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**GOVERNING COUNCIL**  
**91<sup>st</sup> session**  
**Rome, 7-9 May 2012**

UNIDROIT 2012  
C.D. (91) 5(b) and (c)  
Original: French  
April 2012

**Item No. 6 on the agenda:** Transactions on transnational and connected capital markets -

**(b) UNIDROIT Convention on Substantive Rules regarding Intermediated Securities:  
Follow-up work and promotion**

**(c) Principles and Rules Capable of Enhancing Trading in Securities in Emerging  
Markets**

(Memorandum prepared by the Secretariat)

<i>Summary</i>	<i>Official Commentary on the UNIDROIT Convention on Substantive Rules regarding Intermediated Securities and report on promotion and follow-up activities</i> <i>Examination of steps to develop a future legislative guide on principles and rules capable of enhancing trading in securities in emerging markets</i>
<i>Action to be taken</i>	<i>See paragraph 21, below</i>
<i>Mandate</i>	<i>Work Programme 2011-2013</i>
<i>Priority level</i>	<i>Promotion of instruments – No priority</i> <i>Emerging markets – Medium/low</i>
<i>Related documents</i>	<i>Annual Report 2011 (C.D. (91) 2), UNIDROIT 2011 – S78B/CEM/2/Doc. 2</i>

## **I. INTRODUCTION**

1. The UNIDROIT Convention on Substantive Rules for Intermediated Securities (referred to hereafter as “the Geneva Securities Convention”) was adopted at the Final session of the final session of the diplomatic Conference to Adopt a Convention on Substantive Rules regarding Intermediated Securities (Geneva, 5-9 October 2009). At the end of the period specified to verify the text of the Convention and of the Resolutions adopted by the Conference (as to the linguistic changes required to make the texts in the two official languages consistent with one another), those texts became authentic and can be found on the UNIDROIT website.<sup>1</sup>

<sup>1</sup> Convention: <http://www.unidroit.org/english/conventions/2009intermediatedsecurities/convention.pdf>  
Final Act: <http://www.unidroit.org/english/conventions/2009intermediatedsecurities/finalact.pdf>

2. As of today, the Convention has one Signatory State, Bangladesh. In September 2010, the Federal Executive Council of Nigeria (the Nigerian Federal Cabinet) approved that Nigeria should sign the Geneva Securities Convention and the Hague Securities Convention.

3. Since the follow-up work for the Geneva Securities Convention will also be carried out by the *Committee on Emerging Markets Issues, Follow-Up and Implementation* hereinafter: the Committee), this document brings together items 6(b) and (c) of the agenda of the 91<sup>st</sup> session of the Governing Council.

## II. OFFICIAL COMMENTARY

4. In conformity with Resolution No. 2 adopted at the closing of the final session of the diplomatic Conference, the Secretariat, in consultation with the Chairperson and three members of the Drafting Committee and co-ordinated by a Steering Committee, prepared the necessary amendments and additions to the Official Commentary, with a view to reflecting the basic principles and pertinent questions that the diplomatic Conference considered should be dealt with by the Official Commentary. In accordance with the procedure decided by the Conference, the final draft of the Official Commentary was distributed to all States that had participated in the negotiations as well as to the Observers, inviting them to submit any comments they may have. Several States and Observers submitted comments to the draft that involved modifications being made to the text of the Commentary. The Secretariat, always in consultation with the Chairperson and members of the Drafting Committee, therefore continued with the work necessary to finalise the Official Commentary, which was then submitted to the Steering Committee.

5. The final revised version of the Commentary was published by the Oxford University Press in March 2012 and was presented at the second meeting of the Committee on Emerging Markets Issues, Follow-up and Implementation which was held in Rio de Janeiro on 27-28 March 2012. On that occasion, a copy was given to the authors of the Commentary and to the representatives of certain States attending the meeting. The French version of the Commentary for its part will be published in June 2012 by Schulthess (Geneva), LGDJ (Paris) and Thémis (Montreal).

6. In accordance with Resolution No. 2 adopted at the end of the final session of the diplomatic Conference, the UNIDROIT Secretariat is now held to transmit the final revised version of the Official Commentary to all negotiating States and to participating observers at the earliest opportunity. Since the Commentary was published by a commercial publisher, the UNIDROIT Secretariat has only one copy per State at its disposal and has, accordingly, requested each negotiating member State and all participating observers to designate a recipient, failing which the copy will be addressed to the national authority responsible for the relevant member State's relations with UNIDROIT.

## III. DECLARATIONS MEMORANDUM

7. The Secretariat has also prepared a *Declarations Memorandum* concerning a number of practical questions that Contracting States are advised to take into consideration when they sign, ratify, accept or approve the Convention, or adhere to it. The *Declarations Memorandum*, which takes inspiration from the Official Commentary, provides information on the declarations, on their scope, their purpose and their content, as well as on the steps to be taken when they are made. The *Declarations Memorandum* takes into consideration the experience gained by the UNIDROIT Secretariat as Depositary of international conventions, as evinced, for example, from the *Declarations Memoranda* prepared for the Cape Town Convention and its Protocols.

#### IV. PROMOTION OF THE GENEVA CONVENTION

8. In its Resolution No. 3, adopted at the closing of the final session, the Diplomatic Conference requested that UNIDROIT, in its capacity as Depositary of the Convention, make all appropriate efforts, having regard to available resources, to organise activities with a view to promoting awareness and understanding of the Convention and assessing its continued effectiveness in light of relevant contemporary developments in market circumstances and trends in market regulation, and also with a view to encouraging the Convention's early entry into force.

##### A. *Promotion seminars*

9. The Secretariat is doing all it can to promote the Convention, in particular by taking part in conferences and colloquia. Particular mention should be made of the Seminar on the Convention organised by MOFCOM in Beijing from 8 to 11 June 2011, in which the Secretary-General of UNIDROIT participated. It should also be noted that Switzerland (in the person of Ms Monique Jametti-Greiner, member of the Governing Council) both promoted and organised this seminar.

##### B. *Second meeting of the Committee on Emerging Markets Issues, Follow-Up and Implementation*

10. The Secretariat was able, thanks to the support of the Brazilian Securities and Exchange Commission, to call the second meeting of States and observers represented on the Committee on Emerging Markets Issues, Follow-up and Implementation<sup>2</sup> at Rio de Janeiro on 27-28 March 2012 (see the agenda of the meeting reproduced in Annex I). Some 200 people attended the Colloquium held on the first day (see the programme reproduced in Annex II), representing Governments, international organisations and other bodies. With a single exception, all the member States on the Committee were present at the Rio de Janeiro meeting, which it is important to note was also attended by a large number of non-member States.<sup>3</sup> On the second day, the Committee met to discuss the following agenda items: (a) the reception given to the Geneva Securities Convention, in particular in emerging countries; (b) the legislative measures taken to implement the Convention and to incorporate it into domestic law; (c) presentation of the Official Commentary on the Convention; (d) follow-up activities to promote the Convention; and (e) information on the work currently underway at UNIDROIT on netting of financial instruments (see document C.D. (91) (5) (a)) and on possible future work that might be undertaken by UNIDROIT in the field of capital markets.

##### (a) *The reception given to the Geneva Securities Convention and legislative measures*

11. During the discussion on the reception given to the Geneva Securities Convention and on the legislative measures being taken to implement the Convention and to incorporate it into domestic law, most of the member States present indicated that they were in the process of drafting new legislation in the area of financial markets, and that some of that legislation drew heavily on the Geneva Securities Convention (Switzerland is a case in point) with a view to improving the application of the Convention in the future. Others specified that they were awaiting publication of the Official Commentary before taking a closer look at the possibility of ratifying the Convention (South Africa, in particular). Still others called in the assistance of the Secretariat to improve their legislation in this area (e.g., Cameroon). The Member States of the European Union

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<sup>2</sup> The *Committee on Emerging Markets Issues, Follow-up and Implementation* was co-chaired by Mr Alexandre Pinheiro dos Santos (Brazil) and Ms Niu Wenjie (China). The following countries are members of the Committee: Argentina, Cameroon, Chile, France, Greece, India, Japan, Nigeria, Republic of Korea, South Africa, the United States of America and the European Union. Indonesia, the European Central Bank, the Hague Conference on Private International Law, European Issuers and the Trade Association for the Emerging Markets were admitted as observers.

<sup>3</sup> Australia, Italy, Malta, Mexico, Pakistan, Poland, Saudi Arabia and Switzerland.

indicated that their position on the Convention largely depended on the European Commission, which currently had a very full agenda in terms of legislative activity in this area. The Commission representative confirmed that work at the European level was proceeding apace and that it was dealing with subjects that extended far beyond the Geneva Securities Convention. However, she specified that the Commission regarded its work as complementary to the Convention rather than as a substitute, and that the Commission was planning to finalise its proposals by the end of 2012, after which they would be discussed by the 27 Member States and subsequently by the European Parliament.

(b) *Future Legislative Guide for Principles and Rules Capable of Enhancing Trading in Securities in Emerging Markets*

12. At the end of its 90<sup>th</sup> session in 2011, the Council took note, with great interest, of the measures envisaged by the Secretariat to draft a Legislative Guide containing Principles and Rules Capable of Enhancing Trading in Securities in Emerging Markets. Given the Secretariat's heavy work load, and taking account of the projects now underway and projects proposed for the 2011-2013 triennial period, the Council and the General Assembly decided that work on such a Legislative Guide would be given medium/low priority.

13. The scope of a possible Legislative Guide containing Principles and Rules Capable of Enhancing Trading in Securities in Emerging Markets was discussed at the first meeting of the Committee on Emerging Markets Issues, Follow-up and Implementation which was held at the UNIDROIT seat from 6 to 8 September 2010, alongside the discussion on the "Accession Kit" that had been put together to assist countries ratifying the Geneva Securities Convention in incorporating and integrating it into their domestic legal systems. Participants in the Committee meeting stressed the importance of formulating reference principles in a Legislative Guide that would focus on private law aspects, but also indicated, in light of the Colloquium that had preceded their meeting, that some of the issues that had been discussed concerned areas in which UNIDROIT had not yet done any work, and that given the complexity of the subject matter, the Secretariat should work together with a large number of experts and other Organisations. The Secretariat indicated moreover that the future Guide would not be a uniform law text, but simply a document setting out various options. The Guide would present fairly detailed indications on a number of issues as to the options available in implementing the recommendations prepared by IOSCO and other entities. The starting-point for this exercise would be those areas of the law which, although related to the 2009 Geneva Securities Convention, were not directly or wholly addressed by this instrument.

14. The Governing Council, at its 90<sup>th</sup> session (2011), decided to transmit the draft document containing information for member States concerning the references in the Convention to non-Convention law (cf. UNIDROIT 2011/S78B/CME/2/Doc. 2) to a number of experts for in-depth comment on the scope and content of the envisaged Legislative Guide. It also requested the Secretariat to initiate wider consultations with a view to identifying the real needs in terms of legislation and regulation of capital markets, given the wide range of types and degrees of evolution of the emerging markets. The Secretariat submitted the results of these consultations to the Rio de Janeiro meeting. While the number of replies had been neither very large nor very detailed, support for the project had been unanimous.

15. The Committee decided to set up a smaller working group that would be tasked with proposing, together with the UNIDROIT Secretariat, the subjects that should be developed in the future Legislative Guide, and deciding how they should be prepared. The working group is made up of the following States: Brazil, China, France, Japan, Nigeria, the Russian Federation, South Africa, Switzerland and the United States of America. The representatives of these States met briefly after the Committee meeting and appointed the representative of Switzerland as chairman of the working group. They also agreed on a procedure for the months to come (tele-conference,

distribution of work in view of a possible meeting in the autumn). The working group will report back to the Committee at its next session which might be held in an emerging country in early 2013.

C. *Future work*

16. During the Committee's discussion on possible future work by UNIDROIT to promote the Geneva Securities Convention and, in general, its work in the area of capital markets, it was pointed out that the financial markets community, and regulators in particular, were currently heavily engaged in international consultations and that UNIDROIT's involvement in this area, with the Geneva Convention and its work on netting, showed that private law aspects played an important role, a point that tended to be overlooked by regulators. Since the Geneva Securities Convention was germane to the interests of regulators and Governments in that, among other things, it reduced systemic risk, it was suggested that UNIDROIT envisage promoting the Convention as an assessment standard (such as might be done by the *Financial Accounting Standards Board* in other areas), similarly to the Secretariat's intentions for netting principles vis-à-vis the International Monetary Fund.

17. Moreover, in view of the request for technical assistance by certain member States that wish to incorporate some of the issues addressed in the Geneva Securities Convention into their legislation, and of the quality of the experts that make up the Committee, it was suggested that UNIDROIT set in place a network of experts willing and able to assist these States with a view, if possible, to ratification of /accession to the Geneva Securities Convention. In doing so, UNIDROIT should co-operate with the International Monetary Fund (IMF), the European Bank for Reconstruction and Development (EBRD) or the World Bank, so that the special expertise, competences and special resources of each of these bodies might be brought to bear on the matter.

18. At the more general level of *possible future work by UNIDROIT in the area of capital markets*, it was suggested that UNIDROIT might bring its competence in the field of private law harmonisation to the subject of trust and examine how this institution might be used to improve the security of financial transactions.

19. Support was expressed for the idea of turning the Geneva Securities Convention into an assessment standard and, in respect of future work, it was suggested that the company law aspects mentioned in the Convention be examined more closely, such as, for example, voting rights or securitisation.

D. *Centre of Financial Markets Law*

20. The Secretariat agreed in principle with the University of Luxembourg to launch a scientific co-operation project with a Centre of Financial Markets Law which would be established by the University of Luxembourg and with the support of other interested parties in Luxembourg. It is envisaged that the Centre would play a role in the promotion of the work of UNIDROIT in the field of Financial Markets Law.

**ACTION TO BE TAKEN**

21. *The Secretariat invites the Council to take note of the follow-up and promotion activities relating to the Geneva Securities Convention, as well as of the measures proposed to prepare a future Legislative Guide containing principles and rules capable of enhancing trading in emerging financial markets.*

**ANNEXE I****AGENDA**

of the second meeting of the  
Committee on Emerging Markets Issues, Follow-Up and Implementation  
– Rio de Janeiro, 27 and 28 March 2012

1. Opening of the meeting
2. Adoption of the Agenda
3. Colloquium on Financial Markets Law
4. Consideration of the reception given to the UNIDROIT Convention on Substantive Rules for Intermediated Securities in the various countries, in particular in emerging countries
5. Consideration of legislative measures to implement the Convention and incorporate it in domestic law
6. Presentation of the Official Commentary on the Convention
7. Consideration of follow-up activities to promote the Convention
8. Information on current work of UNIDROIT on netting of financial instruments and possible future work by UNIDROIT in the area of capital markets
9. Other business

## ANNEXE II

## COLLOQUIUM

**PROMOTING INVESTOR CONFIDENCE AND ENHANCING LEGAL CERTAINTY FOR SECURITIES TRADING IN EMERGING MARKETS**

Hotel Windsor Atlantica  
Avenida Atlântica, 1020 – Copacabana, Rio de Janeiro

**FINAL PROGRAMME** <sup>4</sup>

(English only)

**TUESDAY 27 MARCH 2012**

9:00 am – 10:00 am Arrival and Registration of Participants

10:00 am – 10:15 am **Opening Session**

*Chairperson* Ms Maria Helena Santana, Chairperson, Brazilian Securities and Exchange Commission (CVM), Rio de Janeiro and Chair, IOSCO Executive Committee

*Welcome Address* – Mr José Angelo ESTRELLA FARIA, Secretary-General, UNIDROIT

*Opening remarks* –

Mr Alexandre PINHEIRO DOS SANTOS, Attorney General, Brazilian Securities and Exchange Commission (CVM), Rio de Janeiro

Ms NIU Wenjie, Director, Legal Affairs Department, China Securities Depository and Clearing Corporation Ltd (SD&C), Beijing

*Supporters* –

Mr Celso ARRUDA FRANÇA, Head of Financial and Tax Division, Ministry of External Relations of Brazil (Itamaraty)

Mr Cícero Augusto VIEIRA NETO, Executive Director for Operations, Clearing and Depository, BM&FBOVESPA

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<sup>4</sup> Les présentations powerpoint faites lors du Colloque figurent sur le site Internet d'UNIDROIT à la page suivante: <http://www.unidroit.org/english/news/2012-03-27-28-programme-e.pdf> (en anglais seulement).

10:30 am – 1:00 pm

**1<sup>st</sup> Session - *Achievements and challenges in the regulation of securities markets***

*Chairman* Mr Alexandre PINHEIRO DOS SANTOS, Attorney General, Brazilian Securities and Exchange Commission (CVM), Rio de Janeiro

Achievements and challenges in the regulation of Brazilian Financial System – *Mr Celso ARRUDA FRANÇA, Head of Financial and Tax Division, Ministry of External Relations of Brazil (Itamaraty)*

The Dodd-Frank Act: selected aspects – *Professor Charles W. MOONEY, Jr., University of Pennsylvania, Philadelphia*

Private Law Underpinnings of Public Debt Securities Markets – *Mr Wouter BOSSU, Legal Department, International Monetary Fund*

12:30 pm – 1:00 pm Comments/Questions by Participants

1:00 pm – 2:30 pm Lunch

2:30 pm – 3:45 pm

**2<sup>nd</sup> Session - *Measures to ensure integrity and effectiveness of securities holdings and settlement systems***

*Chairman* Mr Otavio Yazbek, Commissioner, Brazilian Securities and Exchange Commission

Main Legal Issues of the Special System for Settlement and Custody (SELIC) – *Mr Cristiano de OLIVEIRA LOPES COZER, Chief Counsel, Central Bank of Brazil*

Methods and rules for the segregation of securities – *Dr Maria VERMAAS, Head, Legal Services Strate Ltd, South Africa*

Implications of the Final Beneficiary Model for Exchange and Clearing Processes – *Mr Cícero Augusto VIEIRA NETO, Executive Director for Operations, Clearing and Depository, BM&FBOVESPA*

Major changes in Russian legislation concerning financial markets – *Mr Aleksandr SINENKO, Deputy Head, Federal Financial Markets Service, Russian Federation*

3:45 pm – 4:15 pm Comments/Questions by Participants

4:15 pm – 4:30 pm Coffee break



4:30 pm – 6:30 pm

**3<sup>rd</sup> Session - Consequences of unauthorised disposition of securities in financial and capital markets, with an emphasis on Brazilian jurisprudence**

*Chairman* Ms Julya SOTTO MAYOR WELLISCH, Federal Attorney, Brazilian Securities and Exchange Commission (CVM), Rio de Janeiro

Consequences of unauthorised disposition of securities in financial and capital markets, with an emphasis on Brazilian jurisprudence – *Mr. Newton DE LUCCA, President-elect of the Brazilian Regional Federal Court of the 3th Region (São Paulo)*

Unauthorised disposition of securities and Innocent Acquirer Rule: theory and reality. The Chilean case – *Professor Guillermo Fernando CABALLERO GERMAIN, Universidad Adolfo Ibáñez, Viña del Mar, Chile*

Liability of intermediaries for shortfalls or unauthorised disposition – *Mr Segun SANNI, Head, Investor Services, Stanbic IBTC Bank PLC, Nigeria*

6:00 pm – 6:30 pm      Comments/Questions by Participants

6:30 pm – 7:00 pm      **Closing remarks**

*Mr José Angelo ESTRELLA FARIA, Secretary-General, UNIDROIT*