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

UNIDROIT COMMITTEE OF GOVERNMENTAL EXPERTS FOR THE PREPARATION OF A DRAFT CONVENTION ON HARMONISED SUBSTANTIVE RULES REGARDING SECURITIES HELD WITH AN INTERMEDIARY

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COMMENTS BY GOVERNMENTS AND INTERNATIONAL ORGANISATIONS

(Comments by the Government of the Republic of Tunisia)

In a letter of 23 December 2004 the International Institute for the Unification of Private Law asked the Tunisian Government to state any comments it might feel to be useful on the preliminary draft Convention with a view to their consideration at the session due to be held from 9 to 20 May 2005.

A study of the preliminary draft gives rise to the following comments as to both form and substance:

I – Comments on the form

It is necessary to recall that the draft was written in English and subsequently translated into French, and that this translation affected the meaning of terms used which have lost their legal meaning as formulated in the original text.

By way of example we might refer to Article 14, which prohibits the intermediary from making any credit of securities to a securities account maintained by it, or to dispose of securities if it does not hold a sufficient number or if it does not have the possibility to hold them. In case of contravention of this obligation, it is responsible for the loss suffered by the account holder and it must indemnify it by mutual consent or by way of judicial proceedings. This idea, which was stated in Article 14 in its English version, is not clearly reflected in the French version.

Other articles could be indicated as having lost all meaning.

In the light of the above, we would propose that a drafting committee be set up to prepare a new draft in French which would be as close as possible to the English version. Such a way of proceeding does not, however, prevent the making of proposals for the correction of certain linguistic and grammatical imperfections by submitting a new wording for certain articles as follows:

Article 1

This article contains the definition of terms used. Amongst those terms "insolvency proceeding" is to be found, which has been defined as a collective judicial or administrative proceeding, but it is generally accepted that a collective proceeding can only be judicial considering the guarantees it offers which do not exist in administrative proceedings. Consequently, it would be desirable to permit only collective judicial proceedings.

Article 2

Article 2(1)(c), (d) and (e) are drafted in a very heavy manner and we propose that they be reformulated aiming for clarity and precision.

Article 3(4)

« Le crédit ou le débit d'un compte produit ses effets même en cas d'absence d'identification de l'opération effectuée sur le compte de titres. »

Article 4(1)(a)

« En faveur de l'intermédiaire pertinent par convention conclue entre ce dernier et le titulaire du compte. »

Article 5(1)

« Un débit ou un crédit à un compte de titres ou une identification au sens de l'article 4 est nul s'il est exécuté sans l'autorisation du titulaire du compte. »

Article 5(2)

« Lorsqu'un débit, un crédit ou une identification au sens de l'article 4 est assortie d'une condition visée par la convention de compte ou les règles d'un système de compensation ou de règlement – livraison, il n'est opposable aux tiers qu'une fois la condition est remplie et aux termes de l'article 9 le droit est réputé avoir été créé dès le moment où le crédit ou l'identification pertinente a été effectuée ».

Article 7

« Les dispositions des règles ou conventions régissant le fonctionnement d'un système de compensation ou de règlement – livraison destiné à assurer la stabilité du système ou le caractère définitif des aliénations effectuées par ce système doivent prévaloir sur toute disposition de cette convention sauf en cas d'incohérence ».

Article 10(2)

« Le paragraphe 1 ne s'applique pas à l'acquisition de titre (ou à la constitution de sûreté par voie de donation ou toute autre cession[1] »

Chapter IV: The collective proceedings

Article 11

« Droits des titulaires de compte en cas d'ouverture des procédures collectives contre l'intermédiaire. »

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[1] - The term "*manière*" used in this article of the draft has no meaning in legal terms and has therefore been replaced by the term desired by the drafters of the text, i.e. "*cession*".

Article 13(1)

« Sous réserve du paragraphe 2, un intermédiaire n'est pas tenu, ni autorisé à donner effet à toute instruction… ».

Article 14(3)

« Dans les paragraphes précédents, un intermédiaire est considéré comme détenteur d'un nombre suffisant de titres de même nature lorsqu'il a un nombre égal ou une valeur équivalente de titres inscrits au crédit des comptes tenus par cet intermédiaire ».

Article 14(4)(b)

« exigeant d'un titulaire du compte qu'il paye[2] l'opérateur du système ou tout autre intermédiaire pertinent des coûts engendrés par le crédit de titre supplémentaire sur le compte de ce titulaire lorsque les titres ont été ou peuvent être débités de ce compte de titres conformément à l'alinéa a ».

Article 14(5)

« Le présent article n'affecte aucune disposition d'une convention de compte relative au paragraphe des coûts engendrés par une action intentée par un intermédiaire visant au respect du paragraphe 2 dans le cas où… ».

Article 15(2)

« Les titres affectés conformément au paragraphe précédent ne font pas partie des actifs de l'intermédiaire disponibles pour distribution ou réalisation en faveur des créanciers dans le cadre d'une procédure collective ou ne peuvent être autrement revendiqués par les créanciers ».

Article 16(1)

« S'il y a quantité manquante du fait que le nombre ou la valeur nominale des titres détenus auprès d'un intermédiaire est inférieur au nombre ou à la valeur nominale des titres de même nature crédités aux comptes tenus par cet intermédiaire, on est dans l'un des cas suivants :… ».

Article 18(1)

« Entre l'émetteur de titres et le titulaire d'un compte auquel ces titres sont crédités, le fait que les titres soient détenus auprès d'un intermédiaire ne doit pas par ce seul fait empêcher l'existence ou entraver l'exercice dans une procédure collective relative à l'émetteur, de tous droits de compensation qui auraient existé et auraient pu être exercés si le titulaire du compte avait détenu les titres d'une façon directe ».

Article 21(1)

« Sauf stipulation contraire du contrat de garantie le preneur de la garantie aura le droit d'usage et d'aliénation des titres donnés en garantie comme s'il était propriétaire ».

Article 21(2)

« Lorsque le preneur de la garantie exerce son droit d'usage…[3] ».

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2 The draft uses the term "*indemnise*". Indemnisation is due as compensation for damage suffered, whereas in this case it is the payment of a sum of money which is already known, consequently it is desirable to replace "*indemnise"* by "*paye"*.

3 The term "*utilisation*" has no meaning in legal terms and it is therefore desirable to replace it by a more appropriate legal term such as "*usage"*.

Article 21(3)

« ……

a) …….
b) seront à tous les autres égards soumis aux stipulations du contrat de garantie considéré. »

Article 21(5)

« Le contrat de garantie considéré peut prévoir qu'en cas de survenance d'un ou deux cas de la réalisation de la garantie avant l'exécution complète des obligations garanties ou en cas de possibilité de survenance selon la décision du preneur de la garantie soir par compensation, résiliation d'opération ou autrement :

a) La déchéance du terme des obligations respectives est prononcée. De ce fait, les obligations deviennent soit immédiatement exigibles par le paiement d'une somme d'argent correspondant à la valeur courante estimée ou éteintes et remplacées par une obligation de payer une somme d'argent correspondant au montant susmentionné ».

Article 22

« Le …… l'engagement ……avant d'une procédure collective à l'égard du constituant de la garantie ».

II – Comments as to substance

It is known that the adoption of substantive law rules is intended to compensate for the insufficient internationalisation of conflict rules. The conflict rule will normally designate the national law of a State as the applicable law, and this national law has been conceived for internal trade. The state law is normally a static law, it does not answer the imperatives of international commerce which is perpetually renewed and on the move. For this reason, international trade has forged a system of substantive law in which the International Institute for the Unification of Private Law has participated with the elaboration of several conventions which, once ratified, will apply to conflicts containing a foreign element. In order to do this, when elaborating a convention it is necessary to use precise legal terms used by a majority of States, and this has not been clearly done in this draft. This is to be seen in the following examples:

1) The use of imprecise legal terminology

Articles 4 and 5 use the terms "*valide*" and "*invalide*" and sometimes "*inopposable aux tiers*" to speak of a designation in a securities account. It is known that a legal act which does not fulfil the conditions for its formation is null and void, but this nullity is either an absolute or a relative nullity. If the lack of validity of the contract is the result of a lack of consent, the contract can only be annulled.

As regards the effectiveness against third parties, it means that third parties do not have any obligations, but have the possibility to make use of the contract as against the parties themselves.

Consequently, it is necessary to determine who is a third party in a given contract and the question with which we are concerned is that of securities held by an intermediary. This idea is not clear in the preliminary draft Convention and it is necessary for it to be clarified by

determining the concept of third party in the context of designations made over a securities account.

2) The use of legal terms the meaning of which differs from country to country

The preliminary draft Convention uses the term “insolvency proceeding”, but this term does not have the same legal meaning in all countries. In fact, it is understood in Germany in accordance with Article 1 of the German Insolvency Act of 5 October 1994 as a proceeding the purpose of which is that of satisfying the creditors of a debtor in a collective manner by selling the property of the latter and by sharing out the proceeds, or by establishing an “insolvency plan”. In Belgium, the acts of 17/07/1997 and 08/08/1997 speak of discharge in bankruptcy proceedings and of bankruptcy against a debtor who is a merchant. In Spain, Article 874 of the Commercial Code speaks of collective proceedings against a merchant who discontinues payment of his debts. In Japan, Article 126 of the Insolvency Law speaks of the initiation of collective proceedings against any person who is in total impossibility to make payment. In the United States, Chapter 11 of the United States Code speaks of collective proceedings which are initiated against any debtor who discontinues the payment of its debts. In Tunisia, one speaks of the recovery of enterprises in economic difficulty by virtue of the law of 17/04/1995 which is applicable to any natural or legal person exercising a commercial, industrial or artisanal activity. Such a proceeding is closed either judicially with the maintenance of the activity of the enterprise, or by a declaration of bankruptcy of the debtor.

If we have reviewed these different laws we have done so to insist on the fact that the use of the term “collective proceeding” is necessary to avoid divergent interpretations. In fact, “insolvency” is applied in the private sphere only, whereas “”collective proceeding” is applied to merchants irrespective of whether they are natural or legal persons.

3) Disposal of the security by the collateral provider

Chapter VII, which deals with collateral transactions, provides in Article 21 that “the collateral taker shall have the right to use and dispose of the collateral securities as if it were the owner of them”. This provision is liable to criticism. In fact, it is commonly accepted that the collateral taker has a right to a commission in exchange for the loan it has granted, and moreover in the case of delay in the payment of the debt it has a right to interest on overdue payment or default interest. Thus the sale of the collateral securities is not possible unless the debtor does not pay the debt when it falls due. Moreover the fear that, in the case of initiation of collective proceedings against the debtor, the creditor may suffer damage as it will have the same priority as the other creditors has no reason to be, as the securities pledged permit the pledgor to have first rank of priority and it is paid before the other creditors out of the proceeds of the sale of the securities pledged.

Thus, it seems to us that Chapter VII on collateral transactions has no place in the preliminary draft Convention, as it appears to be contrary to the rules on securities applied in most countries of the world, all the more so as it creates more problems than it solves. In fact, there is no reason to sell collateral securities before the falling due of the debt and after authorisation by the competent court. Furthermore, the sale as provided for in the preliminary draft Convention opens the door to court action and to expert evaluation of the securities at the time of the sale in the case of disagreement or conflict between the parties, which would not appear to be the best solution.