



**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 Austria)

The Austrian delegation is pleased to submit the following comments in advance of the October 2009 diplomatic Conference in Geneva.

I. Liability of intermediaries, Article 28(2)

1. According to Article 28(2) *“the liability of an intermediary in respect of its obligations is governed by the non-Convention law (...)”*. The intention of the draft Convention is not the establishment of a harmonized liability regime; the intention is though to provide for a common legal framework for the holding and disposition of intermediated securities which sets a minimum standard of substantive rules for all Contracting Parties. By arranging for rules concerning the transfer of intermediated securities and collateral transactions as well as designing rights of the account holder and duties of the intermediary, keeping in mind the integrity of the system, the draft Convention tries to enable modern security markets to facilitate domestic and cross-border transactions. By leaving the question of liability to the non-Convention law, the draft Convention risks that the disrespect of the intermediary’s duties will be without consequence; if the applicable non-Convention law does not provide for an obligatory minimum standard of liability or allows for its contractual exclusion an intermediary who does not act according to the Convention will not be liable for possible damages. Even though the functional approach of the Convention may be to identify “the results that an intermediary is to achieve but does not specify the details of how an intermediary is to accomplish those results”¹ the draft Convention should at least state that an intermediary disrespecting his duties under the Convention is liable for culpable acts or omissions. If the disrespect of those duties has no legal consequences the Convention will be prohibited from working properly.

2. Therefore Austria suggests to include at the end of Article 28(2) the following words:

“... but liability may not be excluded in case of intent or gross negligence”.

II. Holding sufficient securities by each intermediary, Article 24

3. Austria is not sure that the provision according to which the intermediary is obliged to hold or have available sufficient securities for the benefit of its account holders but not to cover its own securities is appropriate to protect the account holders. The intermediary should be obliged to hold a sufficient number of securities for his own securities as well so that he actually holds the entire and correct amount of securities credited on the accounts of its account holders and held for its own account.

¹ Draft Official Commentary on the draft Convention, section 28-10.