



INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW
INSTITUT INTERNATIONAL POUR L'UNIFICATION DU DROIT PRIVE

**DIPLOMATIC CONFERENCE TO ADOPT A
CONVENTION ON SUBSTANTIVE RULES
REGARDING INTERMEDIATED SECURITIES**
Geneva, 1 to 13 September 2008

UNIDROIT 2008
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DRAFT FINAL PROVISIONS

capable of embodiment in the
draft Convention on Substantive Rules regarding Intermediated Securities

with

EXPLANATORY NOTES

(drawn up by the UNIDROIT Secretariat)

INTRODUCTION

1. In accordance with traditional practice, the draft final provisions capable of embodiment in a UNIDROIT Convention are drawn up by the Secretariat of the Institute in advance of the Diplomatic Conference of adoption.
2. In this instance, the draft final provisions of the future Convention on Substantive Rules regarding Intermediated Securities as set out below are based essentially on those of the 2001 Convention on International Interest in Mobile Equipment.

DRAFT FINAL PROVISIONS CAPABLE OF EMBODIMENT IN THE DRAFT CONVENTION ON SUBSTANTIVE RULES REGARDING INTERMEDIATED SECURITIES

CHAPTER VII – FINAL PROVISIONS

Article A

Signature, ratification, acceptance, approval or accession

1. **This Convention shall be open for signature in Geneva on 13 September 2008 by States participating in the Diplomatic Conference to adopt a Convention on Substantive Rules regarding Intermediated Securities held at Geneva from 1 to 13 September 2008. After 13 September 2008 this Convention shall be open to all States for signature at [the Headquarters of UNIDROIT in Rome] until it enters into force in accordance with Article C.**
2. **This Convention shall be subject to ratification, acceptance or approval by States which have signed it.**
3. **Any State which does not sign this Convention may accede to it at any time.**
4. **Ratification, acceptance, approval or accession is effected by the deposit of a formal instrument to that effect with the Depository.**

Comment

The four paragraphs of this article reflect provisions traditionally to be found in UNIDROIT Conventions (cf. Article 47 of the Cape Town Convention on International Interests in Mobile Equipment). While practice varies as to the length of time for which international private law conventions remain open for signature after their adoption, UNIDROIT has followed the precedent of its last adopted instruments and chosen to let the possibility for States to sign the Convention until it enters into force. It will of course be for the Diplomatic Conference itself to decide this question.

Article B

Regional Economic Integration Organisations

- 1. A Regional Economic Integration Organisation which is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, accept, approve or accede to this Convention. The Regional Economic Integration Organisation shall in that case have the rights and obligations of a Contracting State, to the extent that that Organisation has competence over matters governed by this Convention. Where the number of Contracting States is relevant in this Convention, the Regional Economic Integration Organisation shall not count as a Contracting State in addition to its Member States which are Contracting States.**
- 2. The Regional Economic Integration Organisation shall, at the time of signature, acceptance, approval or accession, make a declaration to the Depositary specifying the matters governed by this Convention in respect of which competence has been transferred to that Organisation by its Member States. The Regional Economic Integration Organisation shall promptly notify the Depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration under this paragraph.**
- 3. Any reference to a “Contracting State” or “Contracting States” or “State Party” or “States Parties” in this Convention applies equally to a Regional Economic Integration Organisation where the context so requires.**

Comment

This Article enables a Regional Economic Integration Organisation established by sovereign States and having competence on matters within the scope of the Convention to adhere to the Convention as if it were a Contracting State. For the corresponding provision in the 2001 Cape Town Convention on International Interests in Mobile Equipment and its equipment-specific protocols, see Article 48 of that Convention and, most recently, Article XXII of the 2007 Luxembourg Protocol on Matters specific to Railway Rolling Stock. The European Community, for example, has adopted two Directives on Settlement Finality and Financial Collateral, which touch upon matters covered by this Convention. Only the Community and not its Member States has competence to conclude treaties which affect the matters addressed by those Directives. For this reason it is necessary to include an appropriate provision permitting the European Community (and any other Regional Economic Integration Organisation in a similar situation) to become Party to the Convention.

Article C

Entry into force

- 1. This Convention enters into force on the first day of the month following the expiration of [...] months after the date of the deposit of the [...] instrument of ratification, acceptance, approval or accession between the States which have deposited such instruments.**

2. For each State that ratifies, accepts, approves or accedes to this Convention after the deposit of the [...] instrument of ratification, acceptance, approval or accession, this Convention enters into force in respect of that State on the first day of the month following the expiration of [...] months after the date of the deposit of its instrument of ratification, acceptance, approval or accession.

Comment

This article draws from former UNIDROIT Conventions (Article 16 of the 1988 Financial Leasing Convention, Article 12 of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, Article XXVIII of the Aircraft Protocol to the Cape Town Convention). Here again, however, practice is not uniform in regard to either the length of the period after the deposit for a private law convention to enter into force, or the number of instruments of ratification, acceptance, approval, or accession that must be deposited in order for it to enter into force. As far as the length of the period after the deposit is concerned, the authors of the 1988 and 1995 aforementioned Conventions have chosen six months, but those of the 2001 Cape Town Convention and its Protocols have preferred three months. As regards the number of instruments necessary for the Convention to enter into force, the authors of the UNIDROIT 1988 Conventions opted for the number of three, thus following the pattern of the conventions adopted within the framework of the Hague Conference on Private International Law. The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects opted for the number of five. The 2001 Cape Town Convention on International Interests in Mobile Equipment also opted for the number of three whereas the 2007 Luxembourg Protocol on Matters specific to Railway Rolling Stock established a threshold of four ratifications or accessions. It will be for the Diplomatic Conference itself to decide these questions.

Article D Territorial units

- 1. If a Contracting State has one or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may modify its declaration by submitting another declaration at any time.**
- 2. Any such declarations are to be notified to the Depositary and shall state expressly the territorial units to which this Convention applies.**
- 3. If a Contracting State has not made any declaration under paragraph 1, this Convention shall apply to all territorial units of that State.**
- 4. Where a Contracting State extends this Convention to one or more of its territorial units, declarations permitted under this Convention may be made in respect of each such territorial unit, and the declarations made in respect of one territorial unit may be different from those made in respect of another territorial unit.**

Comment

1. In recent years a variety of formulae have been employed in international private law conventions to meet the difficulties sometimes experienced by States with a federal system of government or distinct administrative regions involving a constitutionally guaranteed division of powers among the constituent units of the federation or the State.

2. In particular, such clauses permit States to accept the Convention in the first instance for certain territorial units only and then to extend its application to other territorial units and it is with a view to achieving that result that Article D is submitted as a basis for discussion at the Diplomatic Conference.

Article E Reservations and declarations

1. No reservations may be made to this Convention but declarations authorised by Articles 2, 5, 10, 19, 22, 33 and 34 may be made in accordance with these provisions.

2. Any declaration or subsequent declaration or any withdrawal of a declaration made under this Convention shall be notified in writing to the Depositary.

Comment

1. A reservation differs from a declaration in that it is a unilateral act by a Contracting State purporting to exclude or modify a Treaty provision (Article 2(1)(d) of the Vienna Convention), and, unless authorised by the Treaty, is not binding on other States unless they accept it (Article 20 of the Vienna Convention), whereas a declaration applying or excluding a provision of the Convention is authorised by the Convention itself and requires no acceptance.

2. No reservation is permitted by this Convention, but declarations may be made as authorised by the Articles listed in Article E(1) and may be replaced by a subsequent declaration under Article F or withdrawn under Article H.

Article F Subsequent declarations

1. A State Party may make a subsequent declaration at any time after the date on which this Convention has entered into force for it, by notifying the Depositary to that effect.

2. Any such subsequent declaration shall take effect on the first day of the month following the expiration of six months after the date of receipt of the notification by the Depositary. Where a longer period for that declaration to take effect is specified in the notification, it shall take effect upon the expiration of such longer period after receipt of the notification by the Depositary.

3. Notwithstanding the previous paragraphs, this Convention shall continue to apply, as if no such subsequent declarations had been made, in respect of all rights and interests arising prior to the effective date of any such subsequent declaration.

Comment

A State which has made a declaration may make a subsequent declaration supplementing, replacing or modifying the earlier declaration but not so as to affect rights and interests arising prior to the effective date of the subsequent declaration. This qualification is necessary to ensure the stability of acquired legal rights and established obligations.

Article G Applicability of Declarations

A declaration made by a Contracting State under any article of this Convention is applicable only if the law of that Contracting State is the non-Convention law.

Comment

Article G intends to express the approach that States can only make declarations in respect of their own jurisdiction and that they cannot export their rules.

Article H Withdrawal of declarations

1. Any State Party having made a declaration under this Convention may withdraw it at any time by notifying the Depositary. Such withdrawal is to take effect on the first day of the month following the expiration of six months after the date of receipt of the notification by the Depositary.

2. Notwithstanding the preceding paragraph, this Convention shall continue to apply, as if no such withdrawal had been made, in respect of all rights, interests and obligations arising prior to the effective date of any such withdrawal.

Comment

Similarly a declaration may be withdrawn but not so as to affect rights, interests or obligations arising prior to the effective date of the withdrawal.

Article I Denunciations

- 1. Any State Party may denounce this Convention by notification in writing to the Depositary.**
- 2. Any such denunciation shall take effect on the first day of the month following the expiration of twelve months after the date of receipt of the notification by the Depositary.**
- 3. Notwithstanding the previous paragraphs, this Convention shall continue to apply, as if no such denunciation had been made, in respect of all rights, interests and obligations arising prior to the effective date of any such denunciation.**

Comment

By denouncing the Convention a State Party to the Convention communicates its withdrawal from the Convention. This takes effect 12 months after receipt of the denunciation by the Depositary but does not affect rights, interests or obligations arising prior to that time, nor does it affect other States Parties to the Convention except in their relations with the denouncing State.

Article J Transitional provisions

[.....]

Comment

Contracting States may wish to consider whether it is necessary or appropriate to insert such a final clause in the Convention.

Article K Depositary and its functions

- 1. Instruments of ratification, acceptance, approval or accession shall be deposited with [UNIDROIT], which is hereby designated the Depositary.**
- 2. The Depositary shall:**
 - (a) inform all Contracting States of:**
 - (i) each new signature or deposit of an instrument of ratification, acceptance, approval or accession, together with the date thereof;**
 - (ii) the date of entry into force of this Convention;**

- (iii) each declaration made in accordance with this Convention, together with the date thereof;
 - (iv) the withdrawal or amendment of any declaration, together with the date thereof; and
 - (v) the notification of any denunciation of this Convention together with the date thereof and the date on which it takes effect;
- (b) transmit certified true copies of this Convention to all Contracting States;
 - (c) perform such other functions customary for depositaries.

Comment

1. Paragraph 1 of this Article suggests UNIDROIT as the Depositary.
2. Paragraph 2(a)-(c) lists the specific responsibilities of the Depositary. The responsibilities include the transmission to Contracting States of certified true copies of the Convention in each of the authentic language texts (English and French) and the furnishing of information to Contracting States about deposits of instruments of ratification, etc., date of entry of the Convention into force, deposits of declarations and withdrawals and amendments of declarations.
3. Finally, the Depositary is required to perform “such other functions [as are] customary for depositaries”. These include keeping custody of the original text of the Convention and of instruments of ratification, etc., and declarations; receiving signatures of the Convention; examining each signature and each instrument to ensure that it is in proper form and in accordance with the Convention; and registering the Convention with the Secretariat of the United Nations upon its coming into force (Article 77(1) of the Vienna Convention). The Depositary is also in a position to give guidance on such matters as the standards it employs to determine the acceptability of instruments and the format of declarations to be deposited with it.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, having been duly authorised, have signed this Convention.

DONE at Geneva, this thirteenth day of September, two thousand and eight, in a single original in the English and French languages, both texts being equally authentic, such authenticity to take effect upon verification by the Secretariat of the Conference under the authority of the President of the Conference within ninety days hereof as to the consistency of the texts with one another.

Comment

Establishing a verification period reflects current practice in the negotiation of transnational commercial law instruments, notably the 2001 Cape Town Convention and its equipment-specific protocols.