



**DIPLOMATIC CONFERENCE TO ADOPT A
CONVENTION ON SUBSTANTIVE RULES
REGARDING INTERMEDIATED SECURITIES
Final session**
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Comments on CHAPTER VII – FINAL PROVISIONS

(submitted by the UNIDROIT Secretariat)

The first complete draft of the final provisions was prepared by the Secretariat and set out in document UNIDROIT 2008 – CONF. 11 – Doc. 5. Those provisions were later revised by the diplomatic Conference. Since the draft final provisions, as approved at the first session of the diplomatic Conference, did not benefit from a review by the Editors of the draft Official Commentary, the UNIDROIT Secretariat took upon itself to examine them. This document sets out the comments of the UNIDROIT Secretariat on a few final clauses, which the Secretariat submits to the consideration of the diplomatic Conference.

Draft Convention	Comments
<p style="text-align: center;">Article 40 <i>Signature, ratification, acceptance, approval or accession</i></p> <p>1. This Convention shall be open for signature in Geneva on [...] at the concluding meeting of the diplomatic Conference to adopt a Convention on Substantive Rules regarding Intermediated Securities held at Geneva from [...]. After [...] this Convention shall be open to all States for signature at the Headquarters of the International Institute for the Unification of Private Law (UNIDROIT) in Rome until it enters into force in accordance with Article 42.</p> <p>[...]</p>	<p style="text-align: center;"><i>Article 40(1)</i></p> <p>The reference to “the concluding meeting of the diplomatic Conference.....” is not very precise and probably not necessary. The date and place where the Convention is first made open for signature would be sufficient - that is the usual approach in international conventions of this type.</p> <p style="text-align: center;"><i>Amendment Proposals of the Secretariat</i></p> <p>1. This Convention shall be open for signature in Geneva on <u>[date of final day of diplomatic Conference]</u> at the concluding meeting of <u>by States participating in</u> the diplomatic Conference to adopt a Convention on Substantive Rules regarding Intermediated Securities held at Geneva from <u>[dates of the diplomatic Conference]</u>. After <u>[date of final day of diplomatic Conference]</u> this Convention shall be open to all States for signature at the Headquarters of the International Institute for the Unification of Private Law (UNIDROIT) in Rome until it enters into force in accordance with Article 42.</p>

Article 45 Declarations	Article 45(1) and (2)
<p>1. Declarations authorised by the provisions of the Convention other than the initial declaration provided for in Article 43(1) may be made in accordance with the following provisions.</p> <p>2. Those declarations or subsequent declarations amending those declarations or any withdrawal of such a declaration made under this Convention shall be notified in writing to the Depository.</p> <p>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.</p>	<p>As a general comment, the Secretariat submits that this Article, which combines several provisions of the Cape Town Convention that the Secretariat had originally presented separately, appears excessively complex and not always clear:</p> <ul style="list-style-type: none"> • the crucial question concerning declarations to treaties is whether they must be made (or confirmed) upon ratification or whether they can still be made at any time thereafter. Article 45 does not offer a clear answer to this question, although the use of the word “subsequent” may suggest (albeit not necessarily) that declarations must be made at an early point in time; • it is generally useful to group all rules concerning the procedures and effects of declarations into one single provision. However, in the draft Convention they scattered throughout Articles 43 and 45; • it is not apparent why an “initial declaration” made under Article 43(1) should be excluded from the procedural requirements of Article 45, but a “modification” declaration under Article 43(1) (i.e. a withdrawal of declaration and subsequent declaration) should be subject to Article 45; • it is not entirely clear to which declarations the words “those declarations” in paragraph 2 refer (what is probably meant is “The declarations referred to in Article 45(1)” or “Any declaration made under this Convention [other than the initial declaration provided for in Article 43(1)]”) <p style="text-align: center;">Article 45(3)</p> <p>Both in relation to the entry into force of the Convention for a particular Contracting State, and in relation to the taking effect of declarations made by Contracting States, the policy adopted by the Convention in general is that there should be six months notice of changes to the status of Contracting States, in order to give sufficient notice to everyone with an interest in the Convention’s operations (and in particular those who are or will be involved in transactions to which the Convention relates) of how the Convention applies in relation to that Contracting State.</p>

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.

The phrase "*or made prior to the entry into force of the Convention for the State concerned*" seems to be an exception to this policy. The explanation provided in the report of the Final Clauses Committee is as follows:

"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 follows: 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 (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 Secretariat takes note of the policy decision of the diplomatic Conference. However, we would urge the diplomatic Conference to consider requiring, as is often done in similar conventions, that the declaration must at least have been received by the Depositary prior to the entry into force of the Convention for the State concerned, otherwise, the regular six months period should apply.

Amendment Proposals of the Secretariat

In the light of the above, the Secretariat would propose the following **alternative text for draft Articles 43 and 45** (and **47**, which would become redundant and could be deleted):

Article 43 *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.~~

[...]

Marked-up version

Article 45

Declarations

1. Declarations authorised by the provisions of this Convention ~~other than the initial declaration provided for in Article 43(1)~~ may be made in accordance with the following provisions [at any time.] [at the time of signature, ratification, acceptance, approval or accession.] Declarations made at the time of signature are subject to confirmation upon ratification, acceptance or approval.

2. ~~Those d~~Declarations or subsequent declarations amending those declarations and their confirmations or any withdrawal of such a declaration made under this Convention shall are to be made in writing and to be formally notified in writing to the Depository.

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~~ takes 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.~~ However, a declaration of which the Depository receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the Depository.

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 that makes a declaration under this Convention may modify or withdraw it at any time,~~ by a notification in writing addressed to notifying the Depository to that effect. ~~5. Any such subsequent declaration~~ The modification or withdrawal shall take 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 Depository.

~~56.~~ Notwithstanding the previous paragraphs, this Convention shall continue to apply, as if no ~~such subsequent declarations, or modification or withdrawal of a declaration~~ had been made, in respect of all rights and interests arising prior to the effective date of the declaration, or modification or withdrawal of a declaration any such subsequent declaration.

<p style="text-align: center;">Article 46 <i>Applicability of declarations</i></p> <p>A declaration made by a Contracting State under Chapters I to VI of this Convention is applicable only if the law in force in that Contracting State is the non-Convention law.</p>	<p style="text-align: center;"><i>Clean version</i></p> <p style="text-align: center;">Article 45 <i>Declarations</i></p> <p>1. Declarations authorised by the provisions of this Convention may be made [at any time.] [at the time of signature, ratification, acceptance, approval or accession.] Declarations made at the time of signature are subject to confirmation upon ratification, acceptance or approval.</p> <p>2. Declarations and their confirmations are to be made in writing and to be formally notified to the Depositary.</p> <p>3. A declaration takes effect simultaneously with the entry into force of the Convention for the State concerned. However, a declaration of which the Depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the Depositary.</p> <p>4. A Contracting State that makes a declaration under this Convention may modify or withdraw it at any time by a notification in writing addressed to the Depositary. The modification or withdrawal shall take 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.</p> <p>5. Notwithstanding the previous paragraphs, this Convention shall continue to apply, as if no declaration, or modification or withdrawal of a declaration had been made, in respect of all rights and interests arising prior to the effective date of the declaration, or modification or withdrawal of a declaration.</p> <p style="text-align: center;">Article 46</p> <p>The report of the Final Clauses Committee at the First session of the diplomatic Conference, explained this draft Article as follows:</p> <p><i>"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."</i></p>
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	<p>The Report of the Final Clauses Committee adds further that the Official Commentary should contain the following statement: <i>"Nothing in the Convention prevents any State, when applying according to its own conflict rules the law of a Contracting State, 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)."</i></p> <p style="text-align: center;"><i>Amendment Proposals of the Secretariat</i></p> <p>To the knowledge of the Secretariat, the principle behind Article 46 has not been expressly stated in any uniform law convention. It has, however, arisen in practice and has been affirmed by courts. The Secretariat would propose to reformulate it under a traditional private international law approach so as to express in more familiar terms the understanding of the Article by the Final Clauses Committee.</p> <p><u>"When the rules on conflicts of law of the forum determine the application of the laws of a Contracting State, or the circumstances do not lead to the application of any law other than the law in force in that Contracting State, this Convention shall apply in the manner in which it was given effect in that Contracting State, including any declarations made by that Contracting State under Chapters I to VI of this Convention."</u></p>
<p style="text-align: center;">Article 47 <i>Withdrawal of declaration</i></p>	<p>If the amendments proposed by the Secretariat to Article 45 are accepted, this Article may become redundant and could be deleted.</p>