



**DIPLOMATIC CONFERENCE TO ADOPT A
CONVENTION ON SUBSTANTIVE RULES
REGARDING INTERMEDIATED SECURITIES
Final session**
Geneva, 5 to 7/9 October 2009

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Comments

(submitted by the Government of the Federative Republic of Brazil)

1. The Brazilian delegation is pleased to submit these observations on the draft Official Commentary.

Position of CSD Rules

Background

2. At the fourth session of the Committee of Governmental Experts, a Working Group on Securities Clearing and Settlement Systems was established, including the rules of central securities depositories (CSD). This Working Group has extensively discussed whether the rules of CSD should be given recognition by the Convention. On this issue, it has presented a Report which was discussed during the first session of the diplomatic Conference held in September 2008 (see CONF.11 – Doc. 6).

3. Through this Report, it was expressly stated that the Working Group believed that it would be “useful to reduce ambiguity on the position of CSD rules under the Convention. This would ensure clarity of application and serve a principal objective of the Convention which is internal soundness (...) this issue is not necessarily confined to transparent systems”.

4. In order to achieve this result, the above mentioned Report suggested several options:

- Option 1. Clarify the Issue in the Official Commentary to the Convention
- Option 2. Amend the Convention text to refer explicitly to CSD rules and
- Option 3. Amend the definitions of SSS and SCS

5. Further, during the first session of the diplomatic Conference, there was a consensus in the plenary that Option 1 should prevail, i.e., that the Official Commentary should clarify the position of CSD rules under the Convention.

Suggestion of amendment of the draft Official Commentary

6. Since there was no specific reference to CSD rules in the draft Official Commentary (CONF. 11/2 – Doc. 5), the Brazilian delegation believes that the Commentary should expressly clarify this point of recognition of CSD rules under the Convention as agreed during the plenary.

7. It is further understood that this clarification should be made following the list of recommendations that were part of the descriptions contained in Option 1 of the above mentioned Report:

- Description of the variety of roles that the CSDs perform in different jurisdictions (see examples of such roles included in CONF.11 – Doc.6)
- Reference that “securities settlement systems” and “securities clearing systems” encompass a variety of institutional arrangements for clearance and settlement that may include central security depository functions of holding, dematerializing and immobilizing securities and processing securities transactions by book entry
- Inclusion of uniform rules of CSDs where reference is made to SSS and SCS rules in the Convention, provided a Contracting State has designated the CSD as an SSS or has designated the SSS or SCS of which the CSD is a part in accordance with article 1 (o) of the Convention.

Functions of intermediaries by other persons (Article 6)

8. Since the Official Commentary may be considered by judges or other sources of interpretation of the different Contracting States, the Brazilian delegation would appreciate to include one more example in Article 6, so as to clarify that the local CSD will not necessarily be considered as the relevant intermediary in a so-called transparent system.

9. Such an example would be very worthy so that a Contracting State can make a valid declaration for some of the intermediary functions, such as the ones specified in Articles 11, 12 and 23. The text would read as follows:

"6-16. (...) [OR] 6-25

EXAMPLE 6-.....: A Contracting State has a so-called transparent system for stock securities in which the CSD has a centralized registry of intermediated securities. ABC Inc., the local CSD, is not considered the relevant intermediary. The securities accounts for the account holders are maintained by brokerage firms or banks (CSD Participants), which also maintain direct relationship with and legal responsibility to the account holders, without any interference of the ABC Inc. These intermediated securities are reflected in the CSD's IT infrastructure system and are registered in the Issuers' books in the name of the CSD as fiduciary ownership, in order to permit the operational flow of the intermediated system in accordance to the non-Convention law.

ABC Inc.'s systems record all the intermediated securities in individual sub- accounts, and have full identification of the final investors (account holders) and their respective CSD Participants, which are the relevant intermediaries. The functions of receiving instructions from the account holders, as well as inputting of all the credits and debits in ABC Inc.'s systems are performed by brokerage firms / Banks (CSD Participants). However, the registries of transfers of the intermediated securities (acquisitions, dispositions and designated entries) and attachments are held through the ABC Inc.'s systems as per the provisions of the non-Convention law.

In this example, although ABC Inc. maintains a centralized IT infrastructure system, its functions are performed *vis-a-vis* the brokerage firms and banks which are considered the relevant intermediaries. ABC Inc. can be specified as “an other person” in the declaration under Article 6, since it shares these functions in a non-contractual basis. Such a declaration is consistent and can be applied properly. ”

Prohibition of upper-tier attachment (Article 22) – Example 22-1

10. The Brazilian delegation suggests that the text of Example 22-1 be amended so as to restrict a consequent blocking of settlement operations only to operations settled by Intermediary X:

“EXAMPLE 22-1: (...) The CSD claims that it is unable to comply with the order as it does not know how many, if any, ABC-Securities belong to A, because A is not an account holder of the CSD and therefore completely unknown the CSD. However, in order to avoid going against a court order, the CSD blocks all settlement operations of Intermediary X with ABC-Securities in its system until the situation is sorted out.”