



**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 Austria)

1.) It must be noted that in the course of the negotiations an increasing number of items has been subjected to the “**non-Convention law**”.

Therefore it seems appropriate to review what is meant by “non-Convention law”.

Article 1 (m) of the draft Convention provides the following **definition**:

“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”;

Article 2 of the draft Convention to which reference is made by the definition, reads as follows:

“[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” (emphasis added).

The result of the definition is that a “**forum state**” is required to make the definition work.

The general understanding of “forum state” is that it is the state where **a court is located** that has to decide a certain issue. The draft Convention does not give a specific meaning to “forum state” and therefore any reference to “non-Convention law” does not lead to an understanding in which country the Convention applies, unless a court has to decide on an issue. In case no court is called upon to decide an issue, as is the case throughout the Convention, one would not know what the “non-Convention law” is.

This analysis seems **highly unsatisfactory**.

The way forward could be, to **delete** Article 1 (m) and Article 2 of the draft Convention.

In that case all references to the “non-Convention law” would mean a reference to the provisions of substantive law applicable under the rules of international private law.

It seems preferable to provide **more guidance** what the non-Convention law will be.

It seems that in the vast majority of cases it is meant to be the “law of the place where the **intermediary has its registered office**”. In other cases it could be meant to be the “law of a Contracting State” or the “law of the place where the account holder has its residence or registered office”.

Moreover it should be mentioned that there are Articles of the draft Convention containing “non-Convention law” which not necessarily require specification. There are also examples where the “non-Convention law” is irrelevant because it should not be applied anyway. An example for this is Article 7 para 2 which reads: “No further step is necessary or may be required by the non-Convention law”, or Article 9 which preserves “any method provided by the non-Convention law” for the acquisition and disposition of securities or interests therein which is not provided in the draft Convention’s Articles 7 and 8.

Other examples of draft Articles seem difficult to interpret in respect of what is meant by “non-Convention law”. Examples are Article 13 para 5, Article 30 and Article 31 para 1 alinea (a) (iii).

The **final result of this analysis** is that the draft Convention has to be reviewed, discussed and appropriately amended in each case where it speaks of “non-Convention law”.

2.) There are other issues to be clarified:

In **Article 6** it seems required to give more guidance for the interpretation of “action that is not **within its power**”.

Article 7 para 1 and 2 of the draft Convention seems to be repeating **Article 5 para 1 alinea (a)** and **para 2 alinea (a)** of the draft Convention. Perhaps the difference lies only in the use of “acquired” in Article 7 para 1 and “confers” in Article 5 para 1 of the draft Convention.

It seems desirable to further discuss these Articles.