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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

**STUDY GROUP FOR THE PREPARATION OF HARMONISED
SUBSTANTIVE RULES ON TRANSACTIONS
ON TRANSNATIONAL AND CONNECTED CAPITAL MARKETS**

**Restricted Study Group on Item 1 of the Project: Harmonised Substantive Rules
regarding Securities Held with an Intermediary**

**Proposal with respect to Chapters IV, V
of the Preliminary Draft Convention**

(prepared by the Secretariat)

Rome, September 2004

Chapter IV
Acquisition, disposal and creation of collateral interests

Article 9
[Acquisition]

- (1) Securities held with an intermediary are acquired by an account holder by the credit of those securities to a securities account of that account holder.
- (2) Without limiting paragraph (1), no further step or event is necessary, or may be required by law, as a condition of the acquisition of securities held with an intermediary by an account holder.

Article 9a
[Disposal of securities]

- (1) An account holder may dispose of securities held with an intermediary -
 - (a) by causing them to be debited to his securities account on terms that the securities will be transferred to the intermediary for its own account;
 - (b) by causing them to be debited to his securities account on terms that a corresponding credit will be made to a securities account of another person with the intermediary or with another intermediary.
- (2) No further step or event is necessary to render the disposal under paragraph (1) effective against third parties.
- (3) Subject to Article 13, paragraph (2) does not preclude any other rule provided by the applicable law requiring further [permitting other] steps or events to render the disposal effective against third parties.

Article 9b
[Creation of collateral interests]

- (1) An account holder may create a collateral interest over securities held with an intermediary, or over a securities account. A collateral interest created over a securities account has effect with respect to all securities from time to time credited to the relevant account, without the need for any further identification or appropriation of particular securities.
- (2) If an account holder agrees with an intermediary to grant to that intermediary a collateral interest over securities, or over a securities account, held by the account holder with that intermediary, he thereby creates a collateral interest over those securities or that securities account in favour of the intermediary.
- (3) If an account holder causes securities, or a securities account, held by the account holder with an intermediary to be designated or appropriated in a manner such that the intermediary will give effect to any instructions that it may receive from another person for the further disposition or transfer of the securities, or of the securities from time to time credited to the securities account, [and enters into arrangements which provide for the securities account and any account statements relating to the securities account to be annotated in such manner as to indicate that such designation or appropriation has been made,] he thereby creates a collateral interest over the securities, or the securities account, in favour of that other person.
- (4) No further step or event is necessary to render the collateral interest created under paragraphs (1)-(3) effective against third parties.

(5) Subject to Article 13, paragraph (4) does not preclude any other rule provided by the applicable law requiring further [permitting other] steps or events to render the disposition effective against third parties.

Article 10
[Netting and tracing of debits and credits to securities accounts]

- (1) Debits and credits to securities accounts may be effected on a net basis.
- (2) A debit or credit of securities to a securities account is not ineffective because it is not possible to identify a securities account to which a corresponding credit or debit is effected.

Article 11 – obsolete

Article 12 – obsolete

Article 13
[Priorities among competing dispositions]

Subject to any contrary agreement between persons entitled to any such interests,

- (1) Interests created under Article 9a (1) and Article 9b (1)-(3)
 - (a) have priority over interests created under Article 9a (3) and Article 9b (5); and
 - (b) rank amongst themselves in the following order –
 - (i) first, a disposition under Article 9a (1);
 - (ii) second, a disposition under Article 9b (2);
 - (iii) third, a disposition under Article 9b (3);
- (2) Two or more dispositions under Article 9b (3) rank among themselves in the order in which they were created.
- (3) An interest arising by operation of law under any mandatory rule of the applicable law has such priority as is afforded to it by the rule in question.
- (4) Subject to the preceding provisions, the priority of any competing interests is determined by the applicable law.

Chapter V
Protection from third party claims

Article 14
[Acquisition of securities held with an intermediary]

- (1) An account holder who acquires securities by credit to his securities account is not subject to any adverse claim subsisting with respect to those securities at the time of the credit if the account holder does not at that time have notice of the adverse claim.
- (2) This does not apply where the interest is acquired by way of gift or otherwise gratuitously.

Article 15
[Acquisition of collateral interests
over securities held with an intermediary

A person who acquires or perfects a security interest in securities held with an intermediary by obtaining control of those securities in accordance with article 11 is not subject to an adverse claim subsisting with respect to those securities at the time that he obtains control if that person does not at that time have notice of the adverse claim.

Article 16
[Acquisition from intermediary
acting in breach of Art. 5 (2)]

(1) A person who acquires an interest in securities (whether or not securities held with an intermediary) from an intermediary under a disposition effected in contravention of article 5(2) is not subject to any adverse claim in respect of the rights of account holders of that intermediary if that person does not at that time have notice that the disposition is effected in contravention of article 5(2).

(2) This does not apply where the interest is acquired by way of gift or otherwise gratuitously.

Article 17
[Acquisition by intermediary otherwise
than by credit to a securities account]

An intermediary which, otherwise than by a credit to a securities account held by it with another intermediary, acquires securities for credit to a securities account maintained or to be maintained by it, or otherwise in pursuance of an obligation under article 5, is not subject to any adverse claim subsisting with respect to those securities at the time of the acquisition if the intermediary does not at that time have notice of the adverse claim.

Article 17a
[Limited liability of intermediary acting on instruction]

An intermediary which disposes of securities (whether or not held with another intermediary) in pursuance of instructions given by an account holder or by a person who holds a security interest perfected in accordance with article 12 is not liable to a person having an adverse claim with respect to those securities unless –

- (a) the intermediary acts in contravention of an order of a competent court;
- (b) the adverse claim arises from an interest created by a disposition perfected under article 12(1) or under the applicable law[; or
- (c) the intermediary acts in collusion with another person and with the intention of violating the rights of the adverse claimant].

Chapter V a
[Finality]

Article 18
[Reversal of debits and credits to securities accounts]

Without prejudice to any special rule of the applicable law regarding the finality of dispositions effected through securities accounts (including securities accounts maintained by an intermediary acting in the capacity of central securities depository or operator of a clearing or settlement system) –

- (a) a debit or credit of securities to a securities account may not be reversed so as to prejudice an intermediary who, without notice of any defect in or with respect to that debit or credit, has effected a further debit or credit which is dependent on it; and
- (b) a credit of securities to a securities account of an account holder may not be reversed so as to prejudice that account holder if the account holder, without notice of any defect in or with respect to that credit, has effected a further disposition of the securities thereby credited to the securities account.