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**Item No. 6 on the agenda: Transactions on Transnational and Connected Capital Markets: the UNIDROIT Legislative Guide on Intermediated Securities**

(prepared by the Secretariat)

<i>Summary</i>	<i>Memorandum providing background on the preparation, publication and promotion of the Unidroit Legislative Guide on Intermediated Securities</i>
<i>Action to be taken</i>	<i>The Governing Council is invited to take note of the progress</i>
<i>Mandate</i>	<i>Work Programme 2017-2019</i>
<i>Priority level</i>	<i>High</i>

**Introduction**

1. The final session of the diplomatic Conference to adopt a Convention on Substantive Rules regarding Intermediated Securities (Geneva, 5-9 October 2009) adopted the UNIDROIT Convention on Substantive Rules for Intermediated Securities (the 'Geneva Securities Convention' or the 'Convention') and established a Committee on Emerging Markets Issues, Follow-Up and Implementation (the 'Committee') to assist with the Convention's promotion and implementation. The Committee was responsible, *inter alia*, for overseeing the preparation of a draft Legislative Guide containing principles and rules capable of enhancing trading in securities in emerging markets, which is a high priority item in UNIDROIT's Work Programme for the 2017-2019 triennium.

2. At its 96<sup>th</sup> session (Rome, 10-12 May 2017), the Governing Council considered and adopted the draft Legislative Guide – which was entitled, in full, the *UNIDROIT Legislative Guide on Intermediated Securities: Implementing the Principles and Rules of the Geneva Securities Convention* – and authorised the Secretariat to publish and promote it. This memorandum provides (I) background on the Legislative Guide's development and adoption, (II) an update regarding the Legislative Guide's preparation, publication and promotion since its adoption, and (III) an invitation for action to be taken.

## I. BACKGROUND

### A. The Committee's initial meetings: Guidance for the future Legislative Guide

3. Initially, the Secretariat prepared in advance of the Committee's first meeting a draft Accession Kit for the Geneva Securities Convention, as a first step toward the development of a Legislative Guide on principles and rules capable of enhancing trading in securities in emerging markets.<sup>1</sup> It was intended to provide advice for countries seeking to become Party to the Geneva Securities Convention on how best to incorporate and integrate it into their domestic legal systems.

4. At the first meeting (Rome, 6-8 September 2010), the Committee decided to divide the draft document in two. The first part containing an explanatory memorandum for the assistance of States and Regional Economic Integration Organisations on the system of declarations under the Convention ultimately became a UNIDROIT document in its capacity as Depositary of the Geneva Securities Convention.<sup>2</sup> The second part containing references to sources of law outside the Convention was subsequently prepared and provided to the Committee in advance of its meeting in Rio de Janeiro as a potential basis for further work on the future Legislative Guide.<sup>3</sup>

5. At the second meeting (Rio de Janeiro, 27-28 March 2012), the Committee discussed, among other things, the Legislative Guide's potential scope, content and structure. The Committee stressed the importance of formulating principles focusing on private law aspects of securities trading, but participants indicated that given the complexity of the subject matter, consideration of other aspects (including regulatory law) and cooperation with other organisations would be required. Inputs received by the Committee also indicated that the future Legislative Guide should not be a uniform law text, but a document setting out various options on issues fundamental generally to securities trading and particularly to the Convention's proper implementation. The Committee then set up an informal working group to draft a proposal on these issues for consideration by the full Committee at its next meeting.

6. At the third meeting (Istanbul, 11-13 November 2013), the Committee focused its attention on the Legislative Guide's scope and structure by discussing the annotated outline presented by the Secretariat.<sup>4</sup> This draft outline, prepared in consultation with the informal working group, covered the universe of public and private law subjects related to securities trading in emerging markets. The intent of the broad outline was to provide the Committee with a full picture of transactional, private law topics, as well as related regulatory and public law topics, from which to select those that the Legislative Guide should cover. To narrow the expected content for an initial draft, a group of States presented a proposal focused mainly on private law issues, but which included some regulatory aspects with direct relevance to party transactions. The proposal called for three substantive sections and was accepted by consensus by the Committee to serve as the basis for setting the scope of the Legislative Guide and organising the content and structure of the initial draft.<sup>5</sup>

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<sup>1</sup> UNIDROIT 2010 - S78B/CEM/1/Doc. 3.

<sup>2</sup> UNIDROIT 2011 - DC11/DEP/Doc. 1 rev.

<sup>3</sup> UNIDROIT 2011 - S78B/CEM/2/Doc. 2.

<sup>4</sup> UNIDROIT 2013 - S78B/CEM/3/Doc. 2.

<sup>5</sup> UNIDROIT 2015 - C.D. (94) 6, Annex 1.

## **B. Work of the informal group of experts: Preparation and review of the draft Legislative Guide**

7. Using the Committee's guidance from the three meetings that had taken place by that time, an informal group of experts<sup>6</sup> assisted the Secretariat with the preparation and review of the draft Legislative Guide, which had been provisionally re-entitled by that group the "UNIDROIT Legislative Guide on Intermediated Securities: Implementing the Principles and Rules of the Geneva Securities Convention".

8. Based on a review of a partial initial draft and an agreement on a revised outline at their first informal meeting (Rome, 23-24 October 2015), the experts submitted drafts of the portions for which they were responsible in January 2016, and those drafts were combined into a single document by the Secretariat and circulated to the informal group in February 2016. Following a videoconference held on 7 March 2016 during which initial comments on the combined draft were discussed, it was agreed that the experts would endeavour to provide comments on the combined draft by the end of March 2016 and then provide revisions to their respective contributions by the end of April 2016. Those revisions were used to create a revised draft,<sup>7</sup> which was circulated to the group in advance of its second meeting (Rome, 16-17 May 2016). At that meeting, the group reviewed the revised draft in detail, recommended various changes to be implemented by the Secretariat, and considered how the Secretariat should best collect examples and options for the draft, such as legislative or regulatory texts or related descriptions, from various intermediated holding systems to offer States guidance in establishing an intermediated securities holding system or evaluating an existing one.

9. After that meeting, the Secretariat prepared, based on the input received, an updated draft, which was circulated to the group for review and comments on the changes made. Following a period for review by the experts, the Secretariat made additional changes, ultimately preparing a revised draft. That draft, known as the 4 October draft, was circulated to Committee members and to other interested organisations and stakeholders for review, comments, and collection of possible examples and options.

10. At its third meeting (Rome, 12-13 December 2016), the group reviewed in detail the comments and possible examples and options received by that time and took them into account in recommending modifications to the draft Legislative Guide. It also recommended that the possible examples and options be moved from the draft Legislative Guide into a separate document that could then serve as the basis for a webpage on UNIDROIT's website, on which the examples and options could be keyed to the relevant paragraphs of the Legislative Guide and be kept up to date. After the meeting, a follow-up videoconference was held on 16 January 2017 to review the revised draft Legislative Guide, which was subsequently circulated again for comments<sup>8</sup> and then submitted to the Committee for review.

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<sup>6</sup> The informal group is chaired by Mr Hideki Kanda (Member of the UNIDROIT Governing Council and Professor of Law, Gakushuin University) and includes Mr Philippe Dupont (Partner, Arendt & Medernach), Ms Dorothee Einsele (Professor of Law, University of Kiel), Mr Francisco J. Garcimartín Alférez (Professor of Law, Universidad Autónoma of Madrid), Mr Philippe Goutay (Jones Day, Paris), Mr Thomas Keijser (Senior Researcher, Radboud University), Ms Maria Chiara Malaguti (Professor of Law, Catholic University of the Sacred Heart, Milan/Rome), Mr Charles W. Mooney, Jr. (Professor of Law, University of Pennsylvania), Mr Luc Thévenoz (Professor of Law, University of Geneva), and Ms Wu Jing (Senior Manager, Legal Department, China Securities Depository and Clearing Corporation).

<sup>7</sup> See UNIDROIT 2016 – C.D. (95) 6 rev., Annex 2.

<sup>8</sup> During the draft Legislative Guide's two circulations for review, comments were received from Brazil, China, Germany, the United Kingdom, the United States of America, the European Commission, the Hague Conference on Private International Law, UNCITRAL, the World Bank Group, the European Central Securities Depositories Association, the International Bar Association's Securities Law Committee, the International Swaps and Derivatives Association, Inc., and the Union Internationale des Avocats.

### **C. The Committee’s final meeting and the Governing Council’s 96<sup>th</sup> session: Review and adoption of the draft Legislative Guide**

11. At its fourth meeting (Beijing, 29-30 March 2017), the Committee, in accordance with its past practice, began by holding a Colloquium on Financial Markets Law<sup>9</sup> and then proceeded to cover the items on its agenda. Building upon the discussions during the Colloquium, the Members and Observers of the Committee, as well as other States and Organisations, reviewed in detail the draft Legislative Guide on Intermediated Securities. They agreed upon certain amendments and additions, and ultimately recommended that the draft Legislative Guide, as revised, be submitted to the UNIDROIT Governing Council for review and adoption.

12. In accordance with that recommendation, the Secretariat revised the draft Legislative Guide and submitted it to the Governing Council. At its 96<sup>th</sup> session (Rome, 10-12 May 2017), the Governing Council “considered and adopted the UNIDROIT Legislative Guide on Intermediated Securities.”<sup>10</sup> In doing so, the Governing Council “expressed its gratitude to the Secretariat for its work on the instrument and authorised the Secretariat to promote its dissemination and implementation.”<sup>11</sup>

## **II. UPDATE REGARDING THE LEGISLATIVE GUIDE’S PREPARATION, PUBLICATION AND PROMOTION**

### **A. Preparation and publication**

13. After the Legislative Guide’s adoption, the Secretariat undertook formatting and other editing work to prepare the Legislative Guide for publication, both in print and online. Upon the Legislative Guide’s publication, a launch event, consisting of a panel presentation celebrating and promoting the Legislative Guide, was held immediately following the General Assembly’s 76<sup>th</sup> session (Rome, 7 December 2017). In that panel presentation, Mr Francisco J. Garcimartín Alférez (Chair Professor of Private International Law, Universidad Autónoma of Madrid) provided an overview of the Legislative Guide and its relationship to the Geneva Securities Convention and Ms Maria Chiara Malaguti (Full Professor of International Law, Catholic University of the Sacred Heart) discussed the importance of promotion and implementation of the Legislative Guide and its potential benefits for States.

14. In advance of the launch event, the English and French versions of the Legislative Guide were made available on UNIDROIT’S website. At the launch event, print copies of those versions were distributed to participants. Shortly thereafter, a Chinese version of the Legislative Guide was published and, in March 2018, a Spanish version was also published. In all, as of this writing, the Legislative Guide is available on UNIDROIT’S website in Chinese, English, French and Spanish. Paper copies of the Legislative Guide, moreover, are to be distributed to the members of the Governing Council during its 97<sup>th</sup> session (Rome, 2-4 May 2018).

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<sup>9</sup> The open Colloquium was held on the theme of “Enhancing and Ensuring Legal Certainty in Both Current and Future Holding Systems”, during which there were fruitful discussions on various issues related to UNIDROIT’S financial markets instruments, the latest developments and relevant legal concerns arising from securities holding systems. The Colloquium also considered how to address the rapid development of financial technology, in particular distributed ledger technologies, in order to enhance the legal certainty of securities holding systems. The Colloquium programme, as well as the programmes for the Colloquiums held in conjunction with the Committee’s prior meetings, are available on UNIDROIT’S website for the Legislative Guide: <https://www.unidroit.org/instr-capitalmarkets-legislative-guide>.

<sup>10</sup> UNIDROIT 2017 – C.D. (96) 15, para. 59.

<sup>11</sup> *Id.*

## B. Promotion

15. Further to the launch event and the translation of the Legislative Guide into additional languages, the Secretariat has taken various steps to promote the Legislative Guide's use and implementation.

16. First, the Secretariat has made available significant supplementary resources on UNIDROIT's webpage for the Legislative Guide. Such resources include not only reports and documents from the Committee's meetings.<sup>12</sup> They also include, consistent with the informal group of experts' recommendation:<sup>13</sup> (a) model examples of legislative or regulatory texts or related descriptions, which are ordered by the paragraph number to which they relate;<sup>14</sup> and (b) bibliographic references, which are organised alphabetically by the entity or individual authors, with indications for those sources that are expressly referenced in the Guide.<sup>15</sup>

17. Second, the Secretariat has sought to promote the Legislative Guide, as well as its fellow capital market instruments,<sup>16</sup> through various events and in different fora. Such events and fora include the following:

- The Legislative Guide has been taken into consideration by the European Commission's expert group on conflict of laws regarding securities and claims and was referred to in the Commission's consultation document regarding conflict of laws rules for third party effects of transactions in securities and claims;<sup>17</sup>
- Copies of the Legislative Guide have been provided to participants involved in the "Intermediation and Beyond" project undertaken by the Commercial Law Centre at Harris Manchester College, University of Oxford;<sup>18</sup>
- The Legislative Guide is to be discussed in the context of panel presentations at the Queen Mary-UNIDROIT Institute of Translational Commercial Law's conference entitled "Development Finance in Emerging Markets: Challenges, Innovations and Results" (Oxford, 13-15 April 2018);<sup>19</sup> and

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<sup>12</sup> Overview, development and documentation for the UNIDROIT Legislative Guide on Intermediated Securities, <https://www.unidroit.org/instr-capitalmarkets-legislative-guide>.

<sup>13</sup> See *supra* para. 10 (regarding the examples and options).

<sup>14</sup> Model examples for the UNIDROIT Legislative Guide on Intermediated Securities, <https://www.unidroit.org/model-examples>.

<sup>15</sup> Bibliography for the UNIDROIT Legislative Guide on Intermediated Securities, <https://www.unidroit.org/instr-capitalmarkets-legislative-guide-select-bibliography>.

<sup>16</sup> Notably, promotion of the Legislative Guide, the third of UNIDROIT's capital market instruments, also promotes its fellow capital market instruments. Indeed, the Guide is intended to complement and promote the first instrument – the Geneva Securities Convention – by summarising the Convention's key principles and rules and by offering guidance on choices to be made and matters to be addressed or clarified in establishing an intermediated securities holding system or evaluating an existing one. The Guide also complements and promotes the second instrument – the UNIDROIT Principles on the Operation of Close-Out Netting Provisions, which were adopted by the UNIDROIT Governing Council at its 92<sup>nd</sup> session (Rome, 8-10 May 2013) – by offering guidance consistent with those Principles and incorporating references to them.

<sup>17</sup> European Commission, Consultation Document on conflict of laws rules for third party effects of transactions in securities and claims, Ref. Ares(2017)1874960 (07/04/2017), [https://ec.europa.eu/info/sites/info/files/2017-securities-and-claims-consultation-document\\_en.pdf](https://ec.europa.eu/info/sites/info/files/2017-securities-and-claims-consultation-document_en.pdf).

<sup>18</sup> Intermediation and Beyond, Oxford Law Faculty, <https://www.law.ox.ac.uk/research-and-subject-groups/intermediation-and-beyond>.

<sup>19</sup> Development Finance in Emerging Markets: Challenges, Innovations and Results, Oxford Law Faculty, <https://www.law.ox.ac.uk/events/development-finance-emerging-markets-challenges-innovations-and-results>.

- The Legislative Guide is to be presented at the American Society of International Law's Annual Meeting (Washington, 4-7 April 2018) as part of a panel considering "The International and Transnational Law of Complex Financial Transactions".<sup>20</sup>

18. Third, the Secretariat is seeking articles related to the Legislative Guide for the preparation and publication of a forthcoming issue of the Uniform Law Review focusing on the Legislative Guide's launch and promoting its implementation. It is anticipated that this focus issue will be published in 2018.

19. In sum, subject to the Governing Council's views, the Secretariat intends to continue its efforts to support, in a cost-effective manner, the promotion and implementation of the Legislative Guide and its fellow capital markets instruments. Such efforts include, *inter alia*, continuing to collect and update the supplementary resources made available on UNIDROIT's webpage for the Legislative Guide (i.e. model examples and bibliographic references), ongoing participation in conferences and events concerning capital markets law and the provision of assistance to States and stakeholders that express interest in these instruments.

### **III. ACTION TO BE TAKEN**

20. *The Secretariat invites the Governing Council to take note of the progress with respect to the preparation, publication and promotion of the UNIDROIT Legislative Guide on Intermediated Securities.*

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<sup>20</sup> The ASIL Annual Meeting, ASIL, <https://www.asil.org/annualmeeting> (containing meeting programme).