INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW
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UNIDROIT COMMITTEE OF GOVERNMENTAL EXPERTS FOR THE PREPARATION OF A DRAFT CONVENTION ON HARMONISED SUBSTANTIVE RULES REGARDING INTERMEDIATED SECURITIES
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COMMENTS BY GOVERNMENTS AND INTERNATIONAL ORGANISATIONS

(Comments by the Government of the Russian Federation)

The Ministry of Economic Development and Trade has examined the submitted draft of the Convention on Harmonised Substantive Rules Regarding Intermediated Securities and would like to express its comments as follows:

1. We consider that a chapter regarding the status of the Convention and the procedures necessary for its implementation should be added.
2. The Article headed "Scope of application" should be moved to the beginning of the Convention and it should be made clear to which relationships or in what cases this Convention can be applied.
3. Since the subject matter of the Convention is similar to the subject matter of the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held With an Intermediary of 2004 we assume it is necessary for the correlation between these two conventions to be described.
4. The definition of the term "securities" in paragraph (a) of Article 1 should be made more precise either by the inclusion of the list of securities to which it applies or by addition of a reference to national law.
5. The list of definitions in Article 1 should include explanation of all the terms used in the Convention such as those in Article 21, Article 7(6)(b) ("the acquirer"), Article 23 and any others.
6. In the definition of "intermediary" (paragraph (c) of Article 1) there is a provision for the maintaining by the intermediary of securities accounts not only for others but also for itself. This approach is not permitted by the national law of Russian Federation and the justification of the presence of this approach in the Convention requires additional explanation, including of the juridical meaning of account agreement.
7. It should be made clear whether "intermediaries" may be legal or natural persons.
8. We suggest that the definition of "account agreement" in Article 1 should be amended and suggest the following wording: "the account agreement" means the agreement of the account holder with the relevant intermediary on the maintaining of the securities account of this account holder".

9. A more comprehensive definition of the term “domestic non-Convention law” in Article 1 should be provided.

10. Article 4 (paragraph 2) should provide that the scope of rights arising with the intermediary due to the crediting of the securities to a securities account, is determined not only by the terms of the securities and the national law of the state under which the securities had issued, but also by the account agreement, because the possibility of exercise by the intermediary of the rights of securities can depend on receiving relevant instructions from the account holder.

11. We prefer Versions A of paragraphs 5 and 6 of Article 4.

12. We believe that the text of paragraph 1 of Article 7 should be adjusted to correspond to that of paragraph 1 of article 10.

13. We think it reasonable to examine the possibility of having unified regulations in the Convention that would determine whether a debit, credit or designating entry has any effect against third parties during the period before it is reversed and, if so, what that effect is (paragraph 5 Article 7). Leaving these matters at the discretion of national law may cause significant difference in their regulation.

14. We think that the variant “[any provision of Article 7]” in Article 8 should be used.

15. In Article 11 the meaning of the expression “organization” should be made more clear.

16. We consider that the use of “etc” in the title of Article 13 is unhelpful and that either the list should be continued or “etc” should be replaced “other actions”.

17. We consider that the expression “any credit” in paragraph 1 of Article 16 should be made more clear.

18. In paragraph 1 of Article 18 the prohibition for the intermediary to dispose of securities held by it or credited to a securities account which it holds with another intermediary, if upon that credit or disposition becoming effective there would not be sufficient securities of the same description held by it or credited to securities accounts which it holds with another intermediary should be preserved. An additional explanation is required as to what cases of shortfall of securities are mentioned in paragraph 2. We also find questionable the requirement for allocation of the shortfall among the account holders if the intermediary himself is responsible for this shortfall and also if this shortfall can be traced to the account of a particular account holder. The mechanism of allocation “in proportion” should be made more clear.

19. It would be useful to establish rules on the consequences of the conversion of collateral securities and whether the securities in which the conversion was made can remain collateral.

20. We would like to be clear whether the expression “the law” in paragraph 1 of Article 25 has the same meaning as “national non-Convention law”.

21. It is necessary to define more clearly in Article 21 the expression “enforcement event” and to state whether the intermediary should check the fact of the occurrence of an “enforcement event” upon receiving the relevant instructions from the collateral taker and, if he should, how he can perform this check and what are the consequences of violation of this obligation and in particular if this violation leads to the invalidation of debit or credit.

22. According to Article 6 (subparagraph (b) of paragraph 2) intermediated securities shall be treated as delivered into the possession or control of a collateral taker if the relevant intermediary is itself the collateral taker. Yet national law can stipulate the need for an entry on the account of the collateral taker. So we find it reasonable that the Convention should provide for the exclusion of the application of this paragraph by declaration made by Contracting States.