



**UNIDROIT COMMITTEE OF GOVERNMENTAL EXPERTS FOR
THE PREPARATION OF A DRAFT CONVENTION ON
SUBSTANTIVE RULES REGARDING INTERMEDIATED
SECURITIES**

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Working paper regarding "Transparent Systems"

(prepared by Chairs of the Working Group)

1. Purpose of the Working Paper

At the second session of the UNIDROIT CGE on Intermediated Securities in March 2006, when discussing the provision on prohibition of upper-tier attachment, questions on the application of this rule in so called "transparent systems" led to a broader discussion on the application and interpretation of the draft Convention in such systems. An informal Working Group was set up for considering, in particular, the rule prohibiting upper-tier attachment. The Working Group could not, however, come to conclusions on how to deal with the specificities of such systems (Doc. 43, App. 9). In the end of the session the plenary agreed to continue the work on transparent systems intersessionally.

The intersessional work concentrated on questions relating to the nature of transparent systems, in particular, which entity is regarded as "intermediary" and "relevant intermediary" in different systems, and to the prohibition of upper-tier attachment. On the basis of contributions by delegations the UNIDROIT Secretariat prepared a Working Paper (Doc. 44) where transparent systems are described and categorised in three different groups. In addition, the paper deals with some specific problems of each of these groups as well as draws some preliminary conclusions.

Doc. 44 was presented at the third session of the CGE in November 2006 but no thorough discussion took place. The plenary agreed on additional intersessional work chaired by Finland and Colombia. This work should aim at deepening the analysis of legal and operational arrangements under transparent systems and examining by which means such systems could be linked to the mechanisms of the draft Convention (Doc. 57) without disrupting its harmonising effect. The report of the Working Group will be presented at the fourth session of the CGE in May 2007 being one of the central topics to be discussed.

The purpose of this Working Paper is to provide a basis for this new additional work. The following includes a presentation of specific questions relating to transparent systems that have been taken up so far during the work. Moreover, in an annex to this Working Paper, there are examinations of the draft Convention from the point of view of the Finnish and Colombian system. In these examinations those provisions that might pose problems of application are identified. In addition, some solutions are proposed.

2. Specific questions relating to transparent systems

2.1 Document 44

Summary of the document

In Doc. 44 transparent systems are roughly described, in functional terms, as

“systems, where there are two or more entities involved in the holding chain (between the issuer and the investor) and where at the top level holdings of all lower tier account holder’s interest in intermediated securities are evidenced, in particular by means of maintaining accounts/sub-accounts for each of those lower tier account holders”.

It is underlined that the definition should not be understood as addressing the question of direct relationship between the investor and the issuer.

Doc. 44 includes descriptions of several transparent holding patterns. There are transparent systems throughout the world and different jurisdictions have chosen to base their new legislation on holding securities through such a system. It is also important to note that in many cases holding systems appear to be “mixed systems”, i.e. part of the holding chain is transparent while another part is not. Non-transparent holding is especially necessary for cross-border securities transactions as well as for foreign investors.

In Doc. 44 transparent systems are grouped into three categories. In the *first* category, the upper level (the CSD) maintains accounts in the name of the bottom account holder. The “entity in the middle” merely operates these accounts. In the *second* category, the upper level (the CSD) maintains accounts in the name of the “middle entity” but these accounts are divided in sub-accounts for each account holder (client) of the “middle entity” reflecting each client’s holdings. The *third* category covers systems where there is an account at the level of the CSD in the name of the “middle entity” reflecting the total amount of securities held by the middle entity on behalf of its clients. The middle entity in turn maintains separate accounts for its account holders (clients). Account information is permanently or regularly consolidated between both levels of accounts which enables the CSD at all times to determine exactly what the client of the middle entity has in its account.

The difference between these categories lies in the functions of the “middle entity” and the account structure, i.e. the question is whether or not the middle entity is the “relevant intermediary” and between which parties a securities account exists for the purposes of the draft Convention. These issues concern, in particular, definitions in Article 1(c), (d), (e) and (g).

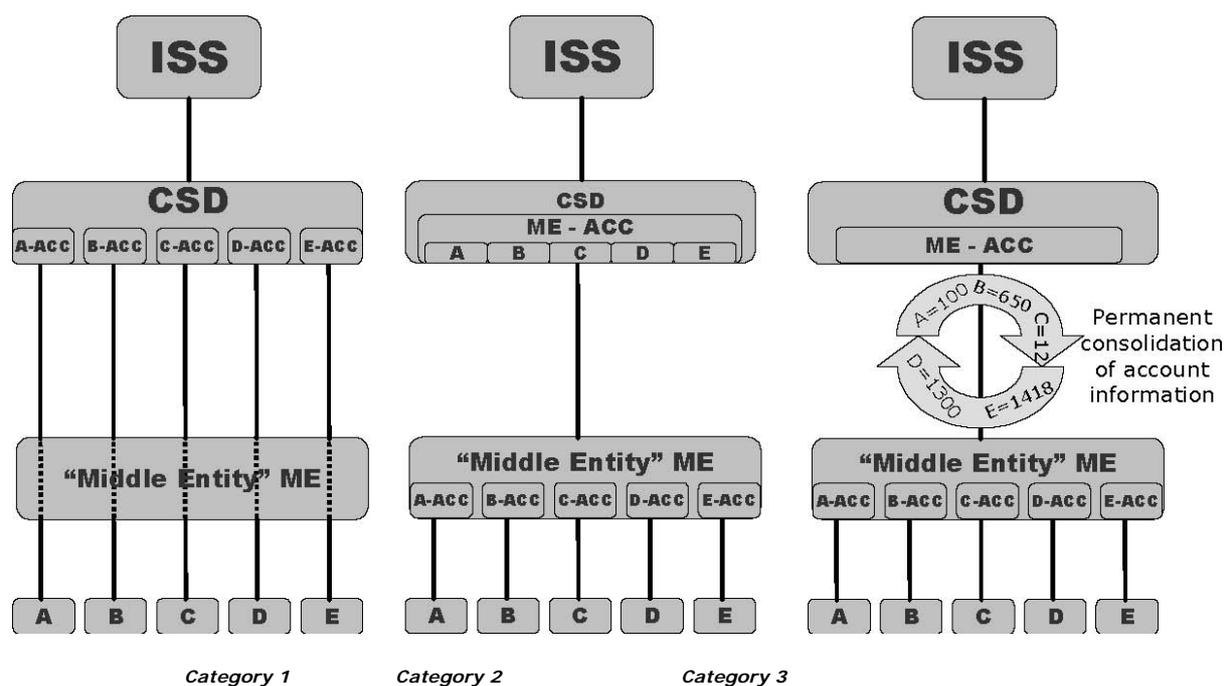


fig.1

According to Doc. 44, for systems belonging to the *first* category, the central issue to be clarified in the draft Convention relates to the question on who is the relevant intermediary. Since the accounts are directly maintained in the name of the bottom account holder by the CSD, it is concluded in Doc. 44 that the CSD should be the relevant intermediary. The middle entity, an account operator, operates such accounts acting as a service interface, and additional records on investors' holdings maintained by them are not regarded to have any legal effect. As one method to solve these issues, an approach similar to the Hague Securities Convention is proposed. The relevant provisions are the following:

Article 1-4. Subject to paragraph (5), a person shall be regarded as an intermediary for the purposes of this Convention in relation to securities which are credited to securities accounts which it maintains in the capacity of a central securities depository or which are otherwise transferable by book entry across securities accounts which it maintains.

Article 1-3. A person shall not be considered an intermediary for the purposes of this Convention merely because –

- a) it acts as registrar or transfer agent for an issuer of securities; or*
- b) it records in its own books details of securities credited to securities accounts maintained by an intermediary in the names of other persons for whom it acts as manager or agent or otherwise in a purely administrative capacity.]*

Moreover, for the first category systems, Doc. 44 takes into consideration the fact that the responsibility for "maintaining" of the securities account with the CSD is somewhat shared between the CSD and the middle entity (the account operator). It is the account operator which, on the basis of specific legislation, makes entries in the securities account with the CSD according to the instructions of the account holder. As one alternative it is considered that the draft Convention could broadly interpret that the account operator is acting on behalf of the CSD. Another possibility would be to recognise the role of the account operator explicitly, for instance by providing that certain provisions concerning the relevant intermediary may have relevance to account operators or other corresponding persons, if so provided by the non-Convention law.

With respect to systems of the *second* and *third* category, it is concluded that the middle entity (participant in the CSD) is the relevant intermediary for the lower-tier account holder. According to Doc. 44, such systems can, consequently, be regarded as falling within the regular scope of the draft Convention so its provisions could be applied without further modification or clarification. The only problem relating to these systems is whether upper-tier attachment should be possible, as it is often the practice. Representatives for the systems belonging to these groups have suggested that a prohibition on upper-tier attachment should not apply in certain systems or to certain entities. In Doc. 44 it is considered that this issue could be clarified by an exemption that the prohibition of upper-tier attachment will not apply in transparent systems where there is full knowledge and control of the account holders and the disposition of securities maintained in securities accounts. This could be done by an express exception, opt-out provision or by a declaration method.

Comments on the document

The descriptions and conclusions presented in Doc. 44 have not been discussed or approved by the plenary. The document requires, therefore, a careful consideration.

First of all, the document takes into account only those systems that took part in the transparent systems work at that time. Thus, it is possible that not all transparent systems are included.

Secondly, it seems that more thought should be given to the role of the “middle entity” in different categories. In systems belonging to the first category it is clear that the middle entity acts as an account operator managing the securities accounts of the bottom account holders with the CSD. However, other systems may work in the similar way, too. For instance, even though in the second category systems the formal structure of the securities accounts held at the CSD is different from the first category systems, the relevance of the securities accounts at the CSD as well as the role of the middle entities can be comparable. Therefore, it is possible that the clarifications that are proposed for solving the uncertainties relating to the first category systems (see Doc. 44 and Annex 1 to this Working Paper) could have more general relevance.

2.2 Additional issues

The UNIDROIT project on intermediated securities has from the beginning concentrated, in particular, on questions relating to multi-tiered holding where securities accounts are held in the names of intermediaries. This starting point very often influences the purpose and wording of the provisions of the draft Convention. Therefore, it is not surprising that some provisions raise questions when applied to other kinds of systems.

The following includes a non-exhaustive presentation of other additional issues that have been taken up so far at the plenary or otherwise during the work on transparent systems. These questions have not yet been thoroughly dealt with but it is the aim of this working paper to provide basis for such discussion as well as for revealing any new questions.

CSD as the highest tier

There have been some concerns on how Articles 19, 21 and 22 relating to sufficient holding, allocation and loss sharing are to be applied to transparent systems, in particular to the CSD level. The main purpose of these provisions is to protect account holders against shortfalls and insolvency of an intermediary. In the following, some general as well as more technical considerations on this issue are presented. It is important to emphasise that they are only relevant when the CSD is below the issuer (i.e. an issuer CSD).

The difficulty in understanding these provisions may partly be related to the assumption that an intermediary itself holds securities for its account holders or holds intermediated securities at an upper-tier level. It is not clear how this assumption is meant to be applied to the CSD whose role is in many ways specific compared to other intermediaries. First of all, intermediated securities are created and recorded at the CSD in the first place, that is to say that securities enter the intermediated holding system through the CSD. This logically affects the issuer CSD's role as an intermediary since it is in all holding systems the highest tier below the issuer. Thus, there is no upper tier intermediary maintaining a securities account for the CSD, except in cases where the CSD deals internationally. Secondly, it is typical, at least for transparent systems, that the CSD acts merely as a registrar having no rights or interest on issued securities. The CSD does not have the right to use such securities for its own purposes and they do not form part of the property of the CSD which could be distributed to its creditors. For these reasons, at the domestic level there appears to be no real risk that the CSD could cause damage to its account holders by using their securities at an upper level.

Moreover, an important additional aspect should be taken into consideration. It is noteworthy that the CSD keeps an issue account, and a related question arises as to whether or not it can be interpreted as corresponding with upper-tier holding for the purposes of the draft Convention. It can also be recalled that the new Article 3 excludes from the scope of the draft Convention "reconciliation of securities conducted by central securities depositories" but the exclusion is against the issuer only. As concerns Article 19, this comparison might seem possible because the amount of securities originally recorded to the issue account has to correspond to the amount of securities credited to accounts with the CSD. However, in making such an analogy, it should be noted that an issue account differs from a securities account and the way in which such accounts are used may vary from system to system.

The comparison in relation to Articles 21 and 22 on the allocation of securities and loss sharing seems more difficult. Article 21 establishes two alternative methods to allocate securities at an upper level between account holders and an intermediary, the first is by allocating all securities to account holders and the second is by segregating securities for the benefit of particular account holders or of account holders generally. It is not clear what this provision means as concerns account holders of the CSD. It seems doubtful whether segregation, in particular of an issue account, can actually be used for allocating securities between account holders and the CSD. Furthermore, since segregation affects the way in which shortfalls are allocated between account holders, it should be noted that if no segregation has been effected, any loss would be shared between account holders in accordance with Article 22.2.b, i.e. all account holders would bear the loss equally. This conclusion might also raise policy problems in different systems. This result, however, can be avoided in practice since the loss sharing rule is subject to any applicable rule in insolvency proceedings as well as the uniform rules of a settlement system. In principle, though, a clarification of the applicability of Article 22 to the CSD as the highest tier seems necessary. This is so even though an insolvency of the CSD and shortfalls are highly unlikely in transparent systems where matching debits and credits and traceability are key elements.

In summary, there is a need to discuss and clarify whether Articles 19, 21 and 22 are to be applied to the issuer CSD level in the first place. If so, the resulting question is by which means the purpose of these provisions could be satisfied at this level as well as whether and to what extent an issue account corresponds with an upper-tier level for the purposes of the draft Convention. Finally, it is extremely important to stress that even though the uncertainties outlined above concern transparent systems in particular, they relate generally to all holding systems due to the role of the issuer CSD as the highest tier.

Position of issuer of securities

Paragraph 1 of Article 24 requires Contracting States to recognise holding through intermediaries when securities are traded in financial markets. Paragraph 2 provides that Contracting States should recognise holding through a person acting in his own name on behalf of others as well as permit such a person to exercise voting and other rights in different ways if securities of same description are held for different account holders. Uncertainty has been raised with respect to the applicability and effect of this provision on transparent systems where the identity of the bottom account holder is always known and where the rights attached to securities are solely conferred on that account holder.

Concepts of debits and credits

For some transparent systems concepts of debit and credit appear to be problematic. It has been proposed that the draft Convention should include an express reference that debits and credits must be in accordance with the non-Convention law. In some transparent systems a transfer of ownership is only perfected upon transcription of the transaction in the issuer's books or at the depositary level.

Netting

The broad wording in Article 7.5 "may be effected on a net basis" has raised concerns since in some transparent systems, due to the requirement of segregated accounts and complete identification of final investors, netting at the level of an intermediary is not possible. Therefore, it has been suggested to clarify that the provision is subject to the non-Convention law and the rules of a settlement system.

3. Problems and their solutions

To be completed at a later stage.

APPENDIX**Examination of the draft Convention on Intermediated Securities**

In the following, the draft Convention on Intermediated Securities adopted by the CGE at the meeting in November 2006 (Doc. 57) is examined technically, article by article, by Finland and Colombia. All participants are invited to prepare a similar examination on the basis of their system and to add it into the text below under the relevant provisions by using revision marks.

*General***Finland**

Examination below merely covers the so called investor specific accounts which are kept in the name of the bottom account holder with the CSD (category 1, see Doc. 44 and the Working Paper).

There are also so called omnibus accounts for foreign investors at the CSD which are kept in the name of an intermediary and which usually contain securities of several owners. Since omnibus accounts are not transparent in the meaning of the definition used in this work and the draft Convention can be applied to them without further modifications, they are not dealt with in this paper. This is also the case where securities issued abroad are held in investor specific accounts with the CSD through an international link. Yet, the following comments relating to the role of an account operator with respect to an investor specific account are relevant in such cases too. Consequently, paying attention to different holding systems is, in our view, important because this ensures that the draft Convention can be applied both to domestic and foreign securities.

Colombia

In the Colombian system the beneficial owners are represented directly on the books of the CSDs which constitute the official records of ownership. Participants (Account Operators) in the market administer accounts within the CSDs in the name of each beneficial owner. Securities positions are held within individual segregated accounts in the beneficial owner's name (even for a participant's own positions), where participants can provide instructions only for their own portfolio or the portfolio administered by them on behalf of their clients.

For book-entry holdings only those debits and credits affected within the CSD accounts are recognized as being legally binding and representative of ownership transfer. Where one of the CSDs does not act as registrar for a particular security, the issuer (or their designated agent) will perform this role. For securities on deposit with a CSD however, only that CSD has the capacity to execute changes in ownership. The issuers' records are considered supplementary to those of the CSD.

*Article 1**[Definitions]*

(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;

(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;

(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;

Finland and Colombia

Examination

Definitions of the draft Convention are generally speaking neutral enough to be applied without difficulties to investor specific accounts. The only unclear issue relates to the specific role of the CSD as well as account operators with respect to these accounts. It is crucial for the functioning of the Finnish and Colombian systems that the relevant intermediary for investor specific accounts is the CSD.

Yet, “maintaining the securities account” is somewhat shared between the CSD and the account operator since even though investor specific accounts are with the CSD, it is often in practice account operators that manage these accounts according to the instructions of account holders. In order to hold securities an account holder needs to use the services of an account operator, so the account holder cannot directly instruct the CSD. Moreover, the account operator is fully responsible for any errors in managing the accounts (i.e. liability to correct erroneous entries in accounts, liability in damages). Consequently, provisions of the draft Convention that are addressed to an intermediary/the relevant intermediary may have relevance to the CSD or to the account operator or both depending on the provision and circumstances of the case.

Provisions where the above question arises are specifically taken into consideration in this examination. As regards Article 1, this question arises in the definition of “designating entry”, which poses problems of application as it is not the CSD that complies with the instructions but the account operator.

The definition of “account agreement” does not apply to investor specific accounts since there is no contractual relationship between the CSD and the investor. The rights and obligations of both the CSD and an account operator are based largely on specific legislation. In our view, this is compatible with the Convention, i.e. that the Convention does not require an account agreement with the relevant intermediary.

Proposals

According to our interpretation, it is clear that the CSD can be regarded as an intermediary or relevant intermediary for the purposes of the draft Convention. In order to avoid any deviation from the Hague Securities Convention, an explicit clarification along the lines of that Convention would be welcomed (see earlier proposals in the Working Paper and Doc. 44). The issue could be clarified by adding a specific paragraph in Article 1 (or in Article 3 on the CSD).

Similarly, it would be good to ensure, in the same way as in the Hague Securities Convention (see earlier proposals in the Working Paper and in Doc. 44), that books/records that account operators may keep for themselves on account holders’ securities in investor specific accounts with the CSD are not regarded as securities accounts for the purposes of the Convention.

Our main concern is that the draft Convention does not recognise that “maintaining of the securities account” can be shared. In our view, the most appropriate way would be to clarify by a generally worded provision that certain provisions concerning the relevant intermediary may have relevance/be applied to account operators or other corresponding persons, if and to the extent provided by the non-Convention law. In addition, if necessary, an account operator could be defined.

This solution would clearly enhance legal certainty, and it cannot be regarded as being inconsistent with the principles of the draft Convention, for example, on the basis of an argument that there should be one relevant intermediary only with respect to one account. The fact that two different entities can fulfil the obligations under the draft Convention with respect to one account/account holder does not create any difficulties for the Convention dealing with substantive rules.

We are, however, open to other alternatives if the above proposal is not acceptable. But, interpreting an account operator as an agent of the CSD (see earlier proposals in the Working Paper and Doc. 44) would not fit well with the Finnish or Colombian rules, as the account operator independently bears the responsibility for errors and omissions in its operations. The CSD does not have subsidiary responsibility for the damage caused by an account operator. However, another possibility could be to regard an instruction given by the account holder to the account operator as an instruction to the CSD. So if an account operator is used, an instruction is given to the CSD through an account operator. This might be a compromise way even though it does not fully fit with nor cover the role of the account operator (or of the CSD).

The interpretation that “account agreement” is not required could be clarified in the Explanatory Report.

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.

Finland and Colombia

Examination

The aim of the provision can be seconded. Currently, the provision deals only with the activities of the CSD that are excluded from the scope of the draft Convention. In our view, the provision could be expanded so as to cover other questions related to the CSD, too. For instance, the clarification proposed earlier under Article 1 that the CSD can be regarded as an intermediary and, thus, be in the scope of the draft Convention, could be such an issue.

In addition, as it will be later explained (see Articles 19, 21 and 22), the provision is linked with the question on whether or not reconciliation of securities conducted by the CSD may have relevance in relation to account holders. In other words, the question is whether or not and to what extent an issue account kept by the CSD may be regarded as an upper tier holding for the purposes of provisions where comparison of information between different levels of holding is required. This question is relevant in particular for one-tier holding systems where the securities accounts of the bottom account holders are with the CSD and there is no upper-tier intermediary above the CSD. Yet this question is more general in nature and is relevant for all holding systems where the CSD is the highest tier.

There is also a question whether or not it should be allowed in the draft Convention, in the same way as is already provided for the rules of a settlement system, that rules of the CSD may cover some questions if permitted by the non-Convention law. It is important to take into account that the provisions of the draft Convention relating to securities settlement systems may be applied to the CSD, too. In practice, many CSDs operate a settlement system in addition to providing

securities accounts. The role of the operator of a settlement system on the one hand and the role of an intermediary on the other can be separated, at least in abstract. To avoid ambiguities, the status of the rules of the CSD should be clarified in the same manner as the rules of a settlement system, given also the fact that different rules cannot easily be applied in practice depending on whether or not an entry is made during a settlement.

Proposals

This provision could be expanded so as to cover all questions relating to the CSD. For example, it could clarify that the CSD can be regarded as an intermediary, and additionally recognise the role of an account operator (another way is to deal with these questions in Article 1). Moreover, if necessary, it could be recognised that the uniform rules of the CSD, in the same way as the rules of a settlement system, can be applied, if and to the extent permitted by the non-Convention law (a general rule in Article 3 or a reference in different provisions to the CSD rules, where necessary).

As to the relevance of an issue account, see Articles 19, 21 and 22.

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.

Finland and Colombia

Examination

The only difficulty with this provision is the role of an account operator. This issue concerns paragraph 1.b-c as well as paragraph 2.b-c where there is a reference to the relevant intermediary.

As concerns paragraph 1.b-c with a reference to “by instructions to the relevant intermediary”, the problem lies in the fact that the account holder of the investor specific account does not give such instructions to the CSD but to the account operator. The same problem is reflected in paragraph 2.c concerning the question against who such rights may be exercised.

With respect to paragraph 2.b, according to Finnish and Colombian law, the issuer can entrust the delivery of the payment to the CSD or an account operator. If it is entrusted to an account operator, the responsibility for making the payment is thus transferred to the account operator. An account holder cannot direct a claim against the issuer or the CSD if the issuer has made the payment to the account operator in time.

Finally, it can be added that it is important to Finland and Colombia that the relationship of Article 5 with Article 24 is clear. According to our understanding, the question whether or not a credit of securities to a securities account confers rights on an intermediary acting on behalf of its clients is in Article 5.1.a.ii left to the non-Convention law. As concerns investor specific accounts, all rights are conferred on the bottom account holders and not to the CSD or account operators. Consequently, Article 24 should be interpreted against Article 5.1.a.ii and, thus, as not obliging Contracting States to recognise rights for an intermediary in all cases.

Proposals

The clarification as regards the role of the account operator along the lines proposed earlier (see examination on Article 1) would be helpful for interpretation and application of this provision.

The relationship between Article 5 and 24 as well as their meaning in transparent systems should be explained in the Explanatory Report.

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.

Finland and Colombia

Examination

For exercising certain rights referred to in Article 5.1.a, an account holder of an investor specific account needs the account operator or the CSD. As concerns rights referred to in Article 5.1.b-c, the account holder is dependent on assistance of the account operator managing the account.

Proposals

The clarification as regards the role of the account operator along the lines proposed earlier (see examination on Article 1) would be helpful for interpretation and application of this provision.

*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.

Finland and ColombiaExamination

In Finnish and Colombian book-entry system, acquisition of securities becomes effective against third parties by crediting the securities to the transferee's account and no other steps are necessary. This rule, which is very important for legal certainty, is compatible with Article 7.

With respect to paragraph 5, debits and credits of securities cannot be effected on a net basis to investor specific accounts because this could prevent traceability of transfers. Since paragraph 5 does not appear to be mandatory, there is no problem of compatibility.

Proposals

It might be good to make it clearer that paragraph 5 is not mandatory and is subject to the non-Convention law.

*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. - A 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.

Finland and Colombia

Examination

There are no specific difficulties relating to investor specific accounts. It is an important feature of the Finnish and Colombian book-entry system that all rights and interests should be registered in securities accounts. For this reason, only the method prescribed in paragraph 2.b is sufficient to render the interest 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.

Finland and Colombia

Examination

There are no specific difficulties relating to investor specific accounts.

Article 10

[Evidential requirements]

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

Finland and Colombia

Examination

There are no specific difficulties relating to investor specific accounts.

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.

Finland and Colombia

Examination

In this provision the question on the role of account operator arises. An account holder of an investor specific account does not authorise the CSD but an account operator to make entries. It is also the account operator that is responsible for making the entries as well as correcting possible errors.

The paragraph 2 issues are left to the non-Convention law, and to the extent permitted by the non-Convention law, to the account agreement or the uniform rules of a securities settlement system. In Finland these issues are predominantly prescribed in law, but some of them fall partly into the scope of the rules of the CSD.

Proposals

The clarification as regards the role of the account operator along the lines proposed earlier (see examination on Article 1) would be helpful for interpretation and application of this provision.

In addition, it might be worthwhile to consider recognising generally the role of the rules of the CSD, to the extent permitted by the non-Convention law (see also Articles 3, 19, 20, 22).

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.

Finland and Colombia

Examination

No specific problems with respect to investor specific accounts seem to arise.

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.

Finland and Colombia

Examination

No specific problems with respect to investor specific accounts seem to arise.

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.

Finland and Colombia

Examination

The scope and purpose of this provision is not very clear, but since the CSD does not have any rights to use securities credited to investor specific accounts, the provision does not pose problems in practice.

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.

Finland and Colombia

Examination

This provision does not pose problems for investor specific accounts.

In Finland and Colombia, segregation has traditionally been the method in which the assets of an investor are protected. With respect to investor specific accounts, this principle is fully safeguarded since they are segregated from the property of the CSD as well as from all other account holders. There is no doubt that the CSD acts as a registrar having no rights or interests on securities credited in the accounts of account holders. It can also be mentioned that in practice an insolvency of the CSD should be very unlikely.

Likewise, account operators do not have any rights on securities credited to investor specific accounts they manage for their clients. Consequently, an insolvency of an account operator does not affect the rights of account holders.

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.

Finland and Colombia

Examination

No specific difficulties that would relate to investor specific accounts seem to arise.

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.

Finland and Colombia

Examination

Investor specific accounts are held with the CSD so it is the relevant intermediary. The fact that account operators manage these accounts does not make them relevant intermediaries for the purposes of the draft Convention. In addition, it is important that books/records that account operators may keep for business purposes and which merely reflect the investor specific accounts are not regarded as securities accounts in the meaning of the Convention since this could create uncertainty as to which of the accounts would take precedence. It should be clear to which account the legally relevant entries are made.

Proposals

The clarification that the CSD can be regarded as an intermediary would be helpful for applying this provision. Similarly, the exclusion of the relevance of books/records of an account operator would make it clear that there are no lower tier securities accounts below the CSD. (See examination on Article 1.)

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.

Finland and Colombia

Examination

As concerns investor specific accounts, this provision should cover account operators since instructions are given to them. The CSD, even though it is the relevant intermediary, does not in this position take orders from account holders (unless the CSD acts as an account operator).

Proposal

The clarification as regards the role of the account operator along the lines proposed earlier (see examination on Article 1) would be helpful for interpretation and application of this provision.

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 the requirements of those paragraphs 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.

Finland

Examination

The provision sets up a requirement for the intermediary, for each description of securities, to hold sufficient amount of securities either in paper form or in a securities account at the upper level. It is to note that in Finland intermediated securities are dematerialised and there is no upper tier intermediary above to maintain an account for the CSD. So, literally, comparison between amounts of securities held with another intermediary is not possible.

However, the CSD keeps an issue account, and the amount of securities credited to the securities accounts with the CSD has to correspond with the amount of securities recorded in the issue account in the spirit of double entry bookkeeping. Functionally, the issue account might therefore correspond to an upper tier holding. Yet, legally the issue account does not have the same characteristics as a securities account and it serves a different purpose. The question, therefore, is if the upper-tier holding in the meaning of the draft Convention, refers only to holding in securities accounts, or if it analogically covers an issue account.

In principle, we think that the purpose of the provision could be applied to the CSD provided that the obligation refers to the monitoring of the issued amount of securities rather than to actual holding. It is, however, unclear whether the provision in its current form covers this aspect.

It is also noteworthy that although the uncertainty above is most relevant for one-tier transparent holding system where the accounts of the bottom account holders are with the CSD, it is of general importance for all holding systems where the CSD is the highest tier of holding.

Paragraph 3 clarifies the prevailing role of the non-Convention law, or, to the extent permitted by the non-Convention law, the uniform rules of a securities settlement system. This leads to a question if and to what extent the rules of the CSD could have the same relevance.

Proposals

The applicability of this provision to the CSD as the highest tier of holding should be discussed and possibly clarified.

In addition, if necessary, it could be recognised that the uniform rules of the CSD, in the same way as the rules of a settlement system, can be applied, if and to the extent permitted by the non-Convention law.

Colombia

Examination

Although Colombian CSDs keep issue accounts, said accounts are not used to make debits or credits of securities. Therefore, according to our understanding of the definition of securities accounts (Article 1.c), issue accounts must not be regarded as securities accounts. If this interpretation is feasible, then the CSD is not required to hold securities in the issue accounts in the same aggregate number and amount as in securities accounts maintained by it.

Proposals

Further discussion of issue accounts shall be held in order to provide the clarifications necessary for an accurate application of this provision

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 8

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

Finland and Colombia

Examination

In relation to investor specific accounts the provision should also be relevant to account operators because they are obliged and liable in cases their services are used. The CSD does not bear subsidiary responsibility for damage caused by them. If an account operator is not able to pay compensation, it will be paid by a special fund. The obligations and liability of the CSD and of an account operator are prescribed by law. The rules of a settlement system as well as the rules of the CSD may also have relevance.

Paragraph 4 applies to the operator of the settlement system to whose securities account securities are credited. In the current Finnish system, with real time gross settlement process connected with investor specific accounts, securities are not credited to the securities account of the operator of the settlement system because entries are directly made between the securities accounts of the relevant parties.

Proposals

The clarification as regards the role of the account operator along the lines proposed earlier (see examination on Article 1) would be helpful for interpretation and application of this provision.

Moreover, if necessary, it could be recognised that the uniform rules of the CSD, in the same way as the rules of a settlement system, can be applied, if and to the extent permitted by the non-Convention law.

The wording of paragraph 4 should be modified so as to cover also operators of settlement systems to whose securities accounts securities are not credited during the settlement.

Apart from transparent issues, we find it necessary to remark that the new wording of this provision is not very clear. For example, in our view, it should be made clearer that paragraphs 2-4 are subject to paragraph 1.

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.

Finland and Colombia

Examination

Investor specific accounts (as well as each omnibus account of participants) are fully segregated at the CSD level so there is no risk of commingling the assets of account holders and that of the CSD. Neither is there a risk of commingling the assets of different account holders. From a legal point of view it is clear that the CSD acts as a registrar and, thus, has no rights or interest on securities that are credited to the accounts it maintains for account holders.

Article 21 deals with the allocation of securities between account holders and an intermediary giving two alternative methods, allocation of all securities to account holders (paragraph 1) or segregating securities (paragraph 4). However, the provision does not concern allocation or segregation at the level of the relevant intermediary, but sets forth such a requirement for the upper tier level. Since there is no upper tier intermediary with whom the CSD would be holding securities, this provision cannot easily be applied to investor specific accounts. Consequently, the uncertainty with respect to the relevance of an issue account kept by the CSD arises in this provision in the same way as explained under Article 19.

Article 21 has to be read together with Article 22 since the allocation rules have an important role in the rare cases where a shortfall arises and the CSD becomes insolvent. The method in which the protection of account holders' rights is arranged at the upper level under Article 21, affects their position in loss sharing.

In principle, it seems there are three possibilities to interpret this Article:

1. The provision is not intended to be applied at the CSD level in the first place.
2. The provision is intended to be applied at the CSD level, but is interpreted to mean that securities accounts at the CSD form the highest tier and the requirements for allocation and segregation would only apply to such accounts. Other issues would be left to the non-Convention law.
3. The provision is intended to be applied at the CSD level the interpretation being that an issue account at the CSD corresponds to the upper tier level.

If the third interpretation above is accepted, an obligation to allocate or segregate securities of account holders could be interpreted to apply to an issue account. This, in turn, raises questions whether such a requirement is at all feasible or necessary for protecting account holders at the CSD. No rights or interests can be recorded in issue accounts and it is not credited and debited in the meaning of the draft Convention. Therefore, we would prefer the second interpretation which would require allocation or segregation of securities accounts at the CSD only. In our view, the

current segregation of securities at the CSD is an adequate way to protect rights of account holders.

Proposals

The applicability and relevance of this provision to the CSD as the highest tier should be discussed and, if necessary, clarified.

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.

Finland and Colombia

Examination

There is no explicit legislation on shortfalls as they should not occur in the centralised CSD system where matching of corresponding debits and credits is required and strictly controlled. Errors and discrepancies relating to entries to securities accounts are traced and corrected. Any situations which could cause discrepancy are to be solved by traditional property law rules or by compensation, which is compatible with the draft Convention since national ways to deal with errors are permitted. Moreover, an insolvency of the CSD should be unlikely in practice, which is a prerequisite for application of this Article.

Despite the above, it is important to point out that Article 22 and Article 21 are connected and they should be examined as a whole. The manner in which a shortfall should be borne by account holders seems to depend primarily on whether or not the securities are held segregated by an intermediary. When applied at the CSD level, where there is no upper-tier intermediary, the same uncertainty in relation to the relevance of an issue account as is explained in Article 21 arises. If no segregation or other arrangement has been effected, the loss sharing rule according to which all account holders share the loss equally should be applied. As the loss sharing rules generally are subject to rules applicable in insolvency proceedings as well as rules of a settlement system, this result would not pose real problems. In principle, though, it would be good to discuss and clarify the role of an issue account and the arrangements needed for segregation. This uncertainty concerns all holding systems where the CSD is the highest tier of holding although it is most relevant for the one-tier transparent systems.

According to paragraph 3, the uniform rules of a settlement system may also include rules on shortfall. This leads to a question if and to what extent the rules of the CSD could have relevance.

Proposals

The applicability and relevance of this provision to the CSD as the highest tier should be discussed and, if necessary, clarified.

Moreover, if necessary, it could be recognised that the uniform rules of the CSD, in the same way as the rules of a settlement system, can be applied, if and to the extent permitted by the non-Convention law.

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.

Finland and Colombia

Examination

In Finland listed securities are incorporated in the book-entry system with the CSD. Securities can be held through investor specific accounts or omnibus accounts. They are, therefore, held through an intermediary in both these cases. According to our interpretation, the plural form “intermediaries” in paragraph 1 does not refer to a non-transparent multi-tiered holding only. Paragraphs 2 and 3 in turn seem not relevant for investor specific accounts which are by law opened only in the name of the bottom account holder. In other words, there is no “person acting in his own name on behalf of another person”.

Hence, it seems that, for the most part, this provision deals with issues that do not concern transparent systems where the identity of the bottom account holder is always known and where the rights attached to securities are conferred and exercised only by that account holder. In our view, such an interpretation is compatible with the draft Convention taken into account that Article 5.1.a.ii confers rights on an intermediary only if permitted by the non-Convention law.

Proposals

The provision does not pose difficulties in investor specific accounts provided that our interpretation on the content of the provision as well as on its relationship with Article 5 is correct. It would be helpful if this relationship were explained in the Explanatory Report.

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.

Finland and Colombia

Examination

The provision is not problematic for investor specific accounts. As a main rule the account holder of an investor specific account is regarded to have direct rights in relation to the issuer of securities. The fact that the investor specific account is held with the CSD (and that the account operator manages the account) does not alter the relationship between the issuer and the investor.