



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

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**Working Group on so called Transparent Systems – Intersessional Work
Comments of the Delegation of the United States of America on the draft Working Paper
on Transparent Systems**

(submitted by the delegation of the United States of America)

The United States delegation wishes to thank and congratulate the Transparent Systems Working Group for providing the committee with an excellent draft report (Doc. 70).

Based on the report and submissions by several delegations it appears that there is a general consensus that the draft Convention should accommodate, to the extent feasible, the various types of transparent systems for intermediated securities. We share that consensus. However, we question the wisdom and the practicality, at this late date in the process, of extensive revisions of numerous articles as some have suggested. Moreover, given the striking differences among the various forms of transparent systems for intermediated securities, we are skeptical that such revisions would render clarity as opposed to further complexity. We propose, instead, that the committee consider the addition of a provision that would permit a Contracting State to make declarations that would have the effect of explaining and disclosing how the Convention would be applied under the non-Convention law of that state. [A draft of such a provision together with a few others suggested drafting changes are included in the attached Annex A.]

Consider some examples. In a Model 1 system the CSD would appear to act in at least two capacities: as an intermediary for the account holders and as a registrar or transfer agent that keeps the securities register on behalf of the issuer. Indeed, assuming only one CSD operating under the law of a Model 1 Contracting State, it would be the *only* intermediary (thus answering the question as to the identity of the relevant intermediary for purposes such as a creditor's attachment). The account operators that receive instructions from account holders and communicate to the CSD the appropriate book entries to be made to an account holder's account would not be acting as intermediaries, but could be acting as the agent (imposed by law or contract) of the account holders, of the CSD, or both, depending on the details of the system's structure.

A declaration by a Contracting State could clarify such issues and provide guidance for how the Convention would be applied and understood in a given Contracting State. This suggestion should be accompanied by two important caveats, however. The Convention should be specific as to the matters to be contained in a declaration and some formalities for screening declarations in advance of the acceptance of a deposit should be adopted.

Concerning the obligations of an intermediary under the Convention, we suggest that it might be wise to supplement Article 20(1) with an additional provision along the lines of the following new paragraph 1*bis*.

If the substance of an obligation of an intermediary under this Convention is the subject of any provision of the non-Convention law or, to the extent permitted by the non-Convention law, the account agreement or the uniform rules of a securities settlement system, compliance with that provision satisfies that obligation.

We also note the concerns expressed by some in connection with Article 7(5), the provision that addresses netting. Perhaps a revision along the following lines would clarify the intended meaning of paragraph 5.

Nothing in this Convention restricts or limits the effectiveness of debits, ~~Debits and~~ credits or other entries that are effected on a net basis to securities accounts in respect of securities of the same description ~~may be effected on a net basis.~~

Finally, we agree with the suggestions made in the report and in other submissions that the Convention should include provisions along the lines of Article 1(3), (4), and (5) of the Hague Securities Convention. To the extent possible the draft Convention should be consistent with the Hague Convention with respect to the “relevant intermediary” concept. Because the Convention contains many substantive provisions, however, we recognize that some deviations from the Hague Convention’s approach will be necessary in order to accommodate some existing intermediated systems.

ANNEX A

Article 17

[Prohibition of upper-tier attachment]

1. - Subject to paragraph 3, no ~~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.

3. - A Contracting State may, in a declaration -

(a) declare that an attachment under the non-Convention law of that Contracting State must be granted or made against the relevant intermediary and, in addition, against a central securities depository if the declaration:

(i) certifies that the central securities depository is required by the non-Convention law of the Contracting State to maintain and does maintain as a part of its records current information concerning -

(A) the identity and intermediated securities holdings of the account holders of the relevant intermediary; and

(B) the identity and interests of persons whose interests have become effective under Article 9 and, if the Contracting State has made a declaration under Article 8(4)(a), under Article 8, with respect to the intermediated securities or securities accounts of the relevant intermediary's account holders; and

(ii) identifies, by name and address, the central securities depository; or

(b) identify, by name and address, the central securities depository that is the sole person that, under the non-Convention law of that Contracting State, acts in the capacity of the relevant intermediary for purposes of Article 17(1).

[NEW] Article 20bis

[Persons other than account holders and intermediaries]

To the extent permitted or required by the non-Convention law or, to the extent permitted by the non-Convention law, the account agreement or the uniform rules of a securities settlement system -

(a) in connection with the relationship between an account holder and the relevant intermediary, a person that is not acting in the capacity of that account holder may act in the capacity of agent for, or otherwise on behalf of, that account holder;

(b) in connection with the relationship between the relevant intermediary and its account holder, a person that is not acting in the capacity of that intermediary may act in the capacity of agent for, or otherwise on behalf of, that intermediary; and

(c) a person that is not acting in the capacity of an intermediary may be responsible for some but not all duties of that intermediary or may be entitled to some but not all rights of that intermediary.

[NEW] Article XXX

[Declarations concerning application of Convention under non-Convention law]

1. - A Contracting State may, in a declaration –

(a) identify, by name, characteristics, or both, each person that, under the non-Convention law of the Contracting State –

(i) acts in the capacity of an intermediary and also maintains the register of security holders on behalf of the issuers of securities credited to securities accounts maintained by that person as intermediary;

(ii) acts in the capacity of an intermediary and also maintains records of the holdings of securities credited to the securities accounts of account holders maintained by one or more intermediaries other than such person;

(iii) acts in the capacity of a central securities depository or in a similar capacity for similar purposes;

(iv) acts in the capacity of agent for, or otherwise on behalf of, account holders in connection with the relationship between account holders and one or more intermediaries;

(v) acts in the capacity of agent for, or otherwise on behalf of, one or more intermediaries in connection with the relationship between one or more intermediaries and account holders;

(vi) does not act in the capacity of an intermediary but is responsible for some but not all duties of an intermediary or is entitled to some but not all rights of an intermediary;¹

(b) with respect to each person identified by a Contracting State under subparagraph (a)(ii), describe the method by which such person obtains information concerning the holdings of securities credited to securities accounts of account holders maintained by one or more intermediaries other than such person;

(c) with respect to each person identified by a Contracting State under subparagraph (a)(vi), describe the duties for which such person is responsible or the rights to which such person is entitled; and

(d) provide other information, including information concerning the structure and systems for the holding of intermediated securities under the non-Convention law of the Contracting State.

2. - In a declaration by a Contracting State under this article the Contracting State must certify that it has determined that the declaration is necessary in the application of the Convention when the law of the Contracting State is the non-Convention law.

¹ The committee also may wish to consider requiring the declaration to identify persons that act in the capacity of a “securities clearing system” or a “securities settlement system.” However, the declarations mentioned in the respective definitions of those terms may be adequate for present purposes.