Article C.
2. This Convention shall be subject to ratification, acceptance or approval by States which have signed it.
3. Any State which does not sign this Convention may accede to it at any time.
4. Ratification, acceptance, approval or accession is effected by the deposit of a formal instrument to that effect with the Depositary.

#### Comment

Dates deleted.

#### Article B

##### Regional Economic Integration Organisations

1. A Regional Economic Integration Organisation which is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, accept, approve or accede to this Convention. The Regional Economic Integration Organisation shall in that case have the rights and obligations of a Contracting State, to the extent that that Organisation has competence over matters governed by this Convention. Where the number of Contracting States is relevant in this Convention, the Regional Economic Integration Organisation shall not count as a Contracting State in addition to its Member States which are Contracting States.

2. The Regional Economic Integration Organisation shall, at the time of signature, acceptance, approval or accession, make a declaration to the Depositary specifying the matters governed by this Convention in respect of which competence has been transferred to that Organisation by its Member States. The Regional Economic Integration Organisation shall promptly notify the Depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration under this paragraph.

3. Any reference to a "Contracting State" or "Contracting States" or "State Party" or "States Parties" in this Convention applies equally to a Regional Economic Integration Organisation where the context so requires.

#### **Comment**

No changes.

### **Article C Entry into force**

1. This Convention enters into force on the first day of the month following the expiration of six months after the date of the deposit of the 3rd instrument of ratification, acceptance, approval or accession between the States which have deposited such instruments.

2. For each State that ratifies, accepts, approves or accedes to this Convention after the deposit of the third instrument of ratification, acceptance, approval or accession, this Convention enters into force in respect of that State on the first day of the month following the expiration of six months after the date of the deposit of its instrument of ratification, acceptance, approval or accession.

#### **Comment**

No changes.

### **Article D Territorial units**

1. If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may modify its declaration by submitting another declaration at any time.

2. Any such declarations are to be notified to the Depositary and shall state expressly the territorial units to which this Convention applies.

3. If a Contracting State has not made any declaration under paragraph 1, this Convention shall apply to all territorial units of that State.

4. Where a Contracting State extends this Convention to one or more of its territorial units, declarations permitted under this Convention may be made in respect of each such territorial unit, and the declarations made in respect of one territorial unit may be different from those made in respect of another territorial unit.

5. ~~The Convention enters into force in respect of that territorial unit on the first day of the month following the expiration of six months after the date of the notification of the declaration referred to in the preceding paragraphs.~~

**56.** In relation to a Contracting State with two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, any reference to the law in force in a Contracting State, or to the law of, a Contracting State shall be construed as referring to the law in force in the relevant territorial unit.

#### **Comment**

Paragraph 5 has been deleted because the coming into force of subsequent declarations is covered under Article F, paragraph 5.

Paragraph 6 (now 5) was modified for reasons of consistency with the text of the Convention.

#### **Article E Reservations**

No reservations may be made to this Convention.

#### **Comment**

No changes.

#### **Article F Declarations**

1. Declarations authorised by the provisions of the Convention other than the initial declaration provided for in paragraph 1 of Article D may be made in accordance with these provisions.

2. Those declarations or subsequent declaration amending those declarations or any withdrawal of such a declaration made under this Convention shall be notified in writing to the Depositary.

3. Any declaration made at the time of signature, ratification, acceptance, approval or accession, or made prior to the entry into force of the Convention for the State concerned, shall take effect simultaneously with the entry into force of the Convention for the State concerned. Declarations made upon signature or prior to the ratification must be confirmed upon ratification.

4. A Contracting State may make a subsequent declaration at any time after the date on which this Convention has entered into force for it, by notifying the Depositary to that effect.

5. Any such subsequent declaration shall take effect on the first day of the month following the expiration of six months after the date of receipt of the notification by the Depositary.

6. Notwithstanding the previous paragraphs, this Convention shall continue to apply, as if no such subsequent declarations had been made, in respect of all rights and interests arising prior to the effective date of any such subsequent declaration.

#### **Comment**

Changes in paragraph 1: Subsequent declarations (i.e. declarations made following the initial declaration in paragraph 1 of Article D) must fall under the rules set out in Article F in regard to notification in writing (Article F, paragraph 2) and the coming into force (Article F, paragraph 5). For this reason only paragraph 1 of Article D can be excluded from Article F.

Changes in paragraph 3: the new text allows for subsequent declarations to be made after the initial declaration but prior to the coming into force of the Convention in a given State.

The proposal aims to avoid a situation as the following: if a State were to make a declaration at the time of ratification to extend the application of the Convention to two territorial units and, after this initial declaration but before the coming into force of the initial declaration a third territorial unit would become ready to implement the Convention, the State would be required to wait until the Convention came into force before making the subsequent declaration. The effect would therefore be to delay the coming into force of the Convention for the third territorial unit. The proposed wording is intended to correct this.

The last sentence was inserted in order to avoid any possible dispute concerning the validity of declarations made upon signature; the need to confirm the declarations upon ratifications adds to legal certainty and predictability.

#### **Article G Applicability of Declarations**

A declaration made by a Contracting State under Chapters I to VI any article of this Convention is applicable only if the law of that Contracting State is the non-Convention law.

**Comment**

This Article aims to ensure that in the case where the applicable law is not the law of the *forum* State, the *forum* State will apply the declarations made under Chapters I to VI of the Convention by the State whose law applies, and not its own declarations. The change aims at ensuring that declarations provided for in Article D, i.e. in the final clause, will not fall under Article G.

The Official Commentary should state that "**Nothing in this Convention prevents any State Party, when applying according to its own conflict rules the law of another State party, to have recourse to a clause of public policy (*ordre public*) of the *forum*, or to apply overriding mandatory provisions, to the extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable (*lois de police*)**".

**Article H  
Withdrawal of declarations**

- 1. Any Contracting State having made a declaration under this Convention may withdraw it at any time by notifying the Depositary. Such withdrawal is to take effect on the first day of the month following the expiration of six months after the date of receipt of the notification by the Depositary.**
- 2. Notwithstanding the preceding paragraph, this Convention shall continue to apply, as if no such withdrawal had been made, in respect of all rights, interests and obligations arising prior to the effective date of any such withdrawal.**

**Comment**

No changes.

**Article I  
Denunciations**

- 1. Any Contracting State may denounce this Convention by notification in writing to the Depositary.**
- 2. Any such denunciation shall take effect on the first day of the month following the expiration of ~~six~~three-~~twelve~~ months after the date of receipt of the notification by the Depositary. Where a longer period for that denunciation to take effect is specified in the notification, it shall take effect upon the expiration of such longer period after receipt of the notification by the Depositary.**
- 3. Notwithstanding the previous paragraphs, this Convention shall continue to apply, as if no such denunciation had been made, in respect of all rights, interests and obligations arising prior to the effective date of any such denunciation.**

**Comment**

The Plenary agreed that a period of six months for the denunciation to take effect was appropriate in an instrument whose provisions affect the financial sector, also in view of the fact that the Committee had already considered, in its first draft submitted to the Plenary (Doc. 27), that it was appropriate to insert the possibility of a longer period for the denunciation to take effect.

**Article J**  
**Transitional provisions**

[.....]

**Article K**  
**Depository and its functions**

- 1. Instruments of ratification, acceptance, approval or accession shall be deposited with UNIDROIT, which is hereby designated the Depository.**
- 2. The Depository shall:**
  - (a) inform all Contracting States of:**
    - (i) each new signature or deposit of an instrument of ratification, acceptance, approval or accession, together with the date thereof;**
    - (ii) the date of entry into force of this Convention;**
    - (iii) each declaration made in accordance with this Convention, together with the date thereof;**
    - (iv) the withdrawal or amendment of any declaration, together with the date thereof; and**
    - (v) the notification of any denunciation of this Convention together with the date thereof and the date on which it takes effect;**
  - (b) transmit certified true copies of this Convention to all Contracting States;**
  - (c) perform such other functions customary for depositaries.**

**Comment**

No changes.

**Article L**  
**Evaluation meetings, revision Conferences and related matters**

1. The Depositary will convene not less than once every ~~1824~~ months an Evaluation Meeting, to which will be invited the Contracting Parties, the States and Observers participating to the Geneva Conference, the member States of UNIDROIT as well as other invited Observers.

2. The Agenda of the Evaluation Meeting may include the following matters:

- a) the implementation and operation of the Convention;
- b) whether any modification to the Convention or to the Official Commentary/Explanatory Report is desirable.

~~3.3. The Depositary will take due account of the results of the Evaluation Meeting and, if appropriate, may convene a Diplomatic Conference. If the majority of the participants to the Evaluation Meeting, including at least one third of the Contracting Parties, should decide that modifications to the Convention and/or the Official Commentary/Explanatory Report are desirable, the Depositary will convene within twelve months a Diplomatic Conference with a view to examine the proposals of amendments formulated by the Evaluation Meeting.~~

~~4. ALTERNATIVE A:~~

~~5. The amendments to the Convention adopted by the Diplomatic Conference referred to in the preceding paragraph will enter into force [on such a date as will be determined by the Conference] in respect to all Contracting States, following ratification, approval or acceptance of these amendments by at least two thirds of the States for which the Convention was already in force at the date of the convening of the Diplomatic Conference.~~

~~[Provided agreement is reached by the Conference on additional international criteria for application of this paragraph].~~

~~ALTERNATIVE B:~~

4. The amendments adopted by the Diplomatic Conference referred to in the preceding paragraph will enter into force [on such a date as will be determined by the Conference] in respect to Contracting States who ratify, approve or accept these amendments.

~~5.5. After the entry into force of the amendments referred to in the preceding paragraphs, the States who will ratify, approve or accede to the Convention will accede to its text as modified by these amendments.~~

**Comment:**

The Committee, following the consensus reached by the Plenary, drafted paragraph 4 according with what was provided by Alternative B of the draft proposal included in Doc. 27, and thus the amendments adopted by the Diplomatic Conference will enter into force only for those States that have specifically approved them by ratification or approval.

Paragraph 3 was redrafted to allow for more flexibility.

Some delegations have raised concern about the practical and financial issues linked to the holding of a Diplomatic Conference. Depending upon the breadth of any proposed amendments, these issues may be more or less relevant. A minor amendment could be made in a short Conference, with all the issues already well prepared in advance, and thus require a modest investment in time and finance. Major amendments would require greater preparation, a more extensive Conference, and greater financial resources. This issue could be addressed in the Official Commentary, which could state: ***"It is expected that the Evaluation Meeting, when proposing amendments, will give a detailed description of the proposed amendments and/or of the issues to be addressed by the Diplomatic Conference, and will give appropriate consideration to the practical issues connected to the holding of the Conference, including timing, logistic and financial aspects".***

**IN WITNESS WHEREOF** the undersigned Plenipotentiaries, having been duly authorised, have signed this Convention.

**DONE at Geneva, on [... 13 September 2008], in a single original in the English and French languages, both texts being equally authentic, such authenticity to take effect upon verification by the Secretariat of the Conference under the authority of the President of the Conference within ninety days hereof as to the consistency of the texts with one another.**

**Comment**

Date has been deleted.

– END –