



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

---

**UNIDROIT COMMITTEE OF GOVERNMENTAL EXPERTS  
FOR THE PREPARATION OF A DRAFT CONVENTION ON  
SUBSTANTIVE RULES REGARDING INTERMEDIATED  
SECURITIES  
Third session  
Rome, 6/15 November 2006**

UNIDROIT 2006  
Study LXXVIII – Doc. 57  
Original: English/French  
November 2006

**PRELIMINARY DRAFT CONVENTION ON SUBSTANTIVE RULES  
REGARDING INTERMEDIATED SECURITIES**

*(as adopted by the Committee of Governmental Experts  
at its third session, held in Rome, 06-15 November 2006)*

***Introductory Remarks***  
*by the UNIDROIT Secretariat*

1. - During the third session of the UNIDROIT *Committee of Governmental Experts for the Preparation of a Convention on Substantive Rules regarding Intermediated Securities* (the CGE), the Drafting Committee continued its work under its Chairman Mr Hideki Kanda (Japan). Members of the Drafting Committee comprised representatives of the delegations from Belgium, Canada, Chile, a “Nordic” country, France, Germany, Luxembourg, Switzerland, United Kingdom and the United States of America. The Chairman of the Drafting Committee invited observers from the European Commission, the European Central Bank and the Trading Association for the Emerging Markets to participate in its work.

2. - The task of the Drafting Committee was to review the draft articles of the *Preliminary draft Convention*<sup>1</sup> as approved by the CGE on the occasion of its second session in March 2006<sup>2</sup>. The revision of the text was designed to reflect discussion in the ongoing session of the CGE.

3. - The Drafting Committee held its first meeting on 7 November 2006 and its last meeting on 14 November 2006. On 15 November the text of the preliminary draft Convention<sup>3</sup>, including amendments proposed by the Drafting Committee, was laid before the CGE meeting in plenary.

4. - As regards the proposed changes to the structure of the draft instrument, the Chairman of the Drafting Committee asked the Secretariat to bring the necessary changes to the text.

5. - Following detailed explanation of the proposed amendments by the Chairman of the Drafting Committee, the CGE decided to take the amended text as a basis for further discussion. After the meeting, the UNIDROIT Secretariat reviewed the text from an editorial perspective and changed the numbering of the preliminary draft Convention following the indications given by the Chairman of the Drafting Committee.

6. - The revised official text is set out in a marked up version (as against UNIDROIT 2006 Study LXXXVIII Doc. 42) in APPENDIX 1 *infra* and in a clean version in APPENDIX 2 *infra*. A table of concordance is included as APPENDIX 3 *infra*.

---

<sup>1</sup> UNIDROIT 2006, Study LXXVIII Doc. 42.

<sup>2</sup> Cf. UNIDROIT 2006, Study LXXVIII Doc. 43, Para 197.

<sup>3</sup> UNIDROIT 2006, C.G.E./Securities/3/DC/W.P. 5.

APPENDIX 1

PRELIMINARY DRAFT CONVENTION ON SUBSTANTIVE RULES REGARDING  
INTERMEDIATED SECURITIES

CHAPTER I - DEFINITIONS, SCOPE OF APPLICATION AND INTERPRETATION

Article 1  
[Definitions]

In this Convention:

(a) *“securities”* means any shares, bonds or other financial instruments or financial assets (other than cash) ~~or any interest therein~~, which are capable of being credited to a securities account and of being acquired and disposed of in accordance with the provisions of this Convention;

(b) *“intermediated securities”* means securities credited to a securities account or rights or interests in securities resulting from the credit of securities to a securities account;

~~(bc)~~ *“securities account”* means an account maintained by an intermediary to which securities may be credited or debited;

~~(ed)~~ *“intermediary”* means a person that in the course of a business or other regular activity maintains securities accounts for others or both for others and for its own account and is acting in that capacity;

~~(de)~~ *“account holder”* means a person in whose name an intermediary maintains a securities account, whether that person is acting for its own account or for others (including in the capacity of intermediary);

~~(ef)~~ *“account agreement”* means, in relation to a securities account, the agreement with between the account holder and the relevant intermediary governing that securities account;

~~(f)~~ *“intermediated securities”* means ~~the rights of an account holder resulting from a credit of securities to a securities account<sup>1</sup>;~~

(g) *“relevant intermediary”* means, with respect to a securities account, the intermediary that maintains the securities account for the account holder;

~~(h)~~ *“disposition”* means ~~an act of an account holder disposing of intermediated securities and includes a transfer of title, whether outright or by way of security, and a grant of a security interest;~~

~~(i)~~ *“adverse claim”* means, with respect to any securities, a claim that a person has an interest in those securities that is effective against third parties and that it is a violation of the rights of that person for another person to hold or dispose of those securities;

~~(jh)~~ *“insolvency proceeding”* means a collective judicial or administrative proceeding, including an interim proceeding, in which the assets and affairs of the debtor are subject to control or supervision by a court or other competent authority for the purpose of reorganisation or liquidation;

---

<sup>1</sup> This definition remains under consideration. Questions have been raised, for example, as to the appropriateness of the particular term “intermediated securities”, as to whether it should be replaced by “intermediated rights”, and as to whether the definition should be expanded so as to include terms that currently form part of Article 4.

(ki) “*insolvency administrator*” means a person (including a debtor in possession where applicable) authorised to administer an insolvency proceeding, including one authorised on an interim basis;

(j) securities are “*of the same description*” as other securities if they are issued by the same issuer and:

(i) they are of the same class of shares or stock; or

(ii) in the case of securities other than shares or stock, they are of the same currency and denomination and are treated as forming part of the same issue;

~~(km)~~ “*control agreement*” means an agreement between an account holder, the relevant intermediary and another person ~~collateral taker~~, or, if so permitted by the ~~domestic non-Convention law~~, an agreement between an account holder and ~~a collateral taker~~ another person of which notice is given to the relevant intermediary, which relates to intermediated securities and includes either or both of the following provisions –

(i) that the relevant intermediary is not permitted to comply with any instructions given by the account holder in respect of the intermediated securities to which the agreement relates without having received the consent of that other person;

(ii) that the relevant intermediary is obliged to comply with any instructions given by that other person in respect of the intermediated securities to which the agreement relates in such circumstances and as to such matters as may be provided by the agreement or the non-Convention law, without any further consent of the account holder; ~~provides that, in such circumstances and as to such matters as may be specified in the agreement or provided by the domestic non-Convention law, the relevant intermediary is not permitted to comply with any instruction given by the account holder without having received the consent of the collateral taker, or is obliged to comply with any instructions given by the collateral taker without any further consent of the account holder;~~

~~(nl)~~ “*designating entry*” means an entry in a securities account made in favour of a ~~collateral a person other than the account holder taker~~ in respect of the ~~securities account or in respect of specified intermediated securities~~ securities credited to the securities account, which, under the account agreement, a control agreement ~~or, the uniform rules of a securities settlement system or the domestic non-Convention law~~, has the effect that either or both of the following effects –

(i) that the relevant intermediary is not permitted to comply with any instructions given by the account holder in respect of the intermediated securities in relation to which the entry is made without having received the consent of that other person;

(ii) that the relevant intermediary is obliged to comply with any instructions given by that other person in respect of the intermediated securities in respect of which the entry is made in such circumstances and as to such matters as may be provided by the account agreement, a control agreement, the uniform rules of a securities settlement system or the non-Convention law, without any further consent of the account holder; ~~in specified circumstances and as to specified matters, the relevant intermediary is not permitted to comply with any instructions given by the account holder without having received the consent of the collateral taker, or is obliged to comply with any instructions given by the collateral taker without any further consent of the account holder;~~

~~(mo)~~ “*domestic non-Convention law*” means the ~~domestic~~ provisions of law ~~of in force in~~ the State whose law is applicable under Article 2, other than those provided in this Convention;

~~(p)~~ “*non-consensual security interest*” ~~[to be defined];~~

~~(qn)~~ “*securities settlement* ~~for clearing~~ system” means ~~{a system} {an entity}~~ which ~~;~~

(i) ~~clears, settles or clears and settles, or clears and settles,~~ securities transactions;

(ii) ~~[has rules and agreements with its participants that are publicly accessible];~~

~~\_\_\_\_\_ (iii) is operated by a central bank or central banks or is subject to regulation, supervision or oversight by a governmental or public authority in respect of its rules; conducts operations that are supervised [by a regulator that has oversight over its rules and agreements]; and~~

~~\_\_\_\_\_ (iv) has been notified, on the ground of the reduction of risk to the stability of the financial system, as a securities settlement [or clearing] system in a declaration by the Contracting State the law of which governs the rules of the system; [or falls within a category of [systems] [entities] that have been notified as securities settlement [or clearing] systems in a declaration by a Contracting State and has been specifically identified as falling within that category in a publicly accessible website of its regulator which also specifies the date on which it first was designated as falling within that category];~~

~~provided that a declaration referred to in this sub-paragraph must be made on the grounds of the reduction of risk to the stability of the financial system;~~

~~\_\_\_\_\_ (o) "securities clearing system" means a system which - \_\_\_\_\_~~

~~\_\_\_\_\_ (i) clears, but does not settle, securities transactions through a central counterparty or otherwise;~~

~~\_\_\_\_\_ (ii) is operated by a central bank or central banks or is subject to regulation, supervision or oversight by a governmental or public authority in respect of its rules; and~~

~~\_\_\_\_\_ (iii) has been notified, on the ground of the reduction of risk to the stability of the financial system, as a securities clearing system in a declaration by the Contracting State the law of which governs the rules of the system;~~

~~\_\_\_\_\_ (p) "uniform rules" means, in relation to a securities settlement system or securities clearing system, rules of that system which are common to the participants or to a class of participants and are publicly accessible.~~

~~(r) "collateral taker" means a person to whom a security interest in intermediated securities is granted;~~

~~(s) "collateral provider" means an account holder by whom a security interest in intermediated securities is granted;~~

~~(t) "collateral agreement" means an agreement between a collateral provider and a collateral taker providing (in whatever terms) for the grant of a security interest in intermediated securities.~~

## Article 2

### [~~Scope~~ Sphere of application]

This Convention applies where =

~~\_\_\_\_\_ (a) the conflict of laws rules of private international law of the forum state designate the law in force in of a Contracting State as the applicable law; or~~

~~\_\_\_\_\_ (b) the circumstances do not involve a choice in favour of any law other than the law in force in the forum state and the forum state is a Contracting State.~~

*Article 3*  
*[Central Securities Depositories]*

~~\_\_\_\_\_ This Convention does not apply to the activity of creation, recording or reconciliation of securities conducted by central securities depositories or other persons *vis-à-vis* the issuer of those securities.~~

*Article 34*  
*[Principles of interpretation]*

~~1. —~~In the implementation, interpretation and application of this Convention, regard is to be had to its purposes, to the general principles on which it is based, to its international character and to the need to promote uniformity and predictability in its application.

~~\_\_\_\_\_ 2. —~~ Questions concerning matters governed by this Convention which are not expressly settled in the Convention are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the domestic non-Convention law.

**CHAPTER II – ~~TRANSFER OF INTERMEDIATED SECURITIES~~**  
**RIGHTS OF THE ACCOUNT HOLDER**

*Article 95*  
*[Intermediated securities]*

1. - The credit of securities to a securities account confers on the account holder:
  - (a) the right to receive and exercise the rights attached to the securities, including in particular dividends, other distributions and voting rights
    - (i) where the account holder is not an intermediary or is an intermediary acting for its own account; and,
    - (ii) in any other case, if the ~~domestic non-Convention law~~ so provides;
  - (b) the right, by instructions to the relevant intermediary, to effect a disposition under Article 7 or grant an interest under Article 8~~dispose of the securities in accordance with Articles 4 and 5;~~
  - (c) the right, by instructions to the relevant intermediary, to cause the securities to be held otherwise than through a securities account, to the extent permitted under the law under which the securities are constituted, the terms of the securities, the non-Convention law and, to the extent permitted by the non-Convention law, the account agreement or the uniform rules of a securities settlement system~~and the account agreement;~~
  - (d) unless otherwise provided in~~subject to~~ this Convention, such other rights, including rights and interests in securities, as may be conferred by the ~~domestic non-Convention law~~.
2. - Unless otherwise provided in this Convention,
  - (a) the rights referred to in paragraph 1 are effective against third parties;

(b) the rights referred to in paragraph 1(a) may be exercised against the relevant intermediary or the issuer of the securities, or both, in accordance with this Convention, the terms of the securities and the law under which the securities are constituted;

(c) the rights referred to in paragraph 1(b) and 1(c) may be exercised only against the relevant intermediary.

3. - ~~Where an account holder has acquired a security interest, or a limited interest other than a security interest, by credit of securities to its securities account under Article 7(4) securities are credited to a securities account of an account holder in the capacity of collateral taker under Article 5, the domestic non-Convention law determines any limits on the rights described in paragraph 1.~~

*Article 46*

*[Measures to enable account holders to receive and exercise rights]*

1. - An intermediary must take appropriate measures to enable its account holders to receive and exercise the rights specified in Article 95(1), but this obligation does not require the relevant intermediary to take any action that is not within its power or to establish a securities account with another intermediary.

2. - This Article does not affect any right of the account holder against the issuer of the securities.

**CHAPTER III – ~~RIGHTS OF THE ACCOUNT HOLDER~~  
TRANSFER OF INTERMEDIATED SECURITIES**

*Article 47*

*[Acquisition and disposition of intermediated securities by debit and credit]*

1. - Subject to Article 11, intermediated securities are acquired by an account holder by the credit of securities to that account holder's securities account.

2. - No further step is necessary, or may be required by the ~~domestic~~ non-Convention law, to render the acquisition of intermediated securities effective against third parties.

3. - Subject to Article 11, intermediated securities are disposed of by an account holder by the debit of securities to that account holder's securities account.

4. - A security interest, or a limited interest other than a security interest, in intermediated securities may be acquired and disposed of by debit and credit of securities to securities accounts under this Article.

~~4. - Without prejudice to any rule of the domestic non-Convention law requiring that no credit or debit be made without a corresponding debit or credit, a debit or credit of securities to a securities account is not ineffective because it is not possible to identify a securities account to which a corresponding credit or debit has been made.~~

5. - Debits and credits to securities accounts in respect of securities of the same description may be effected on a net basis.

~~6. This Article does not preclude any other method provided by the domestic non-Convention law for the acquisition or disposition of intermediated securities.~~

*Article 58*

*[Grant of Security interests in intermediated securities by other methods]*

1. - ~~An account holder may grants an interest in intermediated securities, including a security interest or a limited interest other than a security interest, to another person collateral taker a security interest in intermediated securities so as to be effective against third parties, if - by:~~

~~(a) the account holder entering into an collateral agreement with the collateral taker that person; and~~

~~(b) one of the conditions specified in paragraph 2 applies and the relevant Contracting State has made a declaration in respect of that condition under paragraph 4; and no further step is necessary, or may be required by the non-Convention law, to render the interest effective against third parties.~~

~~2. - The conditions referred to in paragraph 1(b) are as follows - delivering the intermediated securities to the collateral taker; and no further step is necessary, or may be required by the domestic non-Convention law.~~

~~2. - Intermediated securities shall be treated as delivered to a collateral taker if they are credited to a securities account of the collateral taker.~~

~~3. - Intermediated securities shall also be treated as delivered to a collateral taker -~~

~~(aa) that the person to whom the interest is granted is if the relevant intermediary is itself the collateral taker and the relevant Contracting State has made a declaration under paragraph 4 in respect of this sub-paragraph;~~

~~(bb) that if a designating entry in favour of that person has been made and the relevant Contracting State has made a declaration under paragraph 4 in respect of this sub-paragraph; or~~

~~(cc) that if a control agreement in favour of that person applies, and the relevant Contracting State has made a declaration under paragraph 4 in respect of this sub-paragraph~~

~~3. - An interest in intermediated securities may be granted under this Article so as to be effective against third parties -~~

~~(a) in respect of a securities account (and such an interest extends to all intermediated securities from time to time standing to the credit of the relevant securities account);~~

~~(b) in respect of a specified category, quantity, proportion or value of the intermediated securities from time to time standing to the credit of a securities account.~~

~~4. - A Contracting State may declare that under its domestic non-Convention law -~~

~~(a) the condition specified in any one or more of sub-paragraphs (a) to (c) of paragraph 2 is sufficient, to render an interest effective against third parties to constitute delivery of intermediated securities to a collateral taker;~~



~~\_\_\_\_\_ (b) -~~

~~\_\_\_\_\_ 5. - A Contracting State may declare that under its domestic non-Convention law this Article shall not apply in relation to security interests in intermediated securities granted by or to parties falling within such categories as may be specified in the declaration;~~

~~\_\_\_\_\_ (c) paragraph 3, or either sub-paragraph of paragraph 3, does not apply;~~

~~\_\_\_\_\_ (d) paragraph 3(b) applies with such modifications as may be specified in the declaration.-~~

~~\_\_\_\_\_ 6. - If the domestic non-Convention law so permits, a security interest may be granted -~~

~~\_\_\_\_\_ (a) in respect of a securities account (and such a security interest extends to all intermediated securities from time to time standing to the credit of the relevant securities account); or,~~

~~\_\_\_\_\_ (b) in respect of a specified category, quantity, proportion or value of the intermediated securities from time to time standing to the credit of a securities account.~~

~~57. - The domestic non-Convention law determines-~~

~~\_\_\_\_\_ (a) in what circumstances a non-consensual security interest in intermediated securities may arise and become effective against third parties; and~~

~~\_\_\_\_\_ (b) the evidential requirements in respect of a collateral agreement and the delivery of intermediated securities to a collateral taker.~~

~~\_\_\_\_\_ 8. - This Article does not preclude any other method provided by the domestic non-Convention law for the grant of a security interest in intermediated securities, but the priority of a security interest granted by any such other method is subject to the rules in Article 6.~~

#### *Article 9*

#### *[Other methods under non-Convention law]*

~~\_\_\_\_\_ This Convention does not preclude any method provided by the non-Convention law -~~

~~\_\_\_\_\_ (a) for the acquisition or disposition of intermediated securities or of an interest in intermediated securities;~~

~~\_\_\_\_\_ (b) for the creation of an interest in intermediated securities and for making such an interest effective against third parties;~~

~~other than the methods provided by Articles 7 and 8.~~

#### *Article 10*

#### *[Evidential requirements]*

~~\_\_\_\_\_ The non-Convention law determines the evidential requirements in respect of the matters referred to in Articles 7 and 8.~~

*Article 811*

*[Lack of authorisation, ineffectiveness Invalidity and reversal]*

1. - A debit of securities to a securities account or a designating entry is ~~not effective~~ invalid if~~unless~~ the relevant intermediary is not authorised to make that debit or designating entry:

(a) by the account holder and, in the case of a debit or designating entry that relates to intermediated securities which are subject to ~~a security an~~ interest arising granted under Article ~~85(3)~~, by the person to whom that interest is granted~~collateral taker~~; or

(b) by the ~~domestic~~ non-Convention law.

2. - Subject to Article[s] 12 [and 13], ~~the domestic~~ non-Convention law and, to the extent permitted by the ~~domestic~~ non-Convention law, an account agreement or the uniform rules and agreements governing the operation of a securities settlement [or clearing] system determine  
=

\_\_\_\_\_ (a) the validity of a debit, credit or designating entry;

\_\_\_\_\_ (b) whether a debit, credit or designating entry is liable to be reversed;

\_\_\_\_\_ (c) where a debit, credit or designating entry is liable to be reversed, its effect (if any) against third parties and the consequences of reversal;

\_\_\_\_\_ (d) whether and in what circumstances a debit, credit or designating entry may be made subject to a condition; and

\_\_\_\_\_ (e) where a debit, credit or designating entry is made subject to a condition, its effect (if any) against third parties before the condition is fulfilled and the consequences of the fulfilment or non-fulfilment of the condition.

~~, may provide that a debit or credit of securities or a designating entry is not effective or is liable to be reversed.~~

3. ~~Subject to Article 7, the domestic non-Convention law determines—~~

~~(a) where a debit or designating entry is not authorised or a debit, credit or designating entry is otherwise ineffective, the consequences of such ineffectiveness;~~

~~(b) where a debit, credit or designating entry is liable to be reversed, its effect (if any) against third parties and the consequences of reversal.~~

*Article 712*

*[Acquisition by an innocent person of intermediated securities]*

1. ~~Where securities are credited to a securities account under Article 4 and the account holder does not at the time of the credit have knowledge of an adverse claim with respect to the securities—~~

\_\_\_\_\_ ~~(a) the account holder is not subject to the adverse claim;~~

\_\_\_\_\_ ~~(b) the account holder is not liable to the holder of the adverse claim; and~~

\_\_\_\_\_ ~~(c) the credit is not ineffective or reversible on the ground that the adverse claim<sup>2</sup> affects any previous debit or credit made to another securities account.~~

<sup>2</sup>Further consideration to be given to whether to deal specifically with adverse claims of the intermediary (e.g. by amending the definition of adverse claim).

1. - Where securities are credited to the securities account of an account holder at a time when the account holder does not know that another person has an interest in securities or intermediated securities and that the credit violates the rights of that other person with respect to that interest -

(a) the account holder is not subject to the interest of that other person;

(b) the account holder is not liable to that other person; and

(c) the credit is not invalid or liable to be reversed on the ground that the interest or rights of that other person invalidate any previous debit or credit made to another securities account.

2. - Where securities are credited to the securities account of an account holder, or an interest becomes effective against third parties under Article 8, at a time when the account holder or the person to whom the interest is granted does not know of an earlier defective entry –

(a) the credit or interest is not rendered invalid, ineffective against third parties or liable to be reversed as a result of that defective entry; and

(b) the account holder, or the person to whom the interest is granted, is not liable to anyone who would benefit from the invalidity or reversal of that defective entry.

3. - Paragraphs 1 and 2 does not apply in respect of an acquisition of securities, other than the grant of a security interest, made by way of gift or otherwise gratuitously.

~~3. — An intermediary who makes a debit, credit, or designating entry to a securities account is not liable to the holder of an adverse claim with respect to intermediated securities unless at the time of such debit, credit or designating entry the intermediary has knowledge of the adverse claim.~~

4. - For the purposes of this Article =

(a) “defective entry” means a credit of securities or designating entry which is invalid or liable to be reversed, including a conditional credit or designating entry which becomes invalid or liable to be reversed by reason of the operation or non-fulfilment of the condition;

(b) a person acts with knowledge knows of an interest or fact adverse claim if that person =:

(ai) has actual knowledge of the adverse claim the interest or fact; or

(bij) has knowledge of facts sufficient to indicate that there is a significant probability that the interest or fact exists the adverse claim exists and deliberately avoids information that would establish the existence of the adverse claim that this is the case; and

(c) and knowledge received by when the person referred to in (b) is an organisation, it knows of an interest or fact is effective for a particular transaction from the time when it the interest or fact is or ought reasonably to have been brought to the attention of the individual conducting that transaction responsible for the matter to which the interest or fact is relevant.

5. - To the extent permitted by the non-Convention law, paragraph 2 is subject to any provision of the uniform rules of a securities settlement system or of the account agreement.

~~[5. — Notwithstanding Article 8[(2)], if: —~~

~~(a) securities have been credited to a securities account of an account holder, or have been designated in favour of another person in the manner described in Article 5, in~~

circumstances such that the credit or designating entry is not effective or is liable to be reversed; and—

— (b) before that credit or designating entry has been [cancelled or] reversed, the securities are credited to a securities account of a third party, or are designated in the manner described in Article 5 in favour of a third party (such a third party being in either case referred to in this sub-paragraph as “the acquirer”), under a further disposition,

the fact that the initial credit or designating entry was made in circumstances such that it is not effective or is liable to be reversed does not make the further credit or designating entry ineffective, in favour of the acquirer, against the person making the further disposition, the relevant intermediary or third parties unless:—

— (i) the further credit or designating entry is made conditionally and the condition has not been satisfied;

(ii) the acquirer has knowledge, at the time when the further credit or designating entry is made, that it is made as a result of the further disposition and that the further disposition is made in the circumstances referred to in this paragraph; or

(iii) the further disposition is made by way of gift or otherwise gratuitously.]<sup>3</sup>

— [6. — For the purposes of paragraph 5 the acquirer has knowledge that the further credit or designating entry is made as a result of a purported disposition made in the circumstances referred to in that paragraph if the acquirer has actual knowledge that it is so made, or has knowledge of facts sufficient to indicate that there is a significant probability that it is so made and deliberately avoids information that would establish that that is the case.]

### Article 613

#### [Priority among competing security interests]

1. - This Article determines priority between security interests in the same intermediated securities which become effective against third parties under Article 8.

2. - Security Subject to paragraph 5 and Article 14, interests that become effective against third parties under Article 85(3):

— (a) have priority over any security interest that becomes effective against third parties by any other method permitted by the domestic non-Convention law other than those provided by Article 5(2) or (3); and.

— (b) 3. - Interests that become effective against third parties under Article 8 rank among themselves according to the time of occurrence of the following events:—

— (a) if the relevant intermediary is itself the holder of the interest, when the collateral agreement granting the interest is entered into, if the relevant intermediary is itself the collateral taker;

— (b) when a designating entry is made;

— (c) when a control agreement is entered into, or, if applicable, a notice is given to the relevant intermediary.

<sup>3</sup> Further consideration to be given to whether there should be a more general protection against reversal based on reversal etc. of earlier transactions; paragraphs 4 and 5 reproduce Article 7(6) and (7) of Doc. 24.

~~34.~~ - Where an intermediary has an interest that has become effective against third parties under Article 8 and makes a designation or enters into a control agreement with the consequence that an interest of another person becomes effective against third parties, the interest of that other person has priority over the interest of the intermediary unless that other person and the intermediary expressly agree otherwise. ~~enters into a control agreement with a collateral taker or makes a designating entry in favour of a collateral taker, the security interest of the collateral taker has priority over any security interest of the intermediary that is effective against third parties under Article 5(3).~~

~~54.~~ - A non-consensual security interest in intermediated securities arising or recognised under any rule of the ~~domestic~~ non-Convention law has such priority as is afforded to it by that law.

~~5.~~ Subject to paragraph 2, the priority of any competing security interests in the same intermediated securities is determined by the domestic non-Convention law.

~~66.~~ - As between persons entitled to any security interests referred to in paragraphs 2, ~~paragraph 3 and 4 and~~, to the extent permitted by the ~~domestic~~ non-Convention law, paragraph ~~54~~, the priorities provided by ~~this Article~~ ~~the preceding paragraphs~~ may be varied by agreement between those persons, but any such agreement does not affect third parties.

#### *Article 14*

#### *[Priority of interests granted by an intermediary]*

This Convention does not determine the priority or the relative rights and interests between the rights of account holders of an intermediary and interests granted by that intermediary that have become effective under Article 8.

### **CHAPTER IV – PROTECTION MECHANISMS OF THE INTERMEDIATION SYSTEM INTEGRITY OF THE INTERMEDIATED HOLDING SYSTEM**

#### *Article 15*

#### *[Rights of account holders in case of insolvency of intermediary]*

The rights of an account holder under Article ~~95~~(1), and ~~an security interest~~ interest that has become effective against third parties under Article ~~85(2) or (3)~~, are effective against the insolvency administrator and creditors in any insolvency proceeding in respect of the relevant intermediary.

#### *Article 16*

#### *[Effects of insolvency]*

Subject to Article ~~2223~~ and Article ~~2631~~, nothing in this Convention affects:

- (a) any rules of law applicable in insolvency proceedings relating to the avoidance of a transaction as a preference or a transfer in fraud of creditors; or
- (b) any rules of procedure relating to the enforcement of rights to property which is under the control or supervision of an insolvency administrator.

*Article ~~45~~17*  
*[Prohibition of upper-tier attachment]*

1. - No attachment of or in respect of intermediated securities of an account holder shall be granted or made against the issuer of the relevant securities or against any intermediary other than the relevant intermediary.

2. - In this Article "*attachment*" means any judicial, administrative or other act or process for enforcing or satisfying a judgment, award or other judicial, arbitral, administrative or other decision against or in respect of the account holder or for freezing, restricting or impounding property of the account holder in order to ensure its availability to enforce or satisfy any future such judgment, award or decision.

*Article ~~46~~18*  
*[Instructions to the intermediary]*

1. - ~~Subject to paragraph 2 [and Article 8(1)], a~~An intermediary is neither bound nor entitled to give effect to any instructions with respect to intermediated securities of an account holder given by any person other than that account holder.

2. - Paragraph 1 is subject to:

(a) the provisions of the account agreement, any other agreement between the intermediary and the account holder or any other agreement entered into by the intermediary with the consent of the account holder;

(b) the rights of any person (including the intermediary) who holds ~~an~~ security interest that has become effective against third parties ~~created~~ under Article 58;

(c) subject to Article ~~45~~17, any judgment, award, order or decision of a court, tribunal or other judicial or administrative authority of competent jurisdiction;

(d) any ~~mandatory rule~~ applicable rule of the ~~domestic~~-non-Convention law; and

(e) where the intermediary is ~~the operator of~~ a securities settlement ~~for clearing~~ system, the uniform rules of that system.

*Article ~~47~~19*  
*[Requirement to hold sufficient securities]*

1. - An intermediary must, for each description of securities, hold securities and intermediated securities of an aggregate number and amount ~~at least~~ equal to the aggregate number and amount of securities of that description credited to securities accounts which it maintains ~~for account holders~~<sup>4</sup>.

2. - If at any time an intermediary does not hold sufficient securities and intermediated securities of any description in accordance with paragraph 1, it must within the time required by the non-Convention law ~~[immediately] [promptly]~~ take such action as is required ~~necessary~~ to ensure that it holds sufficient securities and intermediated securities of that description.

---

<sup>4</sup>~~The square brackets in paragraph 1 reflect the need to ensure that the Convention does not relax more stringent requirements under a domestic non-Convention law that might, for example, require the intermediary to maintain with another intermediary securities sufficient to reflect securities that the intermediary carries on its books for its own account. Consideration may be given to addressing this issue more generally in the convention.~~

3. - ~~The preceding paragraphs do not affect any provision of the domestic non-Convention law, or, to the extent permitted by subject to the domestic non-Convention law, any provision of the uniform rules of a securities settlement [or clearing] system or of an account agreement, relating to the method of complying with the requirements of those paragraphs or the allocation of the cost of ensuring compliance with those the requirements of those paragraphs or otherwise relating to the consequences of failure to comply with those requirements.~~

*Article 1820*

*[Limitations on obligations and liabilities of intermediaries] Application of domestic non-Convention law and account agreement to obligations of intermediary]*

1. - ~~The obligations and duties of an intermediary under this Convention and the extent of the liability of an intermediary in respect of those obligations and the extent of the liability of an intermediary are subject to any applicable provision of the domestic non-Convention law and, to the extent permitted by that the non-Convention law, the account agreement or the uniform rules of a securities settlement system.~~

2. - ~~[An intermediary, including the] [The] operator of a securities settlement system, who makes a debit, credit, or designating entry (an "entry") to a securities account maintained by the [intermediary] [operator] for an account holder is not liable to a third party who has an interest in intermediated securities and whose rights are violated by the entry unless –~~

~~(a) the [intermediary] [operator] makes the entry after the [intermediary] [operator] has been served with legal process restraining it from doing so, issued by a court of competent jurisdiction, and has had a reasonable opportunity to act on that legal process; or~~

~~(b) the [intermediary] [operator] acts wrongfully and in concert with another person to violate the rights of that third party.~~

3. - ~~Paragraph 2 does not affect any liability of the [intermediary] [operator] -~~

~~(a) to the account holder or a person to whom the account holder has granted an interest that has become effective against third parties under Article 8; or~~

~~(b) that arises from an entry which the [intermediary] [operator] is not entitled to make under Article 18.~~

4. - ~~The operator of a securities settlement system or securities clearing system to whose securities account securities are credited and who authorises a matching debit of those securities to its securities account is not liable to a third party who has an interest in intermediated securities and whose rights are violated by that credit or debit unless –~~

~~(a) the operator receives the credit or authorises the debit after the operator has been served with legal process restraining it from doing so, issued by a court of competent jurisdiction, and has had a reasonable opportunity to act on that legal process; or~~

~~(b) the operator acts wrongfully and in concert with another person to violate the rights of that third party.~~

*Article 1921*

*[Allocation of securities to account holders' rights-  
securities so allocated not property of the intermediary]*

1. - Securities of each description held by an intermediary or credited to securities accounts held by an intermediary with another intermediary shall be allocated to the rights of the account holders of ~~that the former~~ intermediary to the extent necessary to ensure that the aggregate number or amount of the securities of that description so allocated is equal to the aggregate number or amount of such securities credited to securities accounts maintained by the intermediary for account holders other than itself.

2. - Subject to Article 14, ~~s~~Securities allocated under paragraph 1 shall not form part of the property of the intermediary available for distribution among or realisation for the benefit of ~~its unsecured creditors in the event of an insolvency proceeding in respect of the intermediary or be otherwise subject to claims of unsecured creditors of the intermediary.~~

3. - ~~Subject to paragraph 4,~~ tThe allocation required by paragraph 1 shall be effected by the ~~domestic non-Convention law and, subject to the domestic~~ to the extent required or permitted by the non-Convention law, by arrangements made by the relevant intermediary.

4. - The arrangements referred to in paragraph 3 may include arrangements under which an intermediary holds securities in segregated form –

(a) for the benefit of its account holders generally; or

(b) for the benefit of particular account holders or groups of account holders;

in such manner as to ensure that such securities are allocated in accordance with paragraph 1.

~~4~~ 5. - A Contracting State may declare that under its ~~domestic~~ non-Convention law the allocation required by paragraph 1 applies only to securities –that are held by the relevant intermediary in segregated form under arrangements such as are referred to in paragraph 4 ~~with another intermediary under an arrangement for the segregation of securities held by the relevant intermediary for the benefit of its account holders and does not apply to securities held with another intermediary – by the relevant intermediary for its for the relevant intermediary's own account.~~

*Article 2022*

*[Loss sharing in case of insolvency of the intermediary]*

1. ~~— In any insolvency proceeding in respect of an intermediary, if the aggregate number or amount of securities and intermediated securities of any description held by an intermediary is less than the aggregate number or amount of securities of that description credited to securities accounts, the shortfall shall be allocated:~~

~~— (a) — subject to sub-paragraph (b), among the account holders to whose securities accounts securities of the relevant description are credited, in proportion to the respective numbers or amounts of securities so credited; or~~

~~— (b) — where the intermediary is [the operator of] a securities settlement [or clearing] system and the rules or agreements governing the operation of the system make provision for the allocation of the shortfall, in the manner so provided.~~

~~— 2. — [Unless otherwise provided by the domestic non-Convention law,] [I]n any allocation required under paragraph 1(a) no account shall be taken of:~~



~~\_\_\_\_\_ (a) the origin of, or any past dealings in, any securities held by the intermediary or credited to securities accounts held by the intermediary with another intermediary; or~~

~~\_\_\_\_\_ (b) the order in which or time at which any securities are credited or debited to the respective securities accounts of account holders.~~

~~\_\_\_\_\_ 3. The preceding paragraphs are subject to any conflicting rule applicable in the insolvency proceeding of the intermediary.~~

\_\_\_\_\_ 1. - This article applies in any insolvency proceeding in respect of an intermediary unless otherwise provided by any conflicting rule applicable in that proceeding.

\_\_\_\_\_ 2. - If the aggregate number or amount of securities of any description allocated under Article 21 to an account holder, a group of account holders or the intermediary's account holders generally is less than the aggregate number or amount of securities of that description credited to the securities accounts of that account holder, that group of account holders or the intermediary's account holders generally (as the case may be), the shortfall shall be borne –

\_\_\_\_\_ (a) where securities have been allocated to a single account holder, by that account holder;

\_\_\_\_\_ (b) in any other case, by the account holders to whom the relevant securities have been allocated, in proportion to the respective number or amount of securities of that description credited to their securities accounts.

\_\_\_\_\_ 3. - To the extent permitted by the non-Convention law, where the intermediary is the operator of a securities settlement system and the uniform rules of the system make provision in case of a shortfall, the shortfall shall be borne in the manner so provided.

#### *Article 21*

*[Overriding effect of certain rules of securities settlement [or clearing] systems]*

~~\_\_\_\_\_ Any provision of the rules or agreements governing the operation of a securities settlement [or clearing] system [which is directed to the stability of the system or the finality of transactions effected through the system] shall, to the extent of any inconsistency, prevail over any provision of [Articles 8,X,Y, ...] [this Convention].~~

#### *Article 223*

*[Effectiveness of debits, credits etc. and instructions on insolvency of operator or participant in securities settlement [or clearing] system]*

\_\_\_\_\_ 1. - To the extent permitted by the non-Convention law, the following provisions Any provision of the rules or agreements governing the operation of a securities settlement [or clearing] system [which is directed to the stability of the system or the finality of transactions] shall have effect notwithstanding the commencement of an insolvency proceeding in respect of [the operator of] the relevant system or any participant in the relevant system in so far as that provision –:

~~\_\_\_\_\_ (a) precludes the invalidation or reversal of a debit or credit of securities to, or a designating entry in, a securities account which forms part of the system after the time at which that debit, credit or designating entry is treated as final under the rules of the system;~~

(a) any provision of the uniform rules of a securities settlement system or of a securities clearing system in so far as that provision precludes the revocation of any instruction

given by a participant in the system for making a disposition of securities, or for making a payment relating to an acquisition or disposition of securities, after the time at which that instruction is treated under the rules of the system as having been entered irrevocably into the system;:-

(b) any provision of the uniform rules of a securities settlement system in so far as that provision precludes the invalidation or reversal of a debit or credit of securities to, or a designating entry in, a securities account which forms part of the system after the time at which that debit, credit or designating entry is treated as irrevocable under the rules of the system.

2. - Paragraph 1 applies notwithstanding that any invalidation, reversal or revocation referred to in that paragraph would otherwise occur ~~by~~ under any rule applicable in an insolvency proceeding ~~mandatory operation of the insolvency law of a Contracting State.~~

## **CHAPTER V– RELATIONSHIP WITH ISSUERS OF SECURITIES**

### *Article ~~1324~~*

*[Position of issuers of securities]*

1. - The law of a Contracting State shall permit the holding through intermediaries of securities that are permitted to be traded on an exchange or regulated market, and the effective exercise in accordance with Article 5 of the rights attached to such securities which are so held, but need not require that all such securities be issued on terms that permit them to be held through intermediaries. ~~This is without prejudice to the terms of issue of the securities.~~

2. - In particular, the law of a Contracting State shall recognise the holding of such securities described in paragraph 1 by a person acting in his own name on behalf of another person ~~(including a nominee)~~ or other persons and shall permit such a person to exercise voting or other rights in different ways in respect of different parts of a holding of securities of the same description; but this Convention does not determine the conditions under which such a person is authorised to exercise such rights. -

3. This Convention does not determine whom an issuer is required to recognise as the holder of securities.

### *Article ~~1425~~*

*[Set-off]*

1. - As between an account holder who holds intermediated securities for its own account and the issuer of those securities, the fact that the account holder holds the securities through ~~with~~ an intermediary or intermediaries shall not of itself, in any insolvency proceeding in respect of the issuer, preclude the existence or prevent the exercise of any rights of set-off which would have existed and been exercisable if the account holder had held the securities otherwise than through an intermediary.

2. - This Article does not affect any express provision of the terms of issue of the securities.

**CHAPTER ~~V~~VI– SPECIAL PROVISIONS WITH RESPECT TO  
COLLATERAL TRANSACTIONS<sup>5</sup>**

*Article ~~2326~~*

*[Scope and interpretation in Chapter ~~V~~VI]*

1. - This Chapter applies to collateral agreements under which a collateral provider ~~delivers~~ grants a security interest in intermediated securities to a collateral taker ~~under Article 5(2) or Article 5(3)~~ in order to secure the performance of any existing or future obligation of the collateral provider or a third person.

2. - In this Chapter –

\_\_\_\_\_ (a) “collateral agreement” means a security collateral agreement or a title transfer collateral agreement;

\_\_\_\_\_ (b) “security collateral agreement” means an agreement between a collateral provider and a collateral taker providing (in whatever terms) for the grant of an interest other than full ownership in intermediated securities for the purpose of securing the performance of relevant obligations;

\_\_\_\_\_ (c) “title transfer collateral agreement” means an agreement, including an agreement providing for the sale and repurchase of securities, between a collateral provider and a collateral taker providing (in whatever terms) for the transfer of full ownership of intermediated securities by the collateral provider to the collateral taker for the purpose of securing or otherwise covering the performance of relevant obligations;

\_\_\_\_\_ (d) “relevant obligations” means any present or future obligations of a collateral provider or a third person; “enforcement event” means, in relation to a collateral agreement, an event on the occurrence of which, under the terms of that collateral agreement, the collateral taker is entitled to enforce its security;

\_\_\_\_\_ (e) “collateral securities” means intermediated securities delivered under a collateral agreement;

\_\_\_\_\_ (f) “secured obligations” means the obligations secured by a collateral agreement.

\_\_\_\_\_ (g) “collateral taker” means a person to whom an interest in intermediated securities is granted under a security collateral agreement or to whom full ownership of intermediated securities is transferred under a title transfer collateral agreement;

\_\_\_\_\_ (h) “collateral provider” means an account holder by whom an interest in intermediated securities is granted under a security collateral agreement or full ownership of intermediated securities is transferred under a title transfer collateral agreement;

\_\_\_\_\_ (i) “enforcement event” means, in relation to a collateral agreement, an event of default or other event on the occurrence of which, under the terms of that collateral agreement, the collateral taker is entitled to enforce its security or operate a close-out netting provision;

\_\_\_\_\_ (j) “equivalent collateral” means securities of the same description as collateral securities;

\_\_\_\_\_ (k) “close-out netting provision” means a provision of a collateral agreement, or of a set of connected agreements of which a collateral agreement forms part, under which, on the occurrence of an enforcement event, either or both of the following shall occur, or may at the

---

<sup>5</sup> Further consideration will be given to the terminology of this Chapter and its consistency with that of the remainder of the preliminary draft Convention.

election of the collateral taker occur, whether through the operation of netting or set-off or otherwise:

(i) the respective obligations of the parties are accelerated so as to be immediately due and expressed as an obligation to pay an amount representing their estimated current value or are terminated and replaced by an obligation to pay such an amount;

(ii) an account is taken of what is due from each party to the other in respect of such obligations, and a net sum equal to the balance of the account is payable by the party from whom the larger amount is due to the other party.

*Article 27*

*[Recognition of title transfer collateral agreements]*

1. - The law of a Contracting State shall permit a title transfer collateral agreement to take effect in accordance with its terms.

2. - If an enforcement event occurs while any obligation of the collateral taker to transfer equivalent collateral under a title transfer collateral agreement remains outstanding, that obligation and the relevant obligations may be the subject of a close-out netting provision.

*Article 2428*

*[Enforcement]*

1. - On the occurrence of an enforcement event, the collateral taker may —

(a) realise the collateral securities provided under a security collateral agreement:

(i) by selling them and applying the net proceeds of sale in or towards the discharge of the ~~secured~~ relevant obligations; or

(ii) by appropriating the collateral securities as the collateral taker's own property and setting off their value against, or applying their value in or towards the discharge of, the ~~relevant secured~~ obligations, provided that the collateral agreement provides for realisation in this manner and specifies the basis on which collateral securities are to be valued for this purpose; or

(b) operate a close-out netting provision. —

2. - Collateral securities may be realised, and a close-out netting provision may be operated, under paragraph 1:

(a) subject to any contrary provision of the collateral agreement, without any requirement that:

(i) prior notice of the intention to realise or operate the close-out netting provision shall have been given;

(ii) the terms of the realisation or the operation of the close-out netting provision be approved by any court, public officer or other person; or

(iii) the realisation be conducted by public auction or in any other prescribed manner or the close-out netting provision be operated in any prescribed manner; and

(b) notwithstanding the commencement or continuation of an insolvency proceeding in respect of the collateral provider or the collateral taker.

~~3. — A collateral agreement may provide that, if an enforcement event occurs before the secured obligations have been fully discharged, either or both of the following shall occur, or may at the election of the collateral taker occur, whether through the operation of netting or set-off or otherwise:~~

~~————— (a) — the respective obligations of the parties are accelerated so as to be immediately due and expressed as an obligation to pay an amount representing their estimated current value or are terminated and replaced by an obligation to pay such an amount;~~

~~————— (b) — an account is taken of what is due from each party to the other in respect of such obligations, and a net sum equal to the balance of the account is payable by the party from whom the larger amount is due to the other party.~~

~~———— 4. — This Article is without prejudice to any requirement of the domestic non-Convention law to the effect that the realisation or valuation of collateral securities or the calculation of any obligations must be conducted in a commercially reasonable manner.~~

*Article 2529*

*[Right to use collateral securities under security collateral agreement]*

1. - If and to the extent that the terms of a security collateral agreement so provide ~~(or, where collateral securities are delivered to the collateral taker under Article 5(2), if and to the extent that the terms of the collateral agreement do not provide otherwise)~~, the collateral taker shall have the right to use and dispose of the collateral securities as if it were the owner of them (a “*right of use*”).

2. - Where a collateral taker exercises a right of use, it thereby incurs an obligation to replace the collateral securities originally transferred (the “*original collateral securities*”) by transferring to the collateral provider, not later than the discharge of the ~~secured~~ relevant obligations, ~~securities of the same issuer or debtor, forming part of the same issue or class and of the same nominal amount, currency and description~~ equivalent collateral or, where the security collateral agreement provides for the transfer of other assets [following the occurrence of any event relating to or affecting any securities provided as collateral], those other assets.

3. - Securities transferred under paragraph 2 before the ~~secured~~ relevant obligations have been fully discharged:

(a) shall, in the same manner as the original collateral securities, be subject to a security interest under the relevant security collateral agreement, which shall be treated as having been created at the same time as the security interest in respect of the original collateral securities was created; and

(b) shall in all other respects be subject to the terms of the relevant security collateral agreement.

4. - The exercise of a right of use shall not render invalid or unenforceable any right of the collateral taker under the relevant security collateral agreement.

*Article 30**[Requirements of non-Convention law relating to enforcement]*

Articles 27, 28 and 29 do not affect any requirement of the non-Convention law to the effect that the realisation or valuation of collateral securities or the calculation of any obligations must be conducted in a commercially reasonable manner.

*Article ~~26~~31**[Top-up or substitution of collateral]*

1. - Where a collateral agreement includes:

(a) an obligation to deliver ~~collateral securities or additional collateral securities~~—  
(i) in order to take account of changes in the value of the collateral provided under the collateral agreement or in the amount of the secured relevant obligations;

(ii) ~~—~~ in order to take account of any circumstances giving rise to an increase in the credit risk incurred by the collateral taker, as determined by reference to objective criteria relating to the creditworthiness, financial performance or financial condition of the collateral provider or other person by whom the relevant obligations are owed; ~~or,~~

(iii) to the extent permitted by the applicable non-Convention law as determined by the private international law rules of the forum, in any other circumstances specified in the collateral agreement; ~~or~~

(b) a right to withdraw collateral securities or other assets on providing collateral securities or other assets of substantially the same value,

the provision of securities or other assets as described in paragraph (a) and paragraph (b) shall not be treated as invalid, reversed or declared void solely on the basis that they are provided during a prescribed period before, or on the day of but before, the commencement of an insolvency proceeding in respect of the collateral provider, or after the ~~secured relevant~~ obligations have been incurred.

2. - A contracting State may declare that paragraph 1(a)(ii) does not apply.

*Article ~~27~~32**[Declarations in respect of Chapter ~~V~~ VI]*

1. - A Contracting State may declare that this Chapter shall not apply under its ~~domestic~~ non-Convention law .

2. - A Contracting State may declare that under its ~~domestic~~ non-Convention law this Chapter shall not apply –

(a) in relation to collateral agreements entered into by natural persons or persons falling within such other categories as may be specified in the declaration;

(b) in relation to intermediated securities which are not permitted to be traded on an exchange or regulated market;

(c) in relation to collateral agreements which provide for ~~secured relevant~~ obligations falling within such categories as may be specified in the declaration.

**CHAPTER VII – FINAL CLAUSES**

*Article X*  
*[Applicability of Declarations]*

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

APPENDIX 2

PRELIMINARY DRAFT CONVENTION ON SUBSTANTIVE RULES REGARDING  
INTERMEDIATED SECURITIES

CHAPTER I - DEFINITIONS, SCOPE OF APPLICATION AND INTERPRETATION

*Article 1*  
*[Definitions]*

In this Convention:

(a) *“securities”* means any shares, bonds or other financial instruments or financial assets (other than cash) which are capable of being credited to a securities account and of being acquired and disposed of in accordance with the provisions of this Convention;

(b) *“intermediated securities”* means securities credited to a securities account or rights or interests in securities resulting from the credit of securities to a securities account;

(c) *“securities account”* means an account maintained by an intermediary to which securities may be credited or debited;

(d) *“intermediary”* means a person that in the course of a business or other regular activity maintains securities accounts for others or both for others and for its own account and is acting in that capacity;

(e) *“account holder”* means a person in whose name an intermediary maintains a securities account, whether that person is acting for its own account or for others (including in the capacity of intermediary);

(f) *“account agreement”* means, in relation to a securities account, the agreement between the account holder and the relevant intermediary governing that securities account;

(g) *“relevant intermediary”* means, with respect to a securities account, the intermediary that maintains the securities account for the account holder;

(h) *“insolvency proceeding”* means a collective judicial or administrative proceeding, including an interim proceeding, in which the assets and affairs of the debtor are subject to control or supervision by a court or other competent authority for the purpose of reorganisation or liquidation;

(i) *“insolvency administrator”* means a person (including a debtor in possession where applicable) authorised to administer an insolvency proceeding, including one authorised on an interim basis;

(j) securities are *“of the same description”* as other securities if they are issued by the same issuer and:

(i) they are of the same class of shares or stock; or

(ii) in the case of securities other than shares or stock, they are of the same currency and denomination and are treated as forming part of the same issue;



(k) *“control agreement”* means an agreement between an account holder, the relevant intermediary and another person, or, if so permitted by the non-Convention law, an agreement between an account holder and another person of which notice is given to the relevant intermediary, which relates to intermediated securities and includes either or both of the following provisions –

(i) that the relevant intermediary is not permitted to comply with any instructions given by the account holder in respect of the intermediated securities to which the agreement relates without having received the consent of that other person;

(ii) that the relevant intermediary is obliged to comply with any instructions given by that other person in respect of the intermediated securities to which the agreement relates in such circumstances and as to such matters as may be provided by the agreement or the non-Convention law, without any further consent of the account holder;

(l) *“designating entry”* means an entry in a securities account made in favour of a person other than the account holder in respect of intermediated securities, which, under the account agreement, a control agreement, the uniform rules of a securities settlement system or the non-Convention law, has either or both of the following effects –

(i) that the relevant intermediary is not permitted to comply with any instructions given by the account holder in respect of the intermediated securities in relation to which the entry is made without having received the consent of that other person;

(ii) that the relevant intermediary is obliged to comply with any instructions given by that other person in respect of the intermediated securities in respect of which the entry is made in such circumstances and as to such matters as may be provided by the account agreement, a control agreement, the uniform rules of a securities settlement system or the non-Convention law, without any further consent of the account holder;

(m) *“non-Convention law”* means the provisions of law in force in the State whose law is applicable under Article 2, other than those provided in this Convention;

(n) *“securities settlement system”* means a system which-

(i) settles, or clears and settles, securities transactions;

(ii) is operated by a central bank or central banks or is subject to regulation, supervision or oversight by a governmental or public authority in respect of its rules; and

(iii) has been notified, on the ground of the reduction of risk to the stability of the financial system, as a securities settlement system in a declaration by the Contracting State the law of which governs the rules of the system;

(o) *“securities clearing system”* means a system which -

(i) clears, but does not settle, securities transactions through a central counterparty or otherwise;

(ii) is operated by a central bank or central banks or is subject to regulation, supervision or oversight by a governmental or public authority in respect of its rules; and

(iii) has been notified, on the ground of the reduction of risk to the stability of the financial system, as a securities clearing system in a declaration by the Contracting State the law of which governs the rules of the system;

(p) *“uniform rules”* means, in relation to a securities settlement system or securities clearing system, rules of that system which are common to the participants or to a class of participants and are publicly accessible.

*Article 2*  
*[Sphere of application]*

This Convention applies where –

- (a) the conflict of laws rules of the forum state designate the law in force in a Contracting State as the applicable law; or
- (b) the circumstances do not involve a choice in favour of any law other than the law in force in the forum state and the forum state is a Contracting State.

*Article 3*  
*[Central Securities Depositories]*

This Convention does not apply to the activity of creation, recording or reconciliation of securities conducted by central securities depositories or other persons *vis-à-vis* the issuer of those securities.

*Article 4*  
*[Principles of interpretation]*

In the implementation, interpretation and application of this Convention, regard is to be had to its purposes, to the general principles on which it is based, to its international character and to the need to promote uniformity and predictability in its application.

## CHAPTER II – RIGHTS OF THE ACCOUNT HOLDER

*Article 5*  
*[Intermediated securities]*

- 1. - The credit of securities to a securities account confers on the account holder:
  - (a) the right to receive and exercise the rights attached to the securities, including in particular dividends, other distributions and voting rights
    - (i) where the account holder is not an intermediary or is an intermediary acting for its own account; and,
    - (ii) in any other case, if the non-Convention law so provides;
  - (b) the right, by instructions to the relevant intermediary, to effect a disposition under Article 7 or grant an interest under Article 8;
  - (c) the right, by instructions to the relevant intermediary, to cause the securities to be held otherwise than through a securities account, to the extent permitted under the law under which the securities are constituted, the terms of the securities, the non-Convention law and, to the extent permitted by the non-Convention law, the account agreement or the uniform rules of a securities settlement system;
  - (d) unless otherwise provided in this Convention, such other rights, including rights and interests in securities, as may be conferred by the non-Convention law.
- 2. - Unless otherwise provided in this Convention,
  - (a) the rights referred to in paragraph 1 are effective against third parties;

(b) the rights referred to in paragraph 1(a) may be exercised against the relevant intermediary or the issuer of the securities, or both, in accordance with this Convention, the terms of the securities and the law under which the securities are constituted;

(c) the rights referred to in paragraph 1(b) and 1(c) may be exercised only against the relevant intermediary.

3. - Where an account holder has acquired a security interest, or a limited interest other than a security interest, by credit of securities to its securities account under Article 7(4), the non-Convention law determines any limits on the rights described in paragraph 1.

#### *Article 6*

##### *[Measures to enable account holders to receive and exercise rights]*

1. - An intermediary must take appropriate measures to enable its account holders to receive and exercise the rights specified in Article 5(1), but this obligation does not require the relevant intermediary to take any action that is not within its power or to establish a securities account with another intermediary.

2. - This Article does not affect any right of the account holder against the issuer of the securities.

### **CHAPTER III – TRANSFER OF INTERMEDIATED SECURITIES**

#### *Article 7*

##### *[Acquisition and disposition by debit and credit]*

1. - Subject to Article 11, intermediated securities are acquired by an account holder by the credit of securities to that account holder's securities account.

2. - No further step is necessary, or may be required by the non-Convention law, to render the acquisition of intermediated securities effective against third parties.

3. - Subject to Article 11, intermediated securities are disposed of by an account holder by the debit of securities to that account holder's securities account.

4. - A security interest, or a limited interest other than a security interest, in intermediated securities may be acquired and disposed of by debit and credit of securities to securities accounts under this Article.

5. - Debits and credits to securities accounts in respect of securities of the same description may be effected on a net basis.

#### *Article 8*

##### *[Grant of interests in intermediated securities by other methods]*

1. - An account holder grants an interest in intermediated securities, including a security interest or a limited interest other than a security interest, to another person so as to be effective against third parties if -

(a) the account holder enters into an agreement with that person; and

(b) one of the conditions specified in paragraph 2 applies and the relevant Contracting State has made a declaration in respect of that condition under paragraph 4; and no further step is necessary, or may be required by the non-Convention law, to render the interest effective against third parties.

2. - The conditions referred to in paragraph 1(b) are as follows -

- (a) that the person to whom the interest is granted is the relevant intermediary;
- (b) that a designating entry in favour of that person has been made;
- (c) that a control agreement in favour of that person applies.

3. - An interest in intermediated securities may be granted under this Article so as to be effective against third parties –

(a) in respect of a securities account (and such an interest extends to all intermediated securities from time to time standing to the credit of the relevant securities account);

(b) in respect of a specified category, quantity, proportion or value of the intermediated securities from time to time standing to the credit of a securities account.

4. - A Contracting State may declare that under its non-Convention law –

(a) the condition specified in any one or more of sub-paragraphs (a) to (c) of paragraph 2 is sufficient to render an interest effective against third parties;

(b) this Article shall not apply in relation to interests in intermediated securities granted by or to parties falling within such categories as may be specified in the declaration;

(c) paragraph 3, or either sub-paragraph of paragraph 3, does not apply;

(d) paragraph 3(b) applies with such modifications as may be specified in the declaration.

5. - The non-Convention law determines in what circumstances a non-consensual security interest in intermediated securities may arise and become effective against third parties.

#### *Article 9*

##### *[Other methods under non-Convention law]*

This Convention does not preclude any method provided by the non-Convention law –

(a) for the acquisition or disposition of intermediated securities or of an interest in intermediated securities;

(b) for the creation of an interest in intermediated securities and for making such an interest effective against third parties;

other than the methods provided by Articles 7 and 8.

#### *Article 10*

##### *[Evidential requirements]*

The non-Convention law determines the evidential requirements in respect of the matters referred to in Articles 7 and 8.

*Article 11*  
*[Invalidity and reversal]*

1. - A debit of securities to a securities account or a designating entry is invalid if the relevant intermediary is not authorised to make that debit or designating entry:

(a) by the account holder and, in the case of a debit or designating entry that relates to intermediated securities which are subject to an interest granted under Article 8, by the person to whom that interest is granted; or

(b) by the non-Convention law.

2. - Subject to Article[s] 12 [and 13], the non-Convention law and, to the extent permitted by the non-Convention law, an account agreement or the uniform rules of a securities settlement system determine –

(a) the validity of a debit, credit or designating entry;

(b) whether a debit, credit or designating entry is liable to be reversed;

(c) where a debit, credit or designating entry is liable to be reversed, its effect (if any) against third parties and the consequences of reversal;

(d) whether and in what circumstances a debit, credit or designating entry may be made subject to a condition; and

(e) where a debit, credit or designating entry is made subject to a condition, its effect (if any) against third parties before the condition is fulfilled and the consequences of the fulfilment or non-fulfilment of the condition.

*Article 12*  
*[Acquisition by an innocent person of intermediated securities]*

1. - Where securities are credited to the securities account of an account holder at a time when the account holder does not know that another person has an interest in securities or intermediated securities and that the credit violates the rights of that other person with respect to that interest -

(a) the account holder is not subject to the interest of that other person;

(b) the account holder is not liable to that other person; and

(c) the credit is not invalid or liable to be reversed on the ground that the interest or rights of that other person invalidate any previous debit or credit made to another securities account.

2. - Where securities are credited to the securities account of an account holder, or an interest becomes effective against third parties under Article 8, at a time when the account holder or the person to whom the interest is granted does not know of an earlier defective entry –

(a) the credit or interest is not rendered invalid, ineffective against third parties or liable to be reversed as a result of that defective entry; and

(b) the account holder, or the person to whom the interest is granted, is not liable to anyone who would benefit from the invalidity or reversal of that defective entry.

3. - Paragraphs 1 and 2 do not apply in respect of an acquisition of securities, other than the grant of a security interest, made by way of gift or otherwise gratuitously.

4. - For the purposes of this Article –

(a) *"defective entry"* means a credit of securities or designating entry which is invalid or liable to be reversed, including a conditional credit or designating entry which becomes invalid or liable to be reversed by reason of the operation or non-fulfilment of the condition;

(b) a person knows of an interest or fact if that person –

(i) has actual knowledge of the interest or fact; or

(ii) has knowledge of facts sufficient to indicate that there is a significant probability that the interest or fact exists and deliberately avoids information that would establish that this is the case; and

(c) when the person referred to in (b) is an organisation, it knows of an interest or fact from the time when the interest or fact is or ought reasonably to have been brought to the attention of the individual responsible for the matter to which the interest or fact is relevant.

5. - To the extent permitted by the non-Convention law, paragraph 2 is subject to any provision of the uniform rules of a securities settlement system or of the account agreement.

### *Article 13*

#### *[Priority among competing interests]*

1. - This Article determines priority between interests in the same intermediated securities which become effective against third parties under Article 8.

2. - Subject to paragraph 5 and Article 14, interests that become effective against third parties under Article 8 have priority over any interest that becomes effective against third parties by any other method permitted by the non-Convention law.

3. - Interests that become effective against third parties under Article 8 rank among themselves according to the time of occurrence of the following events –

(a) if the relevant intermediary is itself the holder of the interest, when the agreement granting the interest is entered into;

(b) when a designating entry is made;

(c) when a control agreement is entered into, or, if applicable, a notice is given to the relevant intermediary.

4. - Where an intermediary has an interest that has become effective against third parties under Article 8 and makes a designation or enters into a control agreement with the consequence that an interest of another person becomes effective against third parties, the interest of that other person has priority over the interest of the intermediary unless that other person and the intermediary expressly agree otherwise.

5. - A non-consensual security interest in intermediated securities arising or recognised under any rule of the non-Convention law has such priority as is afforded to it by that law.

6. - As between persons entitled to any interests referred to in paragraphs 2, 3 and 4 and, to the extent permitted by the non-Convention law, paragraph 5, the priorities provided by this Article may be varied by agreement between those persons, but any such agreement does not affect third parties.

*Article 14*  
*[Priority of interests granted by an intermediary]*

This Convention does not determine the priority or the relative rights and interests between the rights of account holders of an intermediary and interests granted by that intermediary that have become effective under Article 8.

**CHAPTER IV – INTEGRITY OF THE INTERMEDIATED HOLDING SYSTEM**

*Article 15*  
*[Rights of account holders in case of insolvency of intermediary]*

The rights of an account holder under Article 5(1), and an interest that has become effective against third parties under Article 8, are effective against the insolvency administrator and creditors in any insolvency proceeding in respect of the relevant intermediary.

*Article 16*  
*[Effects of insolvency]*

Subject to Article 23 and Article 31, nothing in this Convention affects:

- (a) any rules of law applicable in insolvency proceedings relating to the avoidance of a transaction as a preference or a transfer in fraud of creditors; or
- (b) any rules of procedure relating to the enforcement of rights to property which is under the control or supervision of an insolvency administrator.

*Article 17*  
*[Prohibition of upper-tier attachment]*

1. - No attachment of or in respect of intermediated securities of an account holder shall be granted or made against the issuer of the relevant securities or against any intermediary other than the relevant intermediary.

2. - In this Article "*attachment*" means any judicial, administrative or other act or process for enforcing or satisfying a judgment, award or other judicial, arbitral, administrative or other decision against or in respect of the account holder or for freezing, restricting or impounding property of the account holder in order to ensure its availability to enforce or satisfy any future such judgment, award or decision.

*Article 18*  
*[Instructions to the intermediary]*

1. - An intermediary is neither bound nor entitled to give effect to any instructions with respect to intermediated securities of an account holder given by any person other than that account holder.

2. - Paragraph 1 is subject to:

(a) the provisions of the account agreement, any other agreement between the intermediary and the account holder or any other agreement entered into by the intermediary with the consent of the account holder;

(b) the rights of any person (including the intermediary) who holds an interest that has become effective against third parties under Article 8;

(c) subject to Article 17, any judgment, award, order or decision of a court, tribunal or other judicial or administrative authority of competent jurisdiction;

(d) any applicable rule of the non-Convention law; and

(e) where the intermediary is the operator of a securities settlement system, the uniform rules of that system.

*Article 19*  
*[Requirement to hold sufficient securities]*

1. - An intermediary must, for each description of securities, hold securities and intermediated securities of an aggregate number and amount equal to the aggregate number and amount of securities of that description credited to securities accounts which it maintains.

2. - If at any time an intermediary does not hold sufficient securities and intermediated securities of any description in accordance with paragraph 1, it must within the time required by the non-Convention law take such action as is necessary to ensure that it holds sufficient securities and intermediated securities of that description.

3. - The preceding paragraphs do not affect any provision of the non-Convention law, or, to the extent permitted by the non-Convention law, any provision of the uniform rules of a securities settlement system or of an account agreement, relating to the method of complying with those requirements or the allocation of the cost of ensuring compliance with those requirements or otherwise relating to the consequences of failure to comply with those requirements.

*Article 20*  
*[Limitations on obligations and liabilities of intermediaries]*

1. - The obligations of an intermediary under this Convention and the extent of the liability of an intermediary in respect of those obligations are subject to any applicable provision of the non-Convention law and, to the extent permitted by the non-Convention law, the account agreement or the uniform rules of a securities settlement system.

2. - [An intermediary, including the] [The] operator of a securities settlement system, who makes a debit, credit, or designating entry (an "entry") to a securities account maintained by the



[intermediary] [operator] for an account holder is not liable to a third party who has an interest in intermediated securities and whose rights are violated by the entry unless –

(a) the [intermediary] [operator] makes the entry after the [intermediary] [operator] has been served with legal process restraining it from doing so, issued by a court of competent jurisdiction, and has had a reasonable opportunity to act on that legal process; or

(b) the [intermediary] [operator] acts wrongfully and in concert with another person to violate the rights of that third party.

3. - Paragraph 2 does not affect any liability of the [intermediary] [operator] -

(a) to the account holder or a person to whom the account holder has granted an interest that has become effective against third parties under Article 8; or

(b) that arises from an entry which the [intermediary] [operator] is not entitled to make under Article 18.

4. - The operator of a securities settlement system or securities clearing system to whose securities account securities are credited and who authorises a matching debit of those securities to its securities account is not liable to a third party who has an interest in intermediated securities and whose rights are violated by that credit or debit unless –

(a) the operator receives the credit or authorises the debit after the operator has been served with legal process restraining it from doing so, issued by a court of competent jurisdiction, and has had a reasonable opportunity to act on that legal process; or

(b) the operator acts wrongfully and in concert with another person to violate the rights of that third party.

#### *Article 21*

##### *[Allocation of securities to account holders' rights]*

1. - Securities of each description held by an intermediary or credited to securities accounts held by an intermediary with another intermediary shall be allocated to the rights of the account holders of the former intermediary to the extent necessary to ensure that the aggregate number or amount of the securities of that description so allocated is equal to the aggregate number or amount of such securities credited to securities accounts maintained by the intermediary for account holders other than itself.

2. - Subject to Article 14, securities allocated under paragraph 1 shall not form part of the property of the intermediary available for distribution among or realisation for the benefit of creditors of the intermediary.

3. - The allocation required by paragraph 1 shall be effected by the non-Convention law and, to the extent required or permitted by the non-Convention law, by arrangements made by the relevant intermediary.

4. - The arrangements referred to in paragraph 3 may include arrangements under which an intermediary holds securities in segregated form –

(a) for the benefit of its account holders generally; or

(b) for the benefit of particular account holders or groups of account holders;

in such manner as to ensure that such securities are allocated in accordance with paragraph 1.

5. - A Contracting State may declare that under its non-Convention law the allocation required by paragraph 1 applies only to securities that are held by the relevant intermediary in segregated form under arrangements such as are referred to in paragraph 4 and does not apply to securities held by the relevant intermediary for its own account.

*Article 22**[Loss sharing in case of insolvency of the intermediary]*

1. - This article applies in any insolvency proceeding in respect of an intermediary unless otherwise provided by any conflicting rule applicable in that proceeding.

2. - If the aggregate number or amount of securities of any description allocated under Article 21 to an account holder, a group of account holders or the intermediary's account holders generally is less than the aggregate number or amount of securities of that description credited to the securities accounts of that account holder, that group of account holders or the intermediary's account holders generally (as the case may be), the shortfall shall be borne –

(a) where securities have been allocated to a single account holder, by that account holder;

(b) in any other case, by the account holders to whom the relevant securities have been allocated, in proportion to the respective number or amount of securities of that description credited to their securities accounts.

3. - To the extent permitted by the non-Convention law, where the intermediary is the operator of a securities settlement system and the uniform rules of the system make provision in case of a shortfall, the shortfall shall be borne in the manner so provided.

*Article 23**[Effect of debits, credits etc. and instructions on insolvency of operator or participant in securities settlement system]*

1. - To the extent permitted by the non-Convention law, the following provisions shall have effect notwithstanding the commencement of an insolvency proceeding in respect of the operator of the relevant system or any participant in the relevant system -

(a) any provision of the uniform rules of a securities settlement system or of a securities clearing system in so far as that provision precludes the revocation of any instruction given by a participant in the system for making a disposition of securities, or for making a payment relating to an acquisition or disposition of securities, after the time at which that instruction is treated under the rules of the system as having been entered irrevocably into the system;

(b) any provision of the uniform rules of a securities settlement system in so far as that provision precludes the invalidation or reversal of a debit or credit of securities to, or a designating entry in, a securities account which forms part of the system after the time at which that debit, credit or designating entry is treated as irrevocable under the rules of the system.

2. - Paragraph 1 applies notwithstanding that any invalidation, reversal or revocation referred to in that paragraph would otherwise occur under any rule applicable in an insolvency proceeding.

## CHAPTER V – RELATIONSHIP WITH ISSUERS OF SECURITIES

### Article 24

#### *[Position of issuers of securities]*

1. - The law of a Contracting State shall permit the holding through intermediaries of securities that are permitted to be traded on an exchange or regulated market, and the effective exercise in accordance with Article 5 of the rights attached to such securities which are so held, but need not require that all such securities be issued on terms that permit them to be held through intermediaries.

2. - In particular, the law of a Contracting State shall recognise the holding of such securities by a person acting in his own name on behalf of another person or other persons and shall permit such a person to exercise voting or other rights in different ways in respect of different parts of a holding of securities of the same description; but this Convention does not determine the conditions under which such a person is authorised to exercise such rights.

3. This Convention does not determine whom an issuer is required to recognise as the holder of securities.

### Article 25

#### *[Set-off]*

1. - As between an account holder who holds intermediated securities for its own account and the issuer of those securities, the fact that the account holder holds the securities through an intermediary or intermediaries shall not of itself, in any insolvency proceeding in respect of the issuer, preclude the existence or prevent the exercise of any rights of set-off which would have existed and been exercisable if the account holder had held the securities otherwise than through an intermediary.

2. - This Article does not affect any express provision of the terms of issue of the securities.

## CHAPTER VI – SPECIAL PROVISIONS WITH RESPECT TO COLLATERAL TRANSACTIONS

### Article 26

#### *[Scope and interpretation in Chapter VI]*

1. - This Chapter applies to collateral agreements under which a collateral provider grants a security interest in intermediated securities to a collateral taker in order to secure the performance of any existing or future obligation of the collateral provider or a third person.

2. - In this Chapter –

(a) "*collateral agreement*" means a security collateral agreement or a title transfer collateral agreement;

(b) "*security collateral agreement*" means an agreement between a collateral provider and a collateral taker providing (in whatever terms) for the grant of an interest other than

full ownership in intermediated securities for the purpose of securing the performance of relevant obligations;

(c) *"title transfer collateral agreement"* means an agreement, including an agreement providing for the sale and repurchase of securities, between a collateral provider and a collateral taker providing (in whatever terms) for the transfer of full ownership of intermediated securities by the collateral provider to the collateral taker for the purpose of securing or otherwise covering the performance of relevant obligations;

(d) *"relevant obligations"* means any present or future obligations of a collateral provider or a third person;

(e) *"collateral securities"* means intermediated securities delivered under a collateral agreement;

(f) *"collateral taker"* means a person to whom an interest in intermediated securities is granted under a security collateral agreement or to whom full ownership of intermediated securities is transferred under a title transfer collateral agreement;

(g) *"collateral provider"* means an account holder by whom an interest in intermediated securities is granted under a security collateral agreement or full ownership of intermediated securities is transferred under a title transfer collateral agreement;

(h) *"enforcement event"* means, in relation to a collateral agreement, an event of default or other event on the occurrence of which, under the terms of that collateral agreement, the collateral taker is entitled to enforce its security or operate a close-out netting provision;

(i) *"equivalent collateral"* means securities of the same description as collateral securities;

(j) *"close-out netting provision"* means a provision of a collateral agreement, or of a set of connected agreements of which a collateral agreement forms part, under which, on the occurrence of an enforcement event, either or both of the following shall occur, or may at the election of the collateral taker occur, whether through the operation of netting or set-off or otherwise:

(i) the respective obligations of the parties are accelerated so as to be immediately due and expressed as an obligation to pay an amount representing their estimated current value or are terminated and replaced by an obligation to pay such an amount;

(ii) an account is taken of what is due from each party to the other in respect of such obligations, and a net sum equal to the balance of the account is payable by the party from whom the larger amount is due to the other party.

#### Article 27

#### *[Recognition of title transfer collateral agreements]*

1. - The law of a Contracting State shall permit a title transfer collateral agreement to take effect in accordance with its terms.

2. - If an enforcement event occurs while any obligation of the collateral taker to transfer equivalent collateral under a title transfer collateral agreement remains outstanding, that obligation and the relevant obligations may be the subject of a close-out netting provision.

*Article 28*  
*[Enforcement]*

1. - On the occurrence of an enforcement event, the collateral taker may –
- (a) realise the collateral securities provided under a security collateral agreement:
- (i) by selling them and applying the net proceeds of sale in or towards the discharge of the relevant obligations; or
- (ii) by appropriating the collateral securities as the collateral taker's own property and setting off their value against, or applying their value in or towards the discharge of, the relevant obligations, provided that the collateral agreement provides for realisation in this manner and specifies the basis on which collateral securities are to be valued for this purpose; or
- (b) operate a close-out netting provision.
2. - Collateral securities may be realised, and a close-out netting provision may be operated, under paragraph 1:
- (a) subject to any contrary provision of the collateral agreement, without any requirement that:
- (i) prior notice of the intention to realise or operate the close-out netting provision shall have been given;
- (ii) the terms of the realisation or the operation of the close-out netting provision be approved by any court, public officer or other person; or
- (iii) the realisation be conducted by public auction or in any other prescribed manner or the close-out netting provision be operated in any prescribed manner; and
- (b) notwithstanding the commencement or continuation of an insolvency proceeding in respect of the collateral provider or the collateral taker.

*Article 29*  
*[Right to use collateral securities under security collateral agreement]*

1. - If and to the extent that the terms of a security collateral agreement so provide, the collateral taker shall have the right to use and dispose of the collateral securities as if it were the owner of them (a "right of use").
2. - Where a collateral taker exercises a right of use, it thereby incurs an obligation to replace the collateral securities originally transferred (the "original collateral securities") by transferring to the collateral provider, not later than the discharge of the relevant obligations, equivalent collateral or, where the security collateral agreement provides for the transfer of other assets [following the occurrence of any event relating to or affecting any securities provided as collateral], those other assets.
3. - Securities transferred under paragraph 2 before the relevant obligations have been fully discharged:
- (a) shall, in the same manner as the original collateral securities, be subject to a security interest under the relevant security collateral agreement, which shall be treated as having been created at the same time as the security interest in respect of the original collateral securities was created; and

(b) shall in all other respects be subject to the terms of the relevant security collateral agreement.

4. - The exercise of a right of use shall not render invalid or unenforceable any right of the collateral taker under the relevant security collateral agreement.

*Article 30*

*[Requirements of non-Convention law relating to enforcement]*

Articles 27, 28 and 29 do not affect any requirement of the non-Convention law to the effect that the realisation or valuation of collateral securities or the calculation of any obligations must be conducted in a commercially reasonable manner.

*Article 31*

*[Top-up or substitution of collateral]*

1. - Where a collateral agreement includes:

(a) an obligation to deliver additional collateral securities –

(i) in order to take account of changes in the value of the collateral provided under the collateral agreement or in the amount of the relevant obligations;

(ii) in order to take account of any circumstances giving rise to an increase in the credit risk incurred by the collateral taker as determined by reference to objective criteria relating to the creditworthiness, financial performance or financial condition of the collateral provider or other person by whom the relevant obligations are owed;

(iii) to the extent permitted by the non-Convention law, in any other circumstances specified in the collateral agreement.

(b) a right to withdraw collateral securities or other assets on providing collateral securities or other assets of substantially the same value,

the provision of securities or other assets as described in paragraph (a) and paragraph (b) shall not be treated as invalid, reversed or declared void solely on the basis that they are provided during a prescribed period before, or on the day of but before, the commencement of an insolvency proceeding in respect of the collateral provider, or after the relevant obligations have been incurred.

2. - A Contracting State may declare that paragraph 1(a)(ii) does not apply.

*Article 32*

*[Declarations in respect of Chapter VI]*

1. - A Contracting State may declare that this Chapter shall not apply under its non-Convention law .

2. - A Contracting State may declare that under its non-Convention law this Chapter shall not apply –

(a) in relation to collateral agreements entered into by natural persons or persons falling within such other categories as may be specified in the declaration;

(b) in relation to intermediated securities which are not permitted to be traded on an exchange or regulated market;

(c) in relation to collateral agreements which provide for relevant obligations falling within such categories as may be specified in the declaration.

## **CHAPTER VII – FINAL CLAUSES**

### *Article X* *[Applicability of Declarations]*

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

## APPENDIX 3

<i>UNIDROIT – Study– LXXVIII - Doc. 57 Preliminary Draft Convention on substantive rules regarding intermediated securities (November 2006)</i>	<i>UNIDROIT – Study– LXXVIII - Doc. 42 Preliminary Draft Convention on substantive rules regarding intermediated securities (March 2006)</i>
Chapter I – Definitions, scope of application and interpretation	Chapter I – Definitions, scope of application and interpretation
Article 1	Article 1
Article 2	Article 2
Article 3 (new)	
Article 4	Article 3
Chapter II – Rights of the account holder	Chapter II – Transfer of intermediated securities
Article 5	Article 9
Article 6	Article 10
Chapter III – Transfer of intermediated securities	Chapter III – Rights of the account holder
Article 7	Article 4
Article 8	Article 5
Article 9	Articles 4(6) and 5(8)
Article 10	Article 5(7)(b)
Article 11	Article 8
Article 12	Article 7
Article 13	Article 6
Article 14 (new)	
Chapter IV – Integrity of the intermediated holding system	Chapter IV – Protection mechanisms of the intermediation system
Article 15	Article 11
Article 16	Article 12
Article 17	Article 15
Article 18	Article 16
Article 19	Article 17
Article 20	Article 18
Article 21	Article 19
Article 22	Article 20
	Article 21 (deleted)
Article 23	Article 22
Chapter V – Relationship with issuers of securities (new)	
Article 24	Article 13
Article 25	Article 14
Chapter VI – Special provisions with respect to collateral transactions	Chapter V – Special provisions with respect to collateral transactions
Article 26	Article 23
Article 27 (new)	
Article 28	Article 24
Article 29	Article 25
Article 30	Article 24(4)
Article 31	Article 26
Article 32	Article 27
Chapter VII – Final Clauses (new)	
Article X (new)	