



**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 the United States of America)

Observations on Article 15

The United States delegation wishes to offer a suggestion for the clarification of Article 15 of the draft Convention.

Under Convention Article 8, a control agreement (when applicable under the non-Convention law and an appropriate declaration) is a method of “grant[ing] an interest in intermediated securities... so as to be effective against third parties.” This structure might be read to imply that unless one of the Article 8 methods were employed the granting or creation of an interest (other than by a credit under Article 7, of course) would be ineffective against third parties. But Article 9(b) appropriately makes it clear that other methods under the non-Convention law also may have the same effect. Without more, however, Article 15 also raises the implication that other methods of granting an interest under non-Convention law might not be effective in insolvency proceedings of the relevant intermediary. In order to avoid such an implication, we believe that the Convention would benefit from a provision along the lines of Article 30(2) of the Cape Town Convention, which provides:

Nothing in this Article impairs the effectiveness of an international interest in the insolvency proceedings where that interest is effective under the applicable law.¹

This would make the point that Article 8 provides for Convention methods for the acquisition of an interest in intermediated securities to become effective against third parties, but it does not provide that these methods are the exclusive methods. Nor does it provide that an acquisition of an interest through another method under the non-Convention law is not effective against third parties.

¹ Art. 30(2), Convention on International Interests in Mobile Equipment (Cape Town 2001) available at <http://www.unidroit.org/english/conventions/mobile-equipment/mobile-equipment.pdf>.

One approach to address this ambiguity would be to add a new paragraph (b) to Article 15 (the existing text becoming paragraph (a)), such as the following:

Nothing in this Convention impairs the effectiveness of an interest in insolvency proceedings where that interest is effective under the non-Convention law.

Alternatively, it might be sufficient to modify Article 15 so that it would read "... effective against third parties under Article 8 or under Article 9(b) and the non-Convention law..."