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The Draft Unidroit Convention  
on Intermediated Securities:  
Transactional Certainty and Market Stability

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I. Facts, issues and objectives

Only a few decades ago, investment securities, in particular shares and bonds, in all legal systems around the world were certificated. At least in everyday bilateral transactions a sale and purchase transaction could be carried out as the sale and purchase of any other movable: the seller delivered the certificate representing the underlying security against payment of the purchase price. The delivery transferred, subject to qualifications flowing from the type of security and varying according to the relevant national law, title in the securities (= settlement); the payment occurred either contemporaneously unless the parties to the transaction agreed, at the seller's risk, to defer payment of the price. The fact that owners of securities either kept the certificates under their direct control or, at the most, under a simple custody agreement with their bank contributed equally to the straightforwardness of the situation and the absence of risks – other than the risk of bad judgment –

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and serious legal problems. So long as all investors had physical possession of their securities in form of certificates and notes and trade occurred within the territorial boundaries of one country the law hardly paid any attention. However, the reality of today's capital markets is different.

The last thirty years have witnessed dramatic changes in the holding patterns as well as the structure and organization of securities markets. The need to reduce administrative burdens, risk and expense by curbing the volume and movement of paper, (the huge increases of the amount of capital sought to be raised on the market and both domestic and trans-border investment and trading had lead to the proverbial 'paper crunch') induced a growing number of countries to move from direct holdings of (certificated) investment securities to indirect holdings (of uncertificated and/or 'immobilised' securities) through one or more tiers of custodian (banks or specialised financial institutions)<sup>1</sup>

In 2005, the estimated value of securities held in custody with intermediaries was USD 50,000,000,000,000. The volume of trades and collateral transactions in corporate and government securities issued by OECD member governments per day amount to USD 2 trillion, i.e. it exceeds the world's total GDP (> USD 40 trillion) approximately every 20 trading days.

Holding patterns being multi-tier – i.e. each of the intermediaries holding its clients' securities in accounts maintained with other intermediaries – and stretching across national frontiers and around the globe, the legal risks known from purely domestic situations (such as the principal risk – that one party to a transaction may perform without reciprocal performance by the other -, the replacement cost risk - that is the potential failure to realize an anticipated gain and a potential

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<sup>1</sup> Cfr. *Goode*, The Nature and Transfer of Rights in Dematerialised and Immobilised Securities, in: Fidelis Oditah (ed.), The Future for the Global Securities Market, Clarendon Press, Oxford, 1996, 107; *Benjamin, Yates, Montagu*, The Law of Global Custody, Butterworths, London, 2<sup>nd</sup> ed. 2002. National reports on Canada, China, France, Germany, Japan, the Nordic countries, Poland, Switzerland, United Kingdom, United States of America as well as related work at the Hague Conference, UNCITRAL, the European Communities and the first UNIDROIT draft by *Sen, Bernasconi* and *Sigman, Bazinas, Löber, Deschamps Dong Ansheng* and *Han Liyu, Maffei, Einsele, Than, Kanda, Afrell* and *Wallin-Norman, Romanowski, Thévenoz*, the FMLC Report, *Reitz* in Unif.L.Rev./Rev.dr.unif. 2005, p. 1-442.

liability to others in case of non-performance by one party -, the general custody risk – that the intermediary may act improperly) become exacerbated. Moreover, the legal frameworks within which the intermediaries that are part of the holding pattern operate are often not compatible. Measures to address these uncertainties in the course of each transaction produces unnecessarily high transaction costs.

The objectives of the draft UNIDROIT Convention on Intermediated Securities are, therefore, first, the protection of market participants (both investors and intermediaries); second, the protection of the financial system; third, gains in economic efficiency.

## II. History and current status

Following UNIDROIT practice, in 2002, a group of experts ('Study Group'), made up of 16 experts from 12 countries and three international Organizations set out to explore possible directions and scope of its work<sup>2</sup> and produced a first draft in 2004. Consultations with 20 countries and three sessions of a Committee of Governmental Experts (CGE), held in May 2005, March and November 2006, at which 38 delegations and 10 observer organisations further substantially developed the underlying analysis and the legal concepts, produced a remarkably mature 'preliminary draft Convention'<sup>3</sup>. A fourth session, particularly devoted to issues arising from the desired inclusion of so-called 'transparent systems', is planned for May 2007. Thereafter, a Diplomatic Conference will be held for the adoption of the final text as a Convention, i.e. a treaty binding those States that will ratify or accede to it.

## III. Conceptual analysis of intermediate holding of securities

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<sup>2</sup> The UNIDROIT Study Group on Harmonised Substantive Rules Regarding Indirectly Held Securities, Position Paper, August 2003, UNIDROIT 2003, Study LXXVIII, Doc. 8. All documents cited are also available at [www.unidroit.org](http://www.unidroit.org).

<sup>3</sup> UNIDROIT 2006, Study LXXVIII – Doc. 57, Original: English/French, November 2006.

Somewhat simplified, there are four different ways to conceptualize the legal position of the various actors in indirect holding patterns and, in particular, that of the investor.

All four show, if one translates the position in a figure, at the top level the issuer and a Central Securities Depository (CSD) where either dematerialised (uncertificated) securities and/or immobilised securities (issued in the form of global notes) are deposited and held. In that figure, the account holder/investor is shown at the bottom (cfr. *infra*, IV 1, Example 2). One or more intermediaries stand between an account holder and the issuer. In other words, the investor holds his securities in an account with an intermediary who in turn may hold that investor's, other clients' as well as its own securities in an account with one or more upper-tier intermediaries. Ultimately all investors' and all intermediaries' securities holdings up the chain are reflected in the CSD's *omnibus* account.

In the first group of legal systems, even though one or more intermediaries stand between the account holder/investor and the issuer, the intermediary has no legal significance and the investor's rights are the functional equivalent of those of a direct owner. In terms of *property law* analysis, all account holders and investors in the securities of an issuer are co-owners of a fraction of a pool of securities. The law, moreover, imputes that the intermediary has some kind of possession or control for the account holder/investor.

In another group of systems, the *property* analysis is the same but the law imposes – and at least in a number of jurisdictions assures – that each individual investor's holdings and dispositions of securities be traceable.

A third group of jurisdictions uses the concepts of the law of *trusts* where ownership is split into legal ownership and beneficial ownership. In those systems the top-tier intermediary is the legal owner bound by fiduciary duties (trustee) whereas the ultimate investor (and, as the case may be, other intermediaries in the chain) is the beneficial owner.

In a fourth group – historically the most recent evolution in two exceedingly important markets, i.e. the United States and, in the not too distant future, Canada – the analysis is that there is legal ownership at the top level, i.e. vested in the CSD whereas the investor's (and other intermediaries') legal position is defined as *entitlement*, a bundle of contractual and other rights defined by statute<sup>4</sup>.

At one end of this spectrum the account holder's rights may include the right to enforce the securities against the issuer and he is generally treated as the direct owner of the securities or may be permitted or required to be recorded as the registered owner on the issuer's books. Elsewhere within that spectrum, either the intermediary breaks the ownership chain between the account holder/investor and the issuer or the intermediary is treated as the registered, legal or nominal owner of the securities and the account holders are limited to enforcing the securities indirectly against the issuers through their intermediaries.

#### IV. Overarching objectives: internal soundness and cross-border compatibility

##### 1. Internal soundness

In light of the specific risks created by the lack of physical control of certificates, the question is whether investors can be confident that their interests are robust and can be dealt with under simple,

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<sup>4</sup> On the revision of Article 8 of the US Uniform Commercial Code, cfr. *Mooney*, Beyond Negotiability: A New Model for Transfer and Pledge of Interests in Securities Controlled by Intermediaries, 12 *Cardozo L. Rev.* 305 (1990); *Rogers*, Policy Perspectives on Revised U.C.C. Article 8, 43 *UCLA L. Rev.* 1431 (1996); *Reitz* (*supra*, n. 1).

clear rules and procedures for acquisition, holding, transfer (including both outright transfer and provision of securities as collateral) and realisation. Furthermore, it is clearly essential that the investor's interest should not be exposed to risks such as the insolvency of any intermediary or interference by unrelated parties.

The Study Group termed these issues of internal soundness. Domestic legislation or judge made law either already addresses them or should address them. The draft Convention's objective is to contribute to modernisation and harmonisation of the solutions.

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In example 1, the account holder holds 100 securities with his intermediary. Under the account agreement the intermediary is allowed to use securities credited to the account maintained with that intermediary. The account holder has pledged 30 to pledgee 1. What happens if the intermediary pledges 100 to pledgee 2?

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In example 2, the account holder/investor has provided securities held with his intermediary as collateral to a lender (= secured creditor). Now he becomes insolvent. His general creditor tries to attach his securities held somewhere further up the chain.

## 2. Cross-border compatibility

Arguably all intermediated securities holdings are or may potentially be turned into cross-border fact patterns. Therefore, the draft Convention must address issues affecting the ability of different legal systems to connect successfully where securities are actually or potentially held or transferred

across national frontiers. If the rules of two systems, though each achieving internal soundness, produce an unclear or unsatisfactory result in combination, this raises issues which the UNIDROIT Study Group termed and the draft addresses as issues of compatibility.

This goes beyond the question of which law governs a cross-border transaction, a question answered by the relevant conflict-of-laws rule – in the future hopefully the Hague Securities Convention (*infra*, V). And we do not need to think of complex fact patterns where rules of company law, contract law, property law, insolvency law and regulatory law have to work together. It is sufficient to recall that the very concept of ‘securities’ varies from country to country. And it is clear that, in case of an investor in country A who provides securities issued and held by a CSD in country B and accredited to his account with his intermediary in country C to his creditor in any of A, B or C, let alone country D, legal certainty suffers significantly if what constitutes a security in country A and B were not to be characterised as a security in C (or D). This situation, however, reflects today’s legal situation even in countries with legal systems belonging to the same family.

### 3. Law and practice: potential benefits of modernisation and harmonisation

Although the same commercial developments have taken place to one degree or another in most markets, domestic legal systems have maintained their insularity. They may be exceedingly refined and, in this respect, typical ‘lawyers’ law’ (or, even worse, ‘students’ law’). But they produce, in the best case, problems of comprehension leading to unnecessarily high transaction costs (e.g. legal opinions) and, in worst-case scenarios, problems of actual incompatibility in a crisis and, following from that, systemic risks of market failures.

By realigning the law (where such law exists) with today’s practice of holding and trading securities many systems – even analytically sophisticated systems in developed securities markets – stand to

gain in terms of economic efficiency. Some may well improve their position as regards international competition of legal systems and the markets for which they provide the framework. Individual investors and individual intermediaries as well as lenders who take securities as collateral stand to gain from improved legal certainty. This, in turn, may lower the cost of credit. And – from domestic legislatures’ and national and international regulators’ perspective most importantly – systemic risk will be reduced and overall financial markets’ stability will be improved. The more these improvements occur in an internationally harmonised fashion the better and the more incisive.

#### IV. What has been achieved and what remains to be done?

At the world wide level, the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary, adopted in 2002 but signed by Switzerland and the United States of America on 5 July 2006 and therefore bearing the title Hague Securities Convention of 2006, now provides legal certainty as regards the conflict of laws issues, i.e. in determining which domestic law is applicable to the holding and dispositions of securities held in form of book entries with an intermediary. This Convention is unique for a number of reasons. Firstly, the unsatisfactory state of the *lex lata* and the basic features of the solution to the problems arising out of technical and operational changes in the securities industry had been identified by both practitioners<sup>5</sup> and legal scholars<sup>6</sup> (as well as the legislators in Belgium and Luxembourg, homes to two major International Central Securities Depositories, ICSDs) before work on the draft got under way. Moreover, a highly visible case in the English courts arising out of the collapse of Robert Maxwell’s empire had given

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<sup>5</sup> To name but a few, *Gynn*, Modernizing Legal Rules to Reduce Settlement Risk, IBA Capital Markets Forum Yearbook, 1993, 172; *Euroclear*, Cross.Border Clearance, Settlement and Custody: Beyond the G 30 Recommendations, Brussels, 1993, 62; *Mouy/de Vauplane*, La réforme du nantissement des titres dématérialisés, Banque & Droit Juillet-Aout 1996, 3.

<sup>6</sup> *Drobnig*, Vergleichende und kollisionsrechtliche Probleme der Girosammelverwahrung von Wertpapieren im Verhältnis Deutschland-Frankreich, in: Festschrift für Konrad Zweigert (H. Bernstein, U. Drobnig, H. Kötz eds.), Mohr Siebeck, Tübingen, 1981, 73; *Einsele*, Wertpapierrecht als Schuldrecht, Mohr Siebeck, Tübingen, 1995; *Goode*, The Nature and Transfer of Rights in Dematerialised and Immobilised Securities, in: The Future for the Global Securities Market (F. Oditah ed.), Clarendon Press, Oxford, 1996, 107; *Kronke*, Capital Markets and Conflict of Laws, *Recueil des Cours*, 286 (2000), 247.

exposure to how unsatisfactory the state of the conflict of laws was in many jurisdictions and how much judicial instinct and calibre it took to get it right<sup>7</sup>. Secondly, the delegates in The Hague were fortunate to start their discussions on the basis of a superb preparatory document, the so-called Bernasconi-Report<sup>8</sup>. Thirdly, the degree of involvement of the financial industry in the consultations. Fourthly, this was the first time that the world negotiated with the European Commission, the executive arm of a Regional Economic Integration Organisation to which its Member States had transferred the law making power over the issues to be covered by the future instrument. Fifthly, a supra-national regulator, the European Central Bank, participated – no doubt to some extent with an agenda of its own. Finally, those who will be called upon to implement, interpret and apply the Convention will have at their disposal an official Explanatory Report<sup>9</sup> of the highest quality. The degree of predictability achieved through the new uniform conflict rules is remarkable. However, there are – deliberately accepted – weaknesses of the Convention deriving from the limitation of its scope.

At the regional level, the Finality Directive<sup>10</sup> and the Financial Collateral Directive<sup>11</sup> have addressed discrete areas and are applicable to distinct market participants and/or specific types of transaction.

The future UNIDROIT Convention is designed to provide a general legal mould in the form of *substantive* rules for indirect holding patterns. The greater the success of the Hague Convention, the

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<sup>7</sup> *Macmillan Inc. v. Bishopsgate Investment Trust plc and Others (No. 3)*, [1995] 1 WLR 978 (Ch. D.); on appeal, the Court of Appeal reverted to the classical *lex situs* rule, [1996] 1 WLR 387. For an insightful comment by Lord Millet (as he now is), see his Foreword, in: *Cross Border Collateral: Legal Risk and the Conflict of Laws* (R. Potok ed.), Butterworths, London, 2002, v *et seq.*

<sup>8</sup> *Bernasconi*, *The Law Applicable to Dispositions of Securities Held Through Indirect Holding Systems*, Prel. Doc. No 1, November 2000, for the attention of the Working Group of January 2001.

<sup>9</sup> *Goode, Kanda, Kreuzer* with the assistance of *Bernasconi*, *Hague Securities Convention – Explanatory Report*, Hague Conference on Private International Law/Martinus Nijhoff Publishers, The Hague, 2005.

<sup>10</sup> Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on Settlement Finality in Payment and Securities Settlement Systems.

<sup>11</sup> Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on Financial Collateral Arrangements.

stronger the incentive for domestic legislators to bring their domestic substantive law up to the benchmark provided by the UNIDROIT Convention because, under the Hague Convention's rule of party autonomy, investors and intermediaries will choose only those national laws as governing their transactions that meet the most advanced standards in terms of investor protection and operational soundness.

## VI. Overview of the draft Convention

### 1. Scope and approach: the policy choices

Governments and their intergovernmental Organisations in charge of formulating private and commercial law instruments have to make a number of policy choices each time they embark on the process of developing and negotiating a new instrument. It must respond to real needs, fix a real problem, not be over-ambitious as regards the prospective scope, where necessary be co-ordinated with other instruments in adjacent areas of the law etc.<sup>12</sup>

Apart from the targeted objectives of improving internal soundness and compatibility of national legal frameworks (cfr. *supra*, IV), five policy decisions were made at the outset.

First, it was considered inappropriate to distinguish between domestic and cross-border transactions and draft an instrument only for the latter. While the definition of 'internationality' and the limitation of the scope based on that criterion do make sense in instruments governing simple, bilateral relationships that may well be and remain domestic such as a contract for the sale of goods (cfr. Article 1 of the 1980 UN Convention on Contracts for the International Sale of Goods – CISG -), it loses its *raison d'être* in all instances that are potentially international even if originally purely domestic. The classic example is the 2001 Cape Town Convention on International Interests in

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<sup>12</sup> Cfr. *Goode, Kronke, McKendrick*, Transnational Commercial Law – Text, Cases and Materials, Oxford University Press, Oxford 2007, chapters 6, 18-20.

Mobile Equipment and its equipment-specific protocols<sup>13</sup>. Where assets that by their very nature cross international frontiers at least potentially in their daily operations or that are located outside any national territory, such as aircraft, railway rolling stock or space assets, are used as collateral, it would not make sense to even envisage a purely domestic situation and distinguish it from fact patterns that are international from the outset. In the same vein, it would have appeared artificial and unrealistic to conceptualise, in today's global environment of financial instruments and connected markets, a distinction between international and domestic holdings of securities with intermediaries.

Second, conceptual neutrality was of the essence. On the basis of the so-called 'functional approach' it had to be avoided to attempt transplanting solutions – or, for that matter, even using terminology – that were clearly associated with a certain legal family and analysis (e.g. the law of trusts, or concepts of ownership rooted in a specific tradition). Article 5 of the current draft<sup>14</sup> is the most striking example. It accommodates effortlessly both the average 'civil-law' and 'common-law' approach as well as hybrids just by describing in neutral, every-day language an investor's rights where that investor holds securities in form of credits to a securities account with an intermediary.

Third, the draftsmen opted for a minimalist approach: no comprehensive uniform 'custody, clearing and settlement Act' is planned; only what is strictly needed to establish or enhance internal soundness and efficiency and cross-border compatibility is being addressed. The objective is to produce as in intrusive an instrument as possible by employing fact-based rules. The instances where the draft leaves details or even basics to the 'non-convention law' (cfr. Article 1 (m) draft Convention) are numerous.

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<sup>13</sup> Texts available at [www.unidroit.org](http://www.unidroit.org). The Convention and the Aircraft Protocol are also reproduced in *Goode, Kronke, McKendrick, Wool*, Transnational Commercial Law, International Instruments and Commentary, Oxford University Press, Oxford, 2004, p. 550-595, with commentary, p. 433-453.

<sup>14</sup> Cfr. note 3.

There are, however, limits to both the ‘functional approach’ and the ‘minimalist approach’. As to the latter, Articles 7 to 14 (on the transfer of intermediated securities) are in all likelihood more detailed than their counterparts in a number of countries participating in the negotiations. As regards the functional approach, it is clear that the neutral, non-connoted language of the instrument will have to be re-‘translated’ into domestically meaningful conceptual language. Undoubtedly, here lies a significant challenge. The implementation legislation in Contracting States must give full effect to the Convention’s provisions, weigh carefully how far it may go beyond minimum requirements so as to not disrupt trans-border compatibility and ensure that any conceptually diverging but functionally equal re-translation by other Contracting States will be recognised as such in a domestic forum and, where applicable, applied on an equal footing. Legislatures in countries which do, at the time of implementation, have no or very few and conceptually non-committed rules on intermediated securities will have a much easier job than, say, France, Germany, Japan.

Fourth, the unifying element – acceptable from early on in the consultation process to all key legal systems independently of their historic roots – is the recognition of book-entry accounts and the constitutive nature of credits to an account for any right or obligation.

Fifth, the future UNIDROIT Convention must be compatible with existing relevant international instruments both at the global and the regional level, such as the Hague Convention and – probably amended – EC Directives (cfr. *supra*, V).

## 2. Guidelines for the solutions of core issues

The needs of market participants, both investors and intermediaries, as well as Governments', regulators' and central banks' responsibilities to assure the soundness and stability of financial markets required that the future instrument encapsulated the following solutions of core issues.

(a) Book entries in the investor's account must be effective both against the intermediary – in particular in case of the intermediary's insolvency – and third parties.

(b) An investor's/account holder's rights attached to the securities, including in particular dividends and other distributions and voting rights must be protected.

(c) The Convention must contain clear and simple rules for the acquisition and disposition of securities, including the creation of security interests, i.e. their being used as collateral.

(d) To the extent that there are matching debits and credits to accounts maintained by the intermediary for different account holders (whether or not in respect of deliveries between those account holders) the intermediary must be enabled to effect a net settlement of those debits and credits. In other words, it need not make precisely matching entries in accounts which it holds with an upper-tier intermediary, but can make such entries (if any) as required to reflect the net overall change in the aggregate balances of its account holders together.

(e) So-called upper tier attachment (cfr. *supra*, IV 1, example 2) must be prohibited. In other words, creditors of an account holder must not be allowed to attach their debtor's intermediated securities at the level of higher tier intermediaries or the issuer.

(f) There must be clear rules on priority in case of competing interests.

(g) ‘Good faith’ acquisition or, as the draft puts it, ‘acquisition by an innocent person’ must be protected.

(h) The rights of an account holder and an interest that has been effective against third parties must be effective against the insolvency administrator and creditors in any insolvency proceeding in respect of the relevant intermediary.

(i) Measures for the protection of the integrity of the issue (against ‘inflation’ by book entries) had to be taken.

(j) Loss sharing in case of an insufficient aggregate number and amount of securities of the same description credited to securities accounts maintained by an intermediary had to be regulated, including in case of insolvency of the intermediary.

### 3. Structure of the draft Convention

In the course of the deliberations of the Study Group and, thereafter, the consultations at the sessions of the Committee of Governmental Experts the structure of the draft instruments has undergone some quite substantial changes. The current version would appear to be mature and capable of being transformed into the final text of the future Convention with relatively few amendments and changes.

As is common in transnational commercial law, Chapter I (Articles 1–4) is devoted to definitions, scope of application and principles of interpretation. The reader’s attention is particularly drawn to the definitions of ‘securities’ (Article 1 (a)), ‘intermediated securities’ (Article 1 (b)), ‘intermediary’ and ‘relevant intermediary’ (Article 1 (d) and (g)), ‘account holder’ (Article 1 (e)), ‘securities

settlement system' and 'securities clearing system' (Article 1 (n) and (o)). Article 4, the provision guiding legislators, courts, as well as investors and intermediaries in the processes of implementing, applying and interpreting the Convention, is current standard. Article 2 defines the sphere of application once the conflict-of-laws analysis – be it under the Hague Convention, be it under the forum's autonomous conflicts rules – has identified which country's law governs. Article 3 establishes that of the two branches of activities carried out by central securities depositories (CSDs), to wit the 'notarial functions' of creating, recording or reconciling securities in their relationship with the issuers and, on the other hand, their activities as intermediaries, only the latter are within the instrument's scope.

Chapter II (Articles 5 and 6) spell out what the rights of the account holders are where securities are credited to their accounts.

Chapter III (Articles 7 to 14) is entitled 'Transfer of intermediated securities'. It lays out the ways of acquiring and deposing of securities by credit and debit to the account holder's securities account, including 'good faith' acquisition by an 'innocent person' (Article 12). Other key provisions of this chapter are Article 11 (on invalidity of debits and reversal and, therefore, important both for the protection of account holders and the stability of the system) and Article 13 (on priority among competing interests).

Chapter IV (Articles 15 to 23) is entitled 'Integrity of the intermediated holding system'. Here, the text deals with insolvency issues, prohibition of upper-tier attachment (cfr. *supra*, IV 2 (e)), instructions to the intermediary, the requirement that an intermediary hold sufficient securities of any description equal to the aggregate number and amount of that description credited to accounts which it maintains, limitations on obligations and liabilities of intermediaries, allocation of securities to account holder's rights, loss sharing in case of insolvency of the intermediary and,

finally, the effect of debits and credits and instructions on the insolvency of operators of or participants in securities settlement systems.

Chapter V (Articles 24 and 25) deals with the relationship with the issuer of securities.

Chapter VI (Articles 26-32) contains special provisions with respect to collateral transactions, obviously an exceedingly important aspect both for account holder/borrower and collateral taker/lender<sup>15</sup>. Here, the reader's attention is in particular drawn to Article 29 (on the collateral taker's right to use collateral securities as if it were the owner of them) and Article 31 (the practice of topping-up and substituting of collateral). Article 32 provides that a Contracting State may opt-out of this chapter by declaration. Providing for opt-out declarations, not long ago considered to be a sin committed by unfaithful uniform-law drafters, are looked at with greater sympathy today. The negotiations of other recent transnational commercial law instruments have shown that accommodating strong feelings rooted in participating States' traditions facilitates both the intergovernmental negotiation process and domestic implementation without closing the door to making the 'right' (i.e. the most radical and innovative) choices in the end<sup>16</sup>.

Chapter VII will contain general and subject-matter specific Final Clauses.

## V. Conclusions

1. The *Group of Thirty* states in its final monitoring report on global clearing and settlement<sup>17</sup>:  
“Consequently, harmonisation in both areas, conflict-of-laws and substantive law, must be pursued.  
As to the scope of the harmonization of substantive law, both the UNIDROIT project and the

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<sup>15</sup> On this topic, cfr. *Keijser*, *Financial Collateral Arrangements*, Kluwer, Deventer 2006.

<sup>16</sup> With respect to secured transactions, cfr. *Goode*, *Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment – Official Commentary*, UNIDROIT, Rome, 2002, p. 28, 40.

<sup>17</sup> *Group of Thirty*, *Global Clearing and Settlement, Final Monitoring Report*, Washington, DC, 2006, p. 41-42.

measures taken by the EU go well beyond the steps required by recommendation 15. Their successful completion and implementation will contribute significantly to the stability and efficiency of clearing and settlement. This report therefore encourages competent national authorities and market participants to support these processes. Despite the overlap in their scope, the work of UNIDROIT and the work of the recent EU Legal Certainty Group are not to be understood as substitutes for each other but as complementary. This is because, on the one hand, more countries participate in the UNIDROIT project (notably including the United States, Japan, Switzerland, Australia and Canada) and, on the other hand, because the EU Legal Certainty Group might target a higher level of harmonization and even prepare the way for a global work on additional issues, such as corporate action processing. It is, however, most important that both projects proceed in a coordinated manner. Uncoordinated results would jeopardize global harmonization in the field of substantive law regarding securities settlement for years. As far as possible, therefore, both projects must go forward at the same pace. It is therefore necessary that sufficient resources are made available to both of them. With a view of achieving full coverage of the 15 target countries, measures should also be examined that would allow the countries that are not yet involved to participate in the work on the UNIDROIT Convention”.

2. Governments who have not yet participated in the intergovernmental consultation process are warmly invited to consider participation in the finalisation of the text, i.e. the fourth session of the Committee of Governmental Experts which will be held from 21 to 25 May 2007 in Rome and the Diplomatic Conference for the adoption of the Convention in early 2008.

3. Interested Governments may contact the Secretariat (Deputy Secretary-General Alessandra Zanobetti) at [a.zanobetti@unidroit.org](mailto:a.zanobetti@unidroit.org).