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

(submitted by the Delegation of Denmark)

1. Preservation of non-Convention law on the conditions for effective control agreements and designating entries ("positive" and/or "negative" control). Art 8, cf. Art 1(k)-(l).

Proposal for amendment of Art 8(4)(a):

> "(a) the condition specified in any or more of the sub-paragraphs (a) to (c) of paragraph 2 is sufficient to render an interest effective against third parties and may in a declaration relating to paragraph 2(b) specify to what extent its non-Convention law requires that a designating entry must have the effects listed in Art 1(l)(i), Art 1(l)(ii) or both and may in a declaration relating to paragraph 2(c) specify to what extent its non-Convention law requires that a control agreement must have the effects listed in Art 1(k)(i), Art 1(k)(ii) or both;

The proposal for amendment is made in order to clarify in the text that non-Convention law is still decisive with respect to whether a designating entry (or control agreement as the case may be) must result in "positive control", "negative control" or both in order to have effects against third parties. The current text might be read as saying that if e.g. a control agreement results in "positive control" for the collateral taker such agreement must be given effect against third parties (under the law of a state that has declared under paragraph 2(c)), even if that State´s non-Convention law requires that "negative control" must be obtained for a control agreement to have effect against third parties. In other words, the current text does not make it quite clear that it is up to each State (through declaration) – and not for the parties to the collateral agreement - to decide which kind of control must be established to obtain effects against third parties of an agreement governed by the law of that State.

2. Priority of an interest granted by an intermediary vis-à-vis rights of the account holders of that intermediary (Art 14).

Current text defers the priority of an interest granted by an intermediary (e.g. in an omnibus account) vis-à-vis the rights of the account holders of that intermediary to non-Convention law. This appears to be a too important issue to leave entirely unresolved by the Convention. There is a need to protect a person (e.g. a collateral taker) who receives an interest in an account held by an intermediary against adverse claims of the account holders of the intermediary at least if that person (the collateral taker) did not know or ought to have known that the account was an omnibus account (or other account held for others). Otherwise, the consequence is likely to be that title-transfer (Art 7-acquisition) will be the only way of taking collateral in order to avoid the risk of adverse claims from account holders of the collateral provider (the intermediary). Consequently, it is suggested that Art 14 is drafted as follows.

> "1. Except as provided in paragraph 2, [t]his 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.
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> 2. An interest in an account granted by an intermediary that has become effective under Article 8 has priority over the rights of account holders of that intermediary, if the person that acquired the interest at the time when the interest became effective did not know or ought to have known that the interest was granted in an account that the intermediary held for its account holders. A person is considered to have such knowledge if it follows from the name of the account or by an entry to the account that the account is an omnibus account, a nominee account or an account maintained for others than the account holder."

The last part of the proposed paragraph 2 deals with the issue of deciding whether a person knew or ought to have known that the person acquired an interest in an account held for other others. It is suggested that this is considered to be the case if the account either by the name of the account (e.g. "Client Account no. x.") or by an entry to the account was labeled as omnibus account, nominee account or in other way as maintained for others. Paragraph 2 is not intended to be an exhaustive list of situations, where "bad faith" can be established. In others words a court may find that a person – despite it is not apparent from the account name or from an entry to the account – ought to have known that he received a credit in an account maintained for others, e.g. because the intermediary informed the person that was the case. Finally, it follows from paragraph 1 that even if the person has knowledge that an account is maintained for others (and paragraph 2 consequently does not apply), it does not necessarily result in that person getting lower (junior) priority to the account holders of the intermediary, as this priority is determined by non-Convention law.