



**DIPLOMATIC CONFERENCE TO ADOPT A
CONVENTION ON SUBSTANTIVE RULES
REGARDING INTERMEDIATED SECURITIES
Final session**
Geneva, 5 to 7/9 October 2009

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Comments

(submitted by the European Banking Federation)

Set up in 1960, the European Banking Federation (EBF) is the voice of the European banking sector (European Union & European Free Trade Association countries). The EBF represents the interests of some 5000 European banks: large and small, wholesale and retail, local and cross-border financial institutions.

The EBF is committed to supporting EU policies to promote the single market in financial services in general and in banking activities in particular. It advocates free and fair competition in the EU and world markets and supports the banks' efforts to increase their efficiency and competitiveness.

1. Having regard to the work of the last UNIDROIT session in September 2008 and in view of the forthcoming diplomatic conference to be held in Geneva in October 2009, the European Banking Federation (EBF) would like to submit its comments on the last draft of the UNIDROIT Convention on Substantive Rules regarding Intermediated Securities (the Convention).
2. As previously stated, the EBF has followed the drafting of the UNIDROIT Convention with great interest and supports this initiative, which aims at providing a much needed improved harmonisation and legal certainty in the field of securities at international level.
3. At this stage of discussion on the draft Convention, the EBF wishes to focus on two main concerns.
4. First of all the EBF reiterates the importance for UNIDROIT to coordinate its work with the European Commission, which could draft a European Directive proposal based on the Recommendations set in the Legal Certainty Group's Second Report of August 2008 (I).
5. Secondly, the EBF believes that the final UNIDROIT Convention should take full consideration of the financial crisis which developed immediately after the last session of September 2008 by maintaining the list of minimum rights conferred upon the account holder in Article 9 of the current draft Convention and by also adding a list of minimum duties for each intermediary in the chain and by ensuring the integrity of the issue of securities (II).
6. Finally, the EBF would like to share a number of specific comments on control agreements (III).

I. The need for a consistent framework at international and at European level

7. The EBF acknowledges the great work accomplished at the last UNIDROIT session where most of the open issues have been addressed, in particular regarding **insolvency-related matters, securities clearing and settlement systems and good faith**.

8. In parallel, the Legal Certainty Group (LCG) which has been working under the supervision of the European Commission has published its Second Advice in August 2008. This fundamental piece of work has been welcomed by the EBF and could pave the way to a proposal for a European Directive.

9. As already stated on different occasions ¹, the EBF believes that **an EU Directive which would not be compatible with the UNIDROIT Convention and vice-versa, a UNIDROIT Convention that would not take into account the still to be agreed European position, would inevitably result in a deadlock situation such as the current *status quo* on the Hague Convention and should be avoided at all costs**.

10. The additional UNIDROIT diplomatic session of October 2009 should therefore serve the objective of precluding any incompatibilities and inconsistencies between the UNIDROIT draft Convention and a potential post-LCG European initiative on securities.

11. Stakeholders involved both at international and at EU level should thus agree on a global consistent framework for intermediated securities by all the stakeholders, even at the cost of additional time.

II. Learning lessons from the financial crisis

12. The EBF encourages UNIDROIT to take full account of the financial crisis which developed after the last session.

13. The EBF endorses the European Council's approach, in particular during the Civil Law Committee of 17 December 2008, of evaluating the UNIDROIT draft Convention against the background of the financial crisis. Account should also be taken of the recent cases of fraudulent activities which have impacted seriously on some investors.

1. Minimum duties for account providers

14. The EBF believes that the UNIDROIT Convention should protect the rights of account holders and in particular of final investors and therefore, fully supports the list of minimum rights for account holders held in Article 9 of the current draft Convention.

15. This list should remain compatible with the list of minimum rights that book-entry securities would confer upon the account holder as suggested in the European Commission consultation on Securities law harmonisation i.e.:

- the right to exercise and receive the rights attached to the securities, as far as the account holder itself is identified by the issuer law as the person entitled to these rights;

¹ See the EBF position paper on the previous draft UNIDROIT Convention (*EBF Ref. N°D1350D*) the EBF letter of 16 May 2008 (*EBF Ref. N° 0258*) to European Union governments and European Commission officials.

- the right to instruct the account provider to dispose of the securities;
- the right to instruct the account provider to arrange for holding the securities with another account provider, as far as the applicable law allows holding otherwise than with an account provider.

16. However, while the rights are conferred upon all account holders in the chain, the investment decision and the final benefit of those rights should only lie with the person recognised as such by the issuer.

17. In **addition, these rights should also correspond to obligations upon account providers** which should be clearly stated as follows:

The account provider:

- (a) must take all necessary care in the custody of the securities registered to securities accounts;
- (b) may use the securities only upon instruction of the account holder;
- (c) must inform account holders of certain events affecting the securities.

2. Holding of securities

18. Article 24 of the UNIDROIT draft Convention on the holding or availabilities of sufficient securities provides that an intermediary must hold a number of securities equal to the number of securities held by its clients.

19. The EBF considers that the integrity of the issue would be improved if Article 24 stated that an account provider has to maintain a number of book-entry securities that corresponds to the aggregate number of book-entry securities credited to the account of its account holders and those held for its own account, as proposed by Recommendation 9 of the LCG Second Advice.

20. In addition, the EBF believes that the reuse of securities by intermediaries should only be allowed with the client's express consent as is currently allowed under the EU regulatory framework (MiFID level 2).

III. Specific comments

21. Given the fact that control agreements do not exist in most civil law countries, the provisions currently present in Article 12(1)(b), which hold that the Contracting State should make a declaration to apply control agreements and that designating entry should be maintained so that it remains clear that the provisions on control agreement (Article 1(k) and subsequently on "designating entry" (Article 1(l)), do not mean that State Parties are required to implement control agreements in their jurisdiction.