



**UNIDROIT COMMITTEE OF GOVERNMENTAL EXPERTS FOR
THE PREPARATION OF A DRAFT CONVENTION ON
SUBSTANTIVE RULES REGARDING INTERMEDIATED
SECURITIES
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***COMMENTS BY GOVERNMENTS
AND INTERNATIONAL ORGANISATIONS***

(submitted by the Government of the Republic of Turkey)

1. On the Article 23 of the draft Convention, it is regulated that the instructions entered into the system by the “participant” or “operator” shall not be subject to a revocation or invalidation notwithstanding the commencement of an insolvency proceeding in respect of the “operator” or “participant”. However, these institutions are not defined in the draft. It is considered that, defining these institutions in the first article of the draft Convention should be beneficial.

2. The draft Convention shall be binding for the contracting states with different legal frameworks. As a result, in order to prevent the potential interpretation differences between the contracting States, it is considered that it would be beneficial to define the terms “security interest” and “limited interest other than a security interest”, used especially in the Article 7 and 8 of the draft Convention, in order to clarify the differences and similarities from each other and from the restricted rights *in rem*.

3. On the paragraph (b) of the first Article of the draft Convention, the term “intermediary” is defined as “*a person on the course of business or other regular activity maintains securities accounts for others or both for others and for its own account*”.

On the other hand, on the Article 17 of the draft Convention titled “*Prohibition of Upper-tier Attachment*” it is stated that no attachment of or in respect of intermediated securities of an account holder shall be granted or made against the issuer of the relevant securities or against any intermediary other than the relevant intermediary.

On the Article 3 of the draft Convention, it is accepted that the rules of the Convention shall not be applied to the activity of creation, recording or reconciliation of securities conducted by central securities depositories.

Although there is an “intermediary” definition in the draft Convention, it is considered that there can be interpretation differences between the contracting States on the application of the Article 3 and 17 of the Convention as the CSDs are not defined and the intermediary definition is not adequate. In this context, it is considered that it would be beneficial to make a definition of Central Securities Depositories in the Article 1 of the draft Convention and/or to redraft the Article 17 of the Convention titled “Prohibition of Upper-tier Attachment” as to determine the application of the said article by the central securities depositories and to provide compatibility between different legal frameworks.

4. Chapter VI of the draft Convention titled “Special Provisions with Respect to Collateral Transactions” makes parallel regulations with the Directive 2002/47/EC on Financial Collateral Arrangements of the European Union.

While the Directive has a field of application in the European Union member States on a regional level, the draft Convention shall be applicable for all the contracting States. The parties to the collateral arrangements within the European Union Directive 2002/47/EC can be Public Authorities, Central Banks, Financial Institutions, settlement agent or clearing house and a person other than a natural person, provided that the other party is one of the above institutions. On the other hand, the draft Convention makes a broader definition and does not restrict the parties to the financial collateral arrangements.

The European Union Directive 2002/47/EC and the draft Convention regulations are of great importance and beneficial for preparing a solid legal basis for the financial collateral arrangements.

5. In accordance with the Turkish capital market regulations, capital market instruments and the rights affixed thereon are recorded on a dematerialized basis by Central Registry Agency (CRA), through the accounts opened in the name of the investors. Investor accounts for dematerialized securities are held within the CRA.

In the present draft Convention, it appears that the central securities depositories are included in the term “intermediary” without considering the differences between the models based on pool accounts holding and the models that the securities are recorded through accounts opened in the name of the real right owner investors. The latter model, adopted by CRA according to the Turkish capital market regulations, makes it possible to control and trace the transfers between the accounts and therefore differ from the other models that the convention is mostly based upon.

As per the other models, the model of recording securities on a dematerialized basis through a more centralized institution prevents multiplied securities or otherwise uneven or illogical credits and debits in the accounts. For this reason, it is considered that it would be beneficial to distinguish central depositories from the intermediaries and to differentiate the Convention for the Countries keeping records on a dematerialized basis through the accounts opened in the name of the investors.

For example, in the Article 7 of the draft Convention it is regulated that the intermediated securities shall be acquired by the account holder by the credit of securities to that account holder’s securities account and that no further step shall be required to render the acquisition of intermediated securities effective against third parties.

In accordance with current Turkish capital market regulations, the records relating to the investor securities and accounts are kept both by the Central Registry Agency and intermediaries with two different accounting systems. On the other hand, in the Capital Market Law Article 10/A, it is regulated that the date of notification to the Central Registry will be taken as reference in claiming against third parties the rights on the dematerialized capital market instruments. As a result, the

records kept by Central Registry are accepted as valid records both for claiming against third parties and means of evidence.

However, it is considered that it would be beneficial to clarify the moment in which the securities shall be accepted as acquired by the investor; whether in the moment of crediting them to the accounts maintained by Central Registry Agency (CSD) or to the accounts of the relevant intermediary.