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**The System of Declarations under the UNIDROIT Convention on
Substantive Rules for Intermediated Securities
("Geneva Securities Convention")**

***An Explanatory Memorandum for the Assistance of States and
Regional Economic Integration Organisations***

Prepared by the Secretariat of UNIDROIT, as Depositary

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INTRODUCTION

1. This document addresses a certain number of practical matters that Contracting States are advised to consider in connection with the ratification, acceptance, approval of, or accession to, the UNIDROIT Convention on Substantive Rules for Intermediated Securities (official shorthand: "Geneva Securities Convention"; hereinafter: the "Convention").¹ The purpose of this document is to assist legislators, regulators and policymakers of Contracting States consider the legislative and treaty actions that may be needed to implement the Convention in a manner consistent with its provisions and with the policy choices it offers to Contracting States.

2. This Declarations Memorandum provides information on the declarations set out in the Convention. Drawing on the *Official Commentary* to the Convention², it explains the scope, purpose and required content of the declarations contemplated by the Convention, as well the steps necessary for lodging them with the Depositary.³

3. It should be noted that this document is not intended to offer comprehensive interpretation of the Convention or to assist judges, arbitrators or practitioners understand its principles or implications. Comprehensive guidance of such nature is provided in the *Official Commentary* to the Convention, to which this document refers.

¹ For the text of the Convention and official documents and information issued in relation thereto, see www.unidroit.org/english/conventions/2009intermediatedsecurities/main.htm.

² The Official Commentary on the UNIDROIT Convention on Substantive Rules for Intermediated Securities has been published by Oxford University Press; <http://ukcatalogue.oup.com/product/9780199656752.do>. The French version has been published by Schulthess (Geneva) - <http://www.schulthess.com/buchshop/detail/ISBN-9783725565672/Kanda-Hideki-Mooney-Charles-Th%C3%A9venoz-Luc-B%C3%A9raud-St%C3%A9phane-Keijser-Thomas/Commentaire-officiel-de-la-Convention-dUNIDROIT-sur-les-r%C3%A8gles-mat%C3%A9rielles-relatives-aux-titres-interm%C3%A9di%C3%A9s>; LGDJ (Paris) - <http://www.lgdj.fr/colloques-etudes-rapports/23379570/commentaire-officiel-convention-unidroit-regles-materielles>; and Thémis (Montreal) - <http://www.editionsthemis.com/livres/livre-4828-commentaire-officiel-de-la-convention-drunidroit-sur-les-regles-materielles-relatives-aux-titres-intermedies.html>.

³ See the Declarations Memoranda issued in relation to the Cape Town Convention: UNIDROIT 2011 – DC9/DEP – Doc. 1 Rev. 4 (Aircraft Protocol) and UNIDROIT 2009 – DC10/DEP – Doc. 1 (Railway Protocol), available on <http://www.unidroit.org/english/conventions/mobile-equipment/depositaryfunction/main.htm>.

DECLARATIONS

Section 1. General remarks

4. Article 44 of the Convention⁴ provides that no reservations may be made to the Convention.⁵ However, the highly technical subject matter covered by the Convention, the variety of solutions offered under different legal traditions, and the sensitive nature of financial markets regulation, led to the formulation of an elaborate system of declarations so as to afford Contracting States and Regional Economic Integration Organisations⁶ an adequate degree of flexibility in implementing the Convention. For a list of the Convention's declarations, see **Annex I**.

5. The system of declarations provided for under the Convention gives Contracting States the possibility of making choices in respect of certain matters so as to better implement the policy objectives that they see fit to pursue in respect of intermediated securities and facilitate the coordination between the provisions of the Convention and their legal systems.

Section 2. Procedures for making and withdrawing declarations

A. Time and form of declarations

6. Article 40 of the Convention provides that instruments of ratification, acceptance, approval or accession are to be deposited with UNIDROIT, which is designated the Depository. Declarations under the Convention must be made accordance with Article 45, which also sets forth the procedure for the modification or withdrawal of a declaration, as well as the time at which a declaration or its modification or withdrawal becomes effective. Under Article 45 of the Convention, any declaration or subsequent declaration or any withdrawal of a declaration made under the Convention is to be notified in writing to UNIDROIT, as Depository.

7. Except for the declaration under Article 41(2), which may only be made by a Regional Economic Integration Organisation at the time of signature, acceptance, approval or accession, and the initial declaration under Article 43(1), which may only be made at the time of signature, ratification, acceptance, approval or accession, declarations may be made by a Contracting State at any time (Article 45(1)). Except for a declaration by a Regional Economic Integration Organisation Declarations made at the time of signature are subject to confirmation upon ratification, acceptance or approval (Article 45(3)). In the absence of confirmation such declarations will be without effect.

8. According to Article 45(2), declarations and confirmations of declarations must be in writing and formally notified to the Depository. It should be noted that the Convention was drawn up in English and French, which are the only two authentic texts. The Depository, therefore, is not able to accept instruments of ratification, acceptance, approval or accession, declarations or notification in a language other than English or French.

⁴ Hereinafter, references to Articles are to Articles of the Convention, unless specified otherwise.

⁵ Cf. Articles 2(d) and 19-23 of the 1969 Vienna Convention on the Law of Treaties.

⁶ References in this document to Contracting States include Regional Economic Integration Organisations, except where the context indicates otherwise.

B. Entry into force of declarations

9. Article 45(3) lays down two rules of general application. The first sentence of Article 45(3), which provides that a declaration takes effect simultaneously with the entry into force of the Convention in respect of the State concerned, contemplates a declaration made (or in the case of a declaration made at the time of signature, confirmed) either at the same time as the State's ratification, acceptance, approval or accession, or after that time but prior to the entry into force of the Convention in respect of that State. In both cases, the declaration will take effect in relation to the Contracting State upon the entry into force of the Convention in respect of that State.

10. In accordance with the second sentence of Article 45(3), a declaration that is notified to the Depositary after the entry into force of the Convention in respect of the State concerned takes effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the Depositary, a rule which has the advantage of giving other Contracting States some time to become aware of the changes in the law of the State making the declaration, so as to provide a reasonable opportunity for parties to adjust business practices and to take into account the changes to be introduced by the declaration.

11. Article 45(4) constitutes a pendant to Article 45(2) and the second sentence of Article 45(3) in that it permits the modification or withdrawal by a State at any time of a declaration by formal notification in writing addressed to the Depositary, such modification or withdrawal taking effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the Depositary.

12. Article 45(5) makes it clear that despite Article 45(1) to (4), the Convention continues to apply to all rights and interests arising *prior to* the effective date of the declaration, modification or withdrawal (as if no declaration, modification or withdrawal of the declaration had been made). However, Article 45(5) does not apply to the declaration provided for in Article 39 (Article 39(4)).

C. Use of the declaration forms

13. Declaration forms are provided for all declarations authorised by the Convention, but not for the notification of withdrawal of a declaration.

14. Contracting States may lodge declarations in any form that complies with the requirements of the Convention. However UNIDROIT, as Depositary, encourages all Contracting States to base their declarations on the declaration forms in this memorandum so as to ensure that their declarations comply with the requirements of the Convention. *Alternative* forms are provided for the declarations in respect of some of the articles, reflecting the different possibilities permitted under the provisions in question, as indicated in the relevant form.

D. Information about laws and policies relating to the matters covered by the Convention

15. In accordance with Article 48(2) (iii) and (iv) of the Convention, information about the declarations made by each Contracting State under the Convention is formally communicated by the Depositary to all other Contracting States. Information about the declarations is also made available on the UNIDROIT website.

16. Those wishing to ascertain the content of declarations made by a Contracting State will be able to do so by consulting the website of the Depositary, UNIDROIT, or by communicating directly with the Depositary or the relevant Contracting State.

Section 3. Types and choice of declarations

17. The question as to which declarations a Contracting State will make under the Convention is one for each Contracting State to determine in accordance with its own circumstances. Furthermore, UNIDROIT in its capacity as Depository under the Convention has no role in evaluating the competence of a Contracting State (having regard, for example, to its internal constitutional arrangements) to make a declaration, and UNIDROIT will accept a declaration that is deposited with it in compliance with the requirements of the Convention.

A. Types of declarations

18. There are various types of declarations depending also on their effect as regards the application of the Convention by a Contracting State:

(a) **Opt-in declarations.** Opt-in declarations are those declarations which must be lodged by a Contracting State in order for a provision of the Convention to have effect in relation to that State. The provisions of the Convention in respect of which opt-in declarations may be made are: **Article 1(n)(iii), Article 1(o)(iii), Article 5, Article 7, Article 12(5)(a), Article 43 and Article 45;**

(b) **Opt-out declarations.** These, in turn, are declarations which must be lodged by a Contracting State in order for a provision of the Convention *not* to have effect within that State. The provisions of the Convention in respect of which opt-out declarations may be made are: **Article 5, Article 12(5)(b), Article 12(5)(c), Article 12(5)(d), Article 19(7), Article 22(3), Article 25(5), Article 36(2), Article 38, Article 39(2), Article 41(2), Article 43, Article 45; and**

(c) **Declarations relating to a Contracting State's own laws.** Certain optional declarations are neither merely opt-in nor opt-out, but are also intended to allow for the provision of information on a Contracting State's own laws, as in the case of the declarations contemplated in following provisions: **Article 1(n)(iii), Article 1(o)(iii), Article 5, Article 7, Article 12(5)(a) (and the mandatory clarification required by paragraphs 6 and 7), Article 22(3).**

19. There are, however, two declarations that do not fall within any of the above categories:

(a) **Declarations relating to territorial units.** This declaration allows a Contracting State to determine the domestic territorial scope of application of the Convention (**Article 43**); and

(b) **Declaration by Regional Economic Integration Organisations. Article 41(2)** of the Convention provides for a declaration to be made by Regional Economic Integration Organisations, at the time of their signature, acceptance, approval or accession, specifying the matters governed by the Convention in respect of which competence has been transferred to that Organisation by its Member States.

20. Except for the declaration that must be submitted by a Regional Economic Integration organisation, all declarations contemplated in the Convention are **optional**.

B. Consistency of declarations

21. Contracting States should ensure that their declarations are consistent both internally and with each other. For instance, a Contracting State that chooses not to submit a declaration under article 12(5)(a) does not have the option to make a declaration under article 39(2).

22. Under Article 41(1) of the Convention, Regional Economic Integration Organisations which are constituted by sovereign States and have competence over certain matters governed by the Convention may sign, accept, approve or accede to those instruments in the same way as States and, where they do so, under Article 41(3) of the Convention, all references in the Convention to "Contracting State" or "Contracting States" or "State Party" or "State Parties" are to apply equally to such Organisations where the context so requires. The capacity of the Organisation and of its member States of the Organisation to make declarations under the Convention is therefore affected by the extent to which competence has been transferred from the member States to the Organisation.

Section 4. Analysis of declarations in the Convention

23. This section offers an outline of the declarations in the Convention. It lists all the declarations and identifies their scope and purpose. Where applicable, possible incompatibilities between declarations will be mentioned so as to assist Contracting States to ensure consistency between their declarations.

A. Articles 1(n)(iii) and 1(o)(iii): Securities clearing and settlement systems

1. Scope and purpose of the declaration

24. Article 1(n) defines a "securities settlement system" (SSS) as a system that settles, or clears and settles, securities transactions. It should also be operated by a central bank or central banks or be subject to regulation, supervision or oversight by a governmental or public authority in relation to its rules. In addition, it should have been identified as an SSS in a declaration made by the Contracting State the law of which governs the system on the ground of the reduction of risk to the stability of the financial system.

25. In Article 1(o), a "securities clearing system" (SCS) is defined along the same lines. Such a system clears, but does not settle, securities transactions through a central counterparty or otherwise. It should be operated by a central bank or central banks or be subject to regulation, supervision or oversight by a governmental or public authority in relation to its rules. In addition, it should have been identified as a SCS in a declaration by the Contracting State the law of which governs the system on the ground of the reduction of risk to the stability of the financial system.

2. Content of the declaration

26. Both an SSS and an SCS only qualify as such if they have been identified in a declaration by a Contracting State. The rationale for this requirement is explained in the official Commentary as follows:

"The text of the Convention preserves [*in Articles 1(l), 9(1)(c), 10(2) 15(2), 16, 18(5), 23, 24(4), 26(3), 27 and 28*], the specific protection afforded by the uniform rules of an SSS, even if these rules might contain provisions that deviate from provisions of the Convention. Consequently, it is necessary to notify the exemption of specified systems from the application of certain rules of the Convention to all Contracting States. This is done by declaration. [...]."

"The declaration must be made by the Contracting State the law of which governs the system and not, for example, the Contracting State the law of which governs the contractual relationships of the system with its participants or the Contracting State in whose jurisdiction the operator of the system is established."

[...]

“Further, the declaration must be made on the ground of the reduction of risk to the stability of the financial system. This is to make clear that not every SSS, but only systemically important ones, may benefit from the recognition of their uniform rules under the provisions of the Convention. [...]”

[...]

“Whether or not there are grounds for the reduction of risk to the stability of the financial system is a matter to be judged by the declaring Contracting State. See in this respect also the principles for systemically important systems as established by the Committee on Payment and Settlement Systems of the Bank for International Settlements. See, for instance, the 2001 CPSS/IOSCO Recommendations for securities settlement systems and the 2004 CPSS/IOSCO Recommendations for Central Counterparties; see Section 1-105.” (*Official Commentary*, sections 1-82, 1-83, 1-85 and 1-88)

3. Type of declaration

27. The declarations contemplated by Articles 1(n)(iii) and 1(o)(iii) are **non-mandatory**. They can be regarded as **“opt-in”** declarations, since their effect is to extend the recognition afforded by the Convention to uniform rules of a SSS or SCS to those systems specifically identified by the Contracting State. At the same time, however, this declaration will also mean that in some instances the uniform rules of the identified SCS and/or SSS may have precedence over a default rule contained in the Convention.

B. Article 5: Central bank and regulated intermediaries

1. Scope and purpose of the declaration

28. In principle, the Convention applies to any securities account maintained by an intermediary (see the definition of “securities account” in Article 1(c)). However, Article 5 “permits Contracting States to limit the scope of application of the Convention to the securities accounts maintained by “regulated” intermediaries and/or those maintained by a central bank. The purpose of the rule is to offer the possibility to exclude the application of the Convention to the securities accounts that are maintained by “unregulated” intermediaries, if and to the extent Contracting States deem it appropriate.” (*Official Commentary*, section 5-1)

2. Content of the declaration

29. The content of this declaration is explained in the *Official Commentary* as follows:

“The Contracting State, in its declaration under Article 5(a), must describe the category or categories of intermediaries which maintain securities accounts to which the Convention shall apply with sufficient particularity to provide adequate notice. The Contracting State thus may declare that only intermediaries which are regulated (“subject to authorisation, regulation, supervision or oversight by a government or public authority in relation to the activity of maintaining securities accounts”) are included in the category. The Contracting State is free to determine any category of intermediaries, so long as it is a regulated category.”

“The requirement of being a regulated intermediary should be read against the purpose of Article 5. Therefore, Article 5 cannot be understood as permitting a general possibility of excluding all intermediaries from the scope of the Convention. Rather, the scope of application can be narrowed in order to accommodate a Contracting State’s concerns regarding the modification, by the Convention, of the legal framework applicable to unregulated intermediaries. Article 5 is not intended to permit a Contracting State to exclude all or even

the great majority of intermediaries from the application of the Convention rules. Such a blanket exclusion would be inconsistent with the purpose of the Convention and thus is not permitted. In this sense, Article 5 is intended to permit a Contracting State to limit the application of the Convention to regulated intermediaries where intermediaries are regulated in that State." (*Official Commentary*, sections 5-9 – 5-10)

30. As regards the particular position of central banks in the context of a declaration under article 5, the *Official Commentary* notes that:

"Central banks regularly maintain securities accounts. Consequently, the default rule of the Convention is that central banks are intermediaries to the extent that they satisfy the definition of intermediary under Article 1(d). However, where a Contracting State makes a declaration limiting intermediaries to "regulated institutions" under Article 5, there may be a question of whether the central bank in that State is an intermediary. Paragraph (b) makes it clear that, where a declaration is made, there should be the possibility to include central banks in the scope of the Convention. Their status would not necessarily be adequately covered by paragraph (a), because in most countries they are not regulated entities in that sense. Quite to the contrary, they very often have regulatory or oversight competencies themselves. Given that they form part of the "public authorities" category, there should be the possibility to apply the Convention to them even where they are not regulated entities. This also means that under a declaration limiting intermediaries to "regulated institutions", a Contracting State may exclude its central bank from intermediaries to which the Convention applies. In summary, when a Contracting State makes a declaration in accordance with Article 5, it is advisable that the declaration explicitly mentions whether or not the Convention applies to that Contracting State's central bank." (*Official Commentary*, section 5-13)

3. Type of declaration

31. The declaration contemplated in article 5 is **non-mandatory**. Such a declaration would limit the scope of application of the Convention in the Contracting State concerned, and may therefore be regarded as an **"opt-out"** declaration.

C. Article 7: Performance of functions of intermediaries by other persons

1. Scope and purpose of the declaration

32. As explained in the *Official Commentary*:

"The purpose of Article 7 is to clarify the identification and role of an intermediary in a situation where the task of "maintaining" a securities account is split between two, or even more, persons. [...]. Article 7 is necessary in order to ensure the proper application of the Convention to the holding patterns where a third person [...] is involved in the relationship between the relevant intermediary and its account holders, in particular in the scenario of a so-called "transparent" holding pattern." (*Official Commentary*, section 7-1)

2. Content of the declaration

33. In accordance with Article 7(2), the declaration contemplated in that article can be either general or in respect of intermediated securities, or securities accounts, of any category or description:

“Sub-paragraph (2)(a) makes it clear that, where applicable, the declaration shall specify the categories (e.g. shares, bonds, etc.) or description (e.g. registered or bearer shares, dematerialised or certificated, etc.) of the intermediated securities. The sub-paragraph refers also to the categories of securities accounts that may be specified, which could, for example, either relate to the tier on which the accounts are located in the holding system, in particular those at a CSD, or accounts maintained for foreign account holders, or any other description.” (*Official Commentary*, section 7-23)

34. As regards the content and effect of the declaration, it is important to note that, in accordance with sub-paragraph 7(2)(b):

“[...] the declaration shall identify the relevant intermediary in respect of the accounts as specified under sub-paragraph (2)(a), the parties to the account agreement on which the account is based and the third person performing functions as described in Article 7(1). A declaration has a constitutive effect in this regard, i.e., the roles of intermediary and other person as attributed by the declaration cannot be contested.” (*Official Commentary*, section 7-24)

35. The *Official Commentary* further clarifies that such other person:

“Typically, [...] is a privately or publicly owned entity which provides services in the financial market. However, it is conceptually irrelevant whether the person is a natural or a legal person. In addition, it is irrelevant whether the person exclusively performs intermediary functions or whether the person offers other services as well. It must be distinct from the relevant intermediary (“other than”). Consequently, subsidiaries or affiliate companies of the relevant intermediary can be such other person as far as they are legally distinct persons, because the economic or organisational relationship between the relevant intermediary and the other person is irrelevant.” (*Official Commentary*, section 7-13)

36. It is important to note that:

“It is not possible for the relevant intermediary to have *all* its functions performed by another person or persons. If that were the case it would not be an intermediary at all, and the other person or one of the other persons would be the relevant intermediary.” (*Official Commentary*, section 7-16)

37. Therefore, according to Article 7(2)(c)(i), the declaration must “specify the function or functions for which the other person shall be responsible”, but “[i]t is not necessary for the declaration to spell out any or all of the functions of the relevant intermediary itself. [...]” (*Official Commentary*, section 7-26). The declaration must further:

“[...] specify the provisions of the Convention that apply to the other person instead of the relevant intermediary. This element of the declaration must be perfectly congruent with the specification of the function under sub-paragraph 2(c)(i). Otherwise, the declaration would be internally inconsistent and impossible to apply.”

“Under the second part of sub-paragraph 2(c)(ii), the declaration shall specify the provisions of the Convention that apply to the other person, “including whether Article 9, Article 10, Article 15 or Article 23 applies to such person”. The declaration may specify articles other than the ones explicitly cited. The word “including” makes this clear.”

“The text under Article 7(2)(c)(iii) prescribes that, if the declaration does not apply in a general manner (see also Article 7(1)), it must specify, with respect to each person, the relevant category or description of securities or securities accounts.” (*Official Commentary*, sections 7-27 – 7-29).

3. Type of declaration

38. The declaration under Article 7 is **non-mandatory**. It can be regarded as an **"opt-in"** declaration, since its purpose is to assimilate certain third parties to intermediaries for the purposes of the Convention.

D. Article 12(5)-(7): Methods for granting an interest in intermediated securities

1. General remarks

39. The Convention contains three provisions relating to the acquisition and disposition of intermediated securities: Articles 11, 12 and 13. Article 11 sets out the "universal" method of debit and credit. Article 12 relates to three other Convention methods for acquisition and disposition, which a Contracting State may declare applicable. Article 13 relates to methods envisaged under the non-Convention law.

40. Besides acquisitions and dispositions of intermediated securities by credits and debits, a Contracting State may declare, in accordance with Article 12, that one or more of the three methods specified below are sufficient to create an interest in intermediated securities under its law:

"(a) an account holder may grant an interest in intermediated securities to the relevant intermediary by entering into an agreement with that intermediary, and no further step is necessary to make that interest effective against third parties;"

"(b) an account holder may grant an interest in intermediated securities to another person by entering into an agreement with that person and by having a designating entry apply to those intermediated securities in its securities account, and no further step is necessary to make that interest effective against third parties;"

"(c) an account holder may grant an interest in intermediated securities to another person by entering into an agreement with that person and by entering into a control agreement in respect of these intermediated securities, and no further step is necessary to make that interest effective against third parties." (*Official Commentary*, section 12-1).

41. As indicated in the *Official Commentary*:

"None of these methods is compulsory and Contracting States are entirely at liberty to provide for one, two, all or none of these methods in their non-Convention law. For the sake of international transparency and legal predictability, paragraph 5 requires a Contracting State to make a declaration in respect of each such method that it wishes to make available to account holders under its law." (*Official Commentary*, section 12-4)

42. For the purpose of enhancing international transparency and legal predictability, article 12 contemplates three different declarations:

(i) a declaration specifying which of the three methods applies in a Contracting State and in what way (see paragraphs 5(a), 6 and 7);

(ii) a declaration specifying categories of parties which are not permitted to grant an interest under Article 12 or to which an interest is not permitted to be granted under Article 12 (see paragraph 5(b)); and

(iii) a declaration relating to the application of paragraph 4 (see paragraphs 5(c) and 5(d)).

2. Declaration under Article 12(5)(a), (6) and (7)

(a) Scope and purpose

43. It follows from Article 12(1)(b) that, if a Contracting State wishes to apply the Convention to any of the methods listed in Article 12(3), it must make a declaration under *Article 12(5)(a)*. In such a declaration, a Contracting State specifies that under its law *any one or more of the methods listed in Article 12(3)* is sufficient to render an interest effective against third parties.

(b) Content of the declaration

44. Whenever a Contracting State makes a declaration in respect of control agreements or designating entries, that declaration must specify the type of control required (see Article 12(3), (6) and (7)). Therefore, as indicated in the *Official Commentary*:

"The type of control required for control agreements and/or designating entries to make an interest effective against third parties may vary among jurisdictions based upon the declaration made by a Contracting State under Article 12(5). The key element of a control agreement, whether it be negative, positive, or both, is that the other person's consent is required or the other person is entitled to give instructions, or both. But the requirement of consent or the right to give instructions need not be presently effective or absolute. For example, the control agreement may provide that after the occurrence of an event of default (or after the other person's notification to the intermediary of such an event) the other person's consent is required or the other person is entitled to give instructions. Such a conditional control agreement is effective from the time it is entered into, however, not from the time that the triggering event occurs. The declaration made by a Contracting State under Article 12(6) or (7) may require "negative control", so that the "the relevant intermediary is not permitted to comply with any instructions given by the account holder in respect of the intermediated securities [...] without having received the consent of that other person". See Articles 1(k)(i) and 1(l)(i). Alternately, the declaration may require "positive control", so that "the relevant intermediary is obliged to comply with any instructions given by that other person in respect of the intermediated securities [...] in such circumstances and as to such matters as may be provided [...]". See Articles 1(k)(ii) and 1(l)(ii). Or, the declaration may require both positive and negative control. Whenever a Contracting State makes a declaration in respect of control agreements or designating entries, that declaration must specify the type of control required. See Article 12(3), (6) and (7)." (*Official Commentary*, section 1-54)

45. It should be noted that a Contracting State that makes a declaration pursuant to 12(5)(a) has further the possibility of declaring, pursuant to article 39(2) that only interests in securities that are granted or repeated by one of those methods before a certain date will retain the priority they enjoyed before the entry into force of the Convention.

(c) Types of declarations

46. The declaration under **Article 12(5)(a)** is **non-mandatory** and can be regarded as an **"opt-in"** declaration, because the making of the declaration would mean that the satisfaction of any of the conditions listed in Article 12(3) will render an interest effective against third parties.

47. The information referred to in **Articles 12(6) and 12(7) is mandatory when a declaration is made under Article 12(5) in relation to paragraph 3(b) or 3(c)** respectively.

3. Declaration under Article 12(5)(b)

(a) Scope and purpose

48. Under Article 12(5)(b) a Contracting State may limit the scope of Article 12 by declaring that under its law this provision will not apply in relation to *interests in intermediated securities granted by or to parties falling within such categories as may be specified in the declaration*. A Contracting State may, for example, wish to preserve the possibility of establishing additional requirements for the effectiveness of interests granted by consumers on intermediated securities owned by them, or generally reserve the methods set forth in article 12 for professional counterparties only.

(b) Type of declaration

49. The declaration under **Article 12(5)(b)** is not mandatory and may be regarded as an **"opt-out"** declaration, because it limits the scope of application of Article 12.

4. Declaration under Article 12(5)(c)-(d)

50. Article 12(4) allows for the granting of an interest:

"- in respect of a securities account generally, in which case the interest attaches to any and all intermediated securities from time to time credited to that securities account;"

"- in respect of a specified category of intermediated securities, in which case the parties need to specify the class or classes of securities subject to the interest or any other method making it possible to determine at any given time which intermediated securities are subject to the interest, and which are not;"

"- in respect of a specified quantity or value of intermediated securities, terms that are meant to make the granting of floating charges and similar interests possible." (*Official Commentary*, section 12-16)

51. However, "[n]ot all jurisdictions are familiar with or may want to include such determinations of the subject matter of an interest." (*Official Commentary*, section 12-17)

(a) Content of the declaration

52. Article 12(5)(c) and (d) allow Contracting States to disapply paragraph 4(a) and/or paragraph 4(b), or to modify paragraph 4(b) as specified in the declaration. The declarations of a Contracting State should, of course, be consistent. If a Contracting State were to make a declaration under Article 12(5)(c) that excluded either Article 4 in its entirety or Article 4(b), no modifications would, of course, be able to be specified in a declaration under Article 12(5)(d).

(b) Type of declaration

53. The declarations permitted by **Article 12(5)(c) and Article 12(5)(d)** are **non mandatory** and may be regarded as **"opt-out"** declarations, as they limit the options given under Article 12(4) of the Convention.

E. Article 19(7): Priority of an interest granted by designating entry

1. Scope and purpose of the declaration

54. As indicated in the *Official Commentary*:

"[Article 19(7)] provides a declaration mechanism that permits a Contracting State to make a declaration concerning the priority of an interest granted under Article 12 made by designating entry. A Contracting State may declare that such an interest has priority over interests granted by other methods under Article 12. If such a declaration is made, it is implicit in this priority scheme that the priorities as among competing designating entry interests *inter se* would be governed by the first-in-time priority rule of paragraph 3. Note that paragraph 7 is subject to paragraph 4. Therefore, the special priority provision in paragraph 4 applies even if a Contracting State has made a declaration giving interests granted by a designating entry priority over any interest in the same intermediated securities granted by another method." (*Official Commentary*, section 19-17)

55. The differences between those methods, and thus the rationale for allowing a Contracting State to ensure priority of designating entries over other Article 12 interests, in particular control agreements, is explained in the *Official Commentary* as follows:

"Designating entries and control agreements differ in one significant respect, however. A designating entry is a "book-entry", or most often an electronic entry into an electronically maintained securities account. The notion of "an entry in a securities account" (see Article 1(l)) suggests that the entry is visible to whoever has access to the account. Several delegations considered that designating entries are superior to control agreements because they create an element of transparency, even though it is restricted to the persons who have access to the account and only provides a snapshot of existing interests at the time of access." (*Official Commentary*, section 12-30)

2. Type of declaration

56. A declaration under Article 19(7) is **non-mandatory**. To the extent that it permits a deviation from the first-in-time priority rule set out in Article 19(3), such a declaration may be regarded as an "**opt-out**" declaration.

F. Article 22(3): Prohibition of upper-tier attachment

1. Scope and purpose of the declaration

57. The declaration mechanism envisaged in **Article 22(3)** should be understood in the light of the baseline rule prohibiting **upper-tier attachment** of Article 22(1). The *Official Commentary* explains that basic rule as follows:

"Paragraph 1 contains the general prohibition of upper-tier attachment. It is designed to make sure that an attachment of intermediated securities must happen "at the right place" in the holding chain. It is built on the understanding that there are three parties involved in an attachment situation: (a) the debtor, who has securities credited to an account maintained by an intermediary and whose intermediated securities are the subject matter of the attachment; (b) the creditor, who tries to attach the debtor's intermediated securities with a view to satisfying its claim against the debtor; and (c) the addressee of the attachment order (here the relevant intermediary) who is compelled to make the intermediated securities of the debtor available to the creditor."

"Paragraph 1 reflects the logic that the intermediated securities of an account holder can only be attached at the level of the relevant intermediary, *i.e.*, the intermediary maintaining the securities account of the account holder. An attachment which is not made at the right level, *i.e.*, which would affect any other securities account than that maintained by the relevant intermediary may hinder the ability of intermediaries to perform their function, creating inefficiencies and possible inconsistencies, especially in cross-border situations. Consequently, the rule ensures that the attachment affects the right account

(the one of the debtor) and addresses the right person(s), *i.e.*, the account holder, its relevant intermediary, or both. Therefore, the role of paragraph 1 is to define exactly the object and the addressee(s) of an attachment order:

- an attachment must not affect the securities account of a person who is not the debtor (see sub-paragraph 1(a)); and
- an attachment must be made against the appropriate person(s) (see sub-paragraphs 1(b) and (c))." (*Official Commentary*, sections 22-9 and 22-10)

58. However, Article 22(3) makes it possible for a Contracting State to make a declaration to the effect that "*an attachment of intermediated securities of an account holder made against or so as to affect a person other than the relevant intermediary has effect also against the relevant intermediary*" under its non-Convention law. As explained in the *Official Commentary*:

"Paragraph 3 [of Article 22] is intended to accommodate holding patterns where an attachment is permitted to be made against a person other than the relevant intermediary. This is often the case in the context of holding patterns (the so-called "transparent systems") where the relevant intermediary shares its functions with a third person. [...]. However, the exception of paragraph 3 can also apply where there is no holding pattern built on such shared functions in the sense of Article 7. [...]."

[...]

"The rationale for this exception lies in the general purpose of the prohibition of upper-tier attachment, *i.e.*, upper-tier attachment bears the risk of disrupting the holding chain. However, this detrimental effect can be avoided where the applicable law provides for special safeguards avoiding such disruption, in particular reconciliation mechanisms which allow the relevant intermediary and the other person to communicate with each other and have procedures in place which guarantee that an attachment made at the level of one entity is correctly reflected in the accounts maintained by the other entity." (*Official Commentary*, sections 22-19 and 22-20)

59. It follows from the above that:

"In many (probably most) cases, a Contracting State making a declaration under Article 22(3) will also have made a declaration under Article 7 with respect to the sharing of intermediary functions, [...]. However, Article 22(3) does not limit its applicability to such Contracting States. It is based on the assumption that a Contracting State that elects to become a party to the Convention and that also elects to make a declaration under paragraph 3 will do so rationally. A Contracting State should make such a declaration only if a system is in place (through the use of information technology or otherwise) which ensures that the problems and risks that Article 22(1) is intended to prevent are adequately addressed. [...]."

 (*Official Commentary*, section 22-21)

2. Content of the declaration

60. The *Official Commentary* describes the content of a declaration as follows:

"Where a declaration under Article 22(3) is made, it must identify the other person by name or description. Furthermore, it must specify the time at which such an attachment becomes effective against the relevant intermediary. The latter requirement shows that the decisive account to look at remains under all circumstances the one held for the debtor by the relevant intermediary. Only if and when the attachment of intermediated securities standing to the credit of that account takes legal effect, the intermediated securities are validly frozen, restricted or impounded. Until that point, the intermediated securities can be disposed of." (*Official Commentary*, section 22-22)

3. Type of declaration

61. The declaration contemplated by Article 22(3) is **non-mandatory**. Since it allows for a limited exception to the baseline prohibition of upper-tier attachment set out in Article 22(1), it may be regarded as an "**opt-out**" declaration.

G. Article 25(5): Allocation of securities

1. Scope and purpose of the declaration

62. As explained in the *Official Commentary*:

"Article 25 is a fundamental rule for investor protection, closely related to Article 24. Article 24(1)(a) imposes an obligation on the intermediary to hold sufficient securities or intermediated securities of each description for its account holders, other than itself. Article 25 provides that the securities or intermediated securities held by the intermediary under Article 24(1)(a) must first be allocated to its account holders. That is, the financial assets held by an intermediary are held for its account holders to the extent necessary to satisfy Article 24(1)(a). This allocation principle applies to the securities or intermediated securities of *each description* held by the intermediary for the benefits of the corresponding account holders, *i.e.*, those in whose accounts the securities of that description have been credited, and not to other securities or intermediated securities that the intermediary may hold."

"Paragraph 2 establishes the natural consequence of the allocation rule. If the securities or intermediated securities held by the intermediary belong to the account holders, they do not form part of the intermediary's estate available for creditors; *i.e.*, creditors cannot realise their claims over the securities held by the intermediary on account of its account holders. This rule applies in all cases, but it is particularly relevant in the case of insolvency of the relevant intermediary. If the relevant intermediary is subject to an insolvency proceeding, these securities do not form part of the property of the intermediary available for distribution among or realisation for the benefit of its creditors." (*Official Commentary*, sections 25-12 and 25-13)

63. The *Official Commentary* notes further that:

"The Convention presupposes that the segregation mechanism is a method of complying with the allocation rule of paragraph 1. But segregation itself cannot be invoked to frustrate that rule. Hence, if an intermediary has not segregated sufficient securities or intermediated securities to satisfy its account holders' rights, the allocation rule extends its application – *ex Conventione* – to the securities or intermediated securities of the same description that the intermediary may hold for itself." (*Official Commentary*, section 25-19)

64. Article 25(5) allows, however, Contracting States to make an exception to this solution by a declaration:

"Paragraph 5 allows Contracting States to make an exception to this solution by a declaration. Under this provision, a Contracting State may declare that, where all securities and intermediated securities held by an intermediary for its account holders are in segregated form under arrangements such as those referred to in paragraph 4, under its non-Convention law the allocation required by paragraph 1 applies only to those securities and intermediated securities and does not apply to securities and intermediated securities held by an intermediary for itself. The option to make a declaration is expected to be

particularly relevant for those jurisdictions that draw proprietary law consequences from the segregation mechanism.” (*Official Commentary*, section 25-20)

2. Type of declaration

65. A declaration under Article 25(5) is **non-mandatory**. By allowing an exception to the baseline rule of Article 25(1), it may be regarded as an **“opt-out”** declaration.

H. Article 36(2): Credit risk top-up of collateral

1. Scope and purpose of the declaration

66. As explained in the *Official Commentary*:

“Collateral agreements in many instances contain provisions for “top-up” and substitution of collateral. Top-up refers to the situation where one of the parties to a collateral agreement delivers additional collateral or returns excess collateral in order to ensure that the outstanding obligations of the parties are balanced. An imbalance may occur as a result of price fluctuations in the financial market affecting the value of the collateral or the amount of the relevant obligations. See Article 36(1)(a)(i). An obligation to transfer top-up collateral may also arise when credit ratings change (Article 36(1)(a)(ii)) or in other circumstances specified in the collateral agreement (Article 36(1)(a)(iii)).”

[...]

“The purpose of Article 36 is to protect top-up and substitution arrangements against the “timing claw back rule” in insolvency law that is found in some jurisdictions. Specifically, it provides that the delivery of top-up or substitution collateral is not to be treated as invalid, reversed or declared void solely because such collateral is given during a prescribed period before, or on the day of but before the commencement of, an insolvency proceeding in respect of the collateral provider. Among other things, this means that a so-called “zero hour rule”, by which a declaration of insolvency has automatic retroactive effect to the beginning of the day on which such a declaration is issued, would have no effect where Article 36 applies. Moreover, the delivery of securities or other assets as top-up or substitution collateral is not treated as invalid, reversed or declared void on the sole basis that they were given after the relevant obligations were incurred.” (*Official Commentary*, sections 36-1 and 36-3)

67. Article 36(2) provides a Contracting State with the possibility to exclude the application of Article 36(1)(a)(ii), which recognises an obligation to deliver additional collateral securities, in order to take account of “any circumstances giving rise to an increase in the credit risk incurred by the collateral taker as determined by reference to objective criteria relating to the creditworthiness, financial performance or financial condition of the collateral provider or other person by whom the relevant obligations are owed” (*credit risk top-up of collateral*). This possibility is explained in the *Official Commentary* as follows:

“[...] A deteriorating general financial condition may be a prelude to insolvency. Article 36(2) recognises that a Contracting State may consider the protection of the provision of collateral in that circumstance to be undesirable, in particular in light of rules such as those relating to avoidance or preference in fraud of other creditors.” (*Official Commentary*, section 36-20)

2. Type of declaration

68. The **non-mandatory** declaration contemplated in Article 36(2) disapplies the Convention rule set out in Article 36(1)(a)(ii), and may be regarded as an "**opt-out**" declaration.

I. Article 38: Declarations in relation to Chapter V

1. Scope and goal of the declaration

69. Chapter V contains a number of specific provisions that define the legal relationship between *collateral providers and collateral takers* where intermediated securities are provided as collateral. Article 38 sets out a number of possible declarations that a Contracting State may make in respect of Chapter V, in addition to the declaration option envisaged in Article 36(2).

70. Under Article 38(1), a Contracting State may declare that it will *not apply Chapter V in its entirety*. The *Official Commentary* notes, in this respect, the following

"Even though harmonisation of the rules relating to collateral transactions as set out in Chapter V is highly beneficial to ensuring legal certainty with respect to cross-border transactions, the proper and sound functioning of the intermediated securities system envisaged in Chapters I to IV does not necessarily require the harmonisation of the rules on collateral transactions. Because Chapter V touches upon important public policy issues, notably consumer protection and insolvency, the opt-out option set out in Article 38(1) was introduced to permit Contracting States to opt out of the whole of Chapter V." (*Official Commentary*, section 38-7)

71. Contracting States wishing to apply Chapter V may nonetheless limit its scope in respect of the matters mentioned in Article 38(2). These possibilities are explained in the *Official Commentary* as follows:

"Article 38(2)(a) provides Contracting States with the option to make a declaration to protect natural persons or other categories of persons by excluding them from the application of Chapter V. Chapter V has the goal of enhancing liquidity in the securities market and, to that end, gives a number of rights to collateral takers, for example in the form of enforcement without traditional procedural safeguards or the right of use. In some jurisdictions, there may be policy reasons to protect a natural person or another person which is in a weak bargaining position against the collateral taker. Article 38(2)(a) thus gives Contracting States the possibility to provide for such protection. [...]."

"Article 38(2)(b) provides Contracting States with the option to make a declaration not to apply Chapter V to intermediated securities which are not permitted to be traded on an exchange or regulated market. This provision should be read together with the definition of "collateral securities" in Article 31(3)(e), which covers both tradable and non-tradable securities. The aim of most provisions of Chapter V is to enhance the liquidity of the securities market. This aim can be achieved where rules on tradable securities are harmonised, but some jurisdictions may have a policy reason for excluding non-tradable securities from Chapter V."

"Article 38(2)(c) should be read in close connection with the definition of "relevant obligations" in Article 31(3)(d), which specifies that relevant obligations are "any existing, future or contingent obligations of a collateral provider or a third person". Because different national policies can exist about what obligations should be secured, Article 38(2)(c) provides a declaration mechanism for Contracting States to limit the scope of

Chapter V by specifying to what kind of relevant obligations it applies." (*Official Commentary*, sections 38-9 – 38-11)

2. Content of declarations

72. The declarations under Article 38 should be consistent. Where a Contracting State declares under Article 38(1) that Chapter V as a whole shall not apply, there is, of course, no room for the specific declarations under Article 38(2).

3. Type of declaration

73. The *non-mandatory* declarations under Article 38 may be regarded as "*opt-out*" declarations, because they allow for a full or partial opt-out of the rules set out in Chapter V of the Convention.

J. Article 39(2): Transitional provision

1. Scope and purpose of the declaration

74. The purpose of the transitional provision contained in Article 39(1) is explained in the *Official Commentary* as follows:

"[...] the Convention does not affect the priority of interests granted under the law in force in a Contracting State before the date on which the Convention entered into force in respect of that Contracting State. Under that law, priority may be based on the respective times when competing interests have been made effective or on some other criteria. It may also be the case that a Contracting State varies its priority rules over time, including at the time it proposes to ratify the Convention. Under paragraph 1, the Convention does not affect such rules in any respect." (*Official Commentary*, section 39-11)

75. This general rules reflects the following policy concern:

"[...] legal certainty requires that, unless it consents, the beneficiary of a collateral interest or other interest in intermediated securities should not face the risk of losing priority, that their interest enjoyed before the Convention's entry into force, to interests that are subsequently created by the account holder in the same intermediated securities after the Convention has entered into force." (*Official Commentary*, section 39-6)

76. The countervailing concern, however, is that:

"[...] the international harmonisation promoted by the Convention for the creation of interests in intermediated securities requires that an acquirer of such interest should not need to investigate interests that were created, before the entry into force of the Convention and possibly many years previously, in accordance with a method then recognised by the law of the relevant Contracting State. [...]"

"Protecting the beneficiaries of the interests granted before the Convention's entry into force, irrespective of the method used, would require all collateral takers and acquirers of other interests after such date to research whether prior interests have been granted in the same securities under any method that was then applicable in the relevant State. This could be a quite difficult and costly task, given that the current rules governing security interests in many jurisdictions were promulgated many years previously for movable assets and do not easily adapt to the operation and market practices of intermediated securities.

Thus, protecting the priority of all interests acquired before the Convention's entry into force would produce significant inefficiencies and legal uncertainty for the parties which transact on intermediated securities after the Convention's entry into force." (*Official Commentary*, sections 39-7 – 39-8)

77. Article 39(2), therefore, allows a Contracting State to make a declaration and limit the duration of the protection afforded by Article 39(1) by setting a date ("the relevant date") after which Article 19(2) will apply to pre-Convention interests.

2. Content of the declaration

78. In accordance with Article 45(1), declarations under the Convention may be submitted at any time. Article 39(3)(b) defines "the relevant date" for the purposes of Article 39 as the date "stated by the Contracting State in the declaration made under this article". A Contracting State wishing to submit a declaration under article 39(2) has, therefore, ample freedom to set the time limit for the protection of pre-existing interests, provided that it is not later than 2 years after the time that the declaration becomes effective under Article 45. A declaration under article 39 is not affected by article 45(5).

79. It should be noted that declaration under Article 39(2) is only possible if the State has also made a declaration pursuant to article 12(5)(a).

3. Type of declaration

80. The *non-mandatory* declaration under Article 39(2) may be regarded as an "*opt-out*" declaration because it allows Contracting States to enact a rule differing from the baseline rule set out in Article 39(1).

K. Article 41(2): Regional Economic Integration Organisations

1. Scope and purpose of the declaration

81. Article 41 enables a Regional Economic Integration Organisation constituted by sovereign States to sign, accept, approve or accede to the Convention to the extent that it has competence over the matters governed by the Convention. The declaration specifies that competence.

2. Content of the declaration

82. The competence of the Regional Economic Integration Organisation over matters governed by the Convention must be described in a declaration that is made to the Depositary pursuant to Article 41(2), and which specifies the matters governed by the Convention in respect of which competence has been transferred to that Organisation by its Member States. Article 41(2) further requires the Organisation concerned to promptly notify the Depositary in writing of any changes to the distribution of competence between itself and its Member States, including new transfers of competence, to the Organisation.

3. Type of declaration

83. The declaration under Article 41(2) is *mandatory* in nature.

L. Article 43: Territorial units

1. Scope and goal of the declaration

84. Article 43 permits a Contracting State that has two or more territorial units in which different systems of law apply to declare, at the time of its signature, ratification, acceptance, approval or accession to the Convention, that the Convention is to extend to all of its territorial units or only to one or more of them. Article 43(1) does not require that the differences between systems of law in the relevant State must derive from that State's constitution.

2. Content of declaration

85. A declaration by a Contracting State under Article 43 can be made only at the time of that State's signature, ratification, acceptance or approval of, or accession to, the Convention, but the State concerned may amend its declaration by submitting another declaration at any subsequent time. Article 43(2) provides that the initial declaration must be made in writing and formally notified to the Depositary, and must state expressly the territorial units to which the Convention extends. Modifying declarations should also be made in writing and formally notified to the Depositary on the basis of Article 45(2).

86. Where a Contracting State has made a declaration under Article 43(1), the other declarations permitted to be made under the Convention may be made by that State in respect of all or only some of the territorial units to which the application of the Convention is extended, and those declarations may differ as between one of those territorial units and another (Article 43(4)).

3. Type of declaration

87. A declaration under Article 43 is **non-mandatory**. If no declaration is submitted by a Contracting State at the time of its signature, ratification, acceptance, approval or accession, the Convention will extend to all territorial units of that State in accordance with Article 43(3).

ANNEX I**List of Declarations and Declaration Forms****List**

Article 1(n)(iii)
Article 1(o)(iii)
Article 5
Article 7
Article 12(1)(b) and 12(5)-(7)
Article 19(7)
Article 22(3)
Article 25(5)
Article 36(2)
Article 38
Article 39(2)
Article 41(2)
Article 43
Article 45
Article 48(2)(a)(iii) and (iv)

Form No. 1 – Declarations under Article 1(n)(iii) and Article 1(o)(iii)

• **Identification of securities settlement system (Article 1(n)(iii))**

(Name of State).....

[, on the ground of the reduction of risk to the stability of the financial system], declares that *(insert description of the securities settlement system)* is a securities settlement system.

• **Identification of securities clearing system (Article 1(o)(iii))**

(Name of State)

[, on the ground of the reduction of risk to the stability of the financial system], declares that *(insert description of the securities clearing system)* is a securities clearing system.

UNIDROIT 2009 - CONF. 11/2 – Doc. 5:	paras. 1-75 to 1-81 and 1-92
Official Commentary:	paras. 1-82 to 1-88 and 1-99

Form No. 2 – Declaration under Article 5

(Name of State)

declares that the Convention shall apply only to securities accounts held by:

- (a) the following *category / categories (delete whichever is inapplicable)* of intermediaries
(*insert description of the category/categories of intermediaries, which must be subject to authorisation, regulation, supervision or oversight by a government or public authority in relation to the activity of maintaining securities accounts*)
- (b) the following central bank (*insert, as applicable, the official designation of the central bank*)
.....

UNIDROIT 2009 - CONF. 11/2 – Doc. 5:	paras. 4-6 to 4-13
Official Commentary:	paras. 5-7 to 5-14

Form No. 3 A – Declaration under Article 7

(Name of State) declares that under its non-Convention law a person other than the relevant intermediary is responsible for the performance of a function or functions ¹ of the relevant intermediary under the Convention ² for all intermediated securities and securities accounts, as follows: ³

- a) the relevant intermediary is (*describe the relevant intermediary by name or category*)
.....
- b) the parties to the account agreement are (*describe the parties to the account agreement by name or category*)
- c) the *person / persons* other than the relevant intermediary who are responsible for exercising one or more functions of the relevant intermediary *is / are* (*delete whichever is inapplicable*) (*identify the person or persons by name or category*)
- d) for each such person:
 - i) the *function / functions* that the person is entrusted with *is / are* (*delete whichever is inapplicable*)
 - ii) the provisions of the Convention which apply to the person ⁴ are:
.....

(Where more than one person is responsible for exercising one or more functions of the relevant intermediary, specify in the same way for the second person and any subsequent person their functions, and the applicable provisions of the Convention.)

UNIDROIT 2009 - CONF. 11/2 – Doc. 5:	paras. 6-18 to 6-29
Official Commentary:	paras. 7-19 to 7-30

¹ Pursuant to Article 7(1) of the Convention, a declaration made pursuant to Article 7 cannot provide that a person other than the relevant intermediary is responsible for the performance of all of the functions of the relevant intermediary.

² Article 7(3) of the Convention provides: "Unless otherwise provided in this Convention, if a declaration under this Article applies, references in any provision of this Convention to an intermediary or the relevant intermediary are to the person or persons responsible for performing the function to which that provision applies."

³ This form should be used by a Contracting State that wishes to make a declaration under Article 7 of the Convention, and wishes that declaration to relate generally to intermediated securities and securities accounts. For a declaration that relates to specified categories or descriptions of intermediated securities or securities accounts, Form 3 B should be used.

⁴ The declaration, in specifying the provisions of the Convention which apply to the person, must *inter alia* specify whether Article 9, Article 10, Article 15 or Article 23 applies to the person (see Article 7(2)(c)(ii) of the Convention).

Form No. 3 B – Declaration under Article 7

(Name of State) declares that under its non-Convention law a person other than the relevant intermediary is responsible for the performance of a function or functions ¹ of the relevant intermediary under the Convention ² for some categories of intermediated securities and securities accounts, as follows: ³

- a) the relevant intermediary is (*describe the relevant intermediary by name or category*)
.....
- b) the parties to the account agreement are (*describe the parties to the account agreement by name or category*)
- c) the *person / persons* other than the relevant intermediary who are responsible for exercising one or more functions of the relevant intermediary *is / are* (*delete whichever is inapplicable*) (*identify the person or persons by name or category*)
- d) for each such person:
 - i) the *function / functions* that the person is entrusted with *is / are* (*delete whichever is inapplicable*)
 - ii) the provisions of the Convention which apply to the person ⁴ are:
.....
 - iii) the categories or description of intermediated securities or securities accounts are: (*specify the categories or description of intermediated securities or securities accounts*)

(Where more than one person is responsible for exercising one or more functions of the relevant intermediary, specify in the same way for the second person and any subsequent person their functions, and the applicable provisions of the Convention and, where appropriate, the categories or description of intermediated securities.)

UNIDROIT 2009 - CONF. 11/2 – Doc. 5: paras. 6-18 to 6-29

Official Commentary : paras. 7-19 to 7-30

¹ Pursuant to Article 7(1) of the Convention, a declaration made pursuant to Article 7 cannot provide that a person other than the relevant intermediary is responsible for the performance of all of the functions of the relevant intermediary.

² Article 7(3) of the Convention provides: "Unless otherwise provided in this Convention, if a declaration under this Article applies, references in any provision of this Convention to an intermediary or the relevant intermediary are to the person or persons responsible for performing the function to which that provision applies."

³ This form should be used by a Contracting State that wishes to make a declaration under Article 7 of the Convention, and wishes that declaration to relate to intermediated securities or securities accounts of specified categories or descriptions. For a declaration that relates generally to intermediated securities and securities accounts, Form 3 A should be used.

⁴ The declaration, in specifying the provisions of the Convention which apply to the person, must *inter alia* specify whether Article 9, Article 10, Article 15 or Article 23 applies to the person (see Article 7(2)(c)(ii) of the Convention).

Form No. 4 A – Declaration under Article 12(5)(a)

(Name of State)

declares that under its law,

(delete whichever of the following are not applicable)

- the requirement under Article 12(3)(a) of the Convention;
- the requirement under Article 12(3)(b) of the Convention;¹
- the requirement under Article 12(3)(c) of the Convention;²

is / are (delete whichever is inapplicable) sufficient to render an interest effective against third parties.³

UNIDROIT 2009 - CONF. 11/2 – Doc. 5:	paras. 12-32 to 12-34
Official Commentary:	paras. 12-32 to 12-35

¹ Article 12(6) of the Convention provides: “A declaration in relation to paragraph 3(b) shall specify whether a designating entry has the effect described in Article 1(l)(i) or Article 1(i)(ii) or both.” See Form No. 4 E.

² Article 12(7) of the Convention provides: “A declaration in relation to paragraph 3(c) shall specify whether a designating entry has the effect described in Article 1(l)(i) or Article 1(l)(ii) or both.” See Form No. 4 F.

³ Article 39(2) of the Convention provides: “A Contracting State may declare that a pre-existing interest shall retain the priority it enjoyed before the relevant date only if, at any time before that date, the interest has become effective against third parties by satisfying a condition specified in the declaration made by that Contracting State in accordance with Article 12(5)(a).”

Form No. 4 B– Declaration under Article 12(5)(b)

(Name of State)

declares that under its law, Article 12 shall not apply in relation to interests in intermediated securities granted by or to parties falling within the following *category/categories* (*delete whichever is inapplicable*) (*specify the category or categories*):

UNIDROIT 2009 - CONF. 11/2 – Doc. 5:

paras. 12-32 to 12-34

Official Commentary :

paras. 12-32 to 12-35

Form No. 4 C – Declaration under Article 12(5)(c)

(Name of State)

declares that under its law,

(delete whichever two of the following three options are not applicable)

- Article 12(4) as a whole
- Article 12(4)(a)
- Article 12(4)(b)

does not apply.

UNIDROIT 2009 - CONF. 11/2 – Doc. 5:	paras. 12-32 to 12-34
Official Commentary:	paras. 12-32 to 12-35

Form No. 4 D – Declaration under Article 12(5)(d)

(Name of State)

declares that, under its law, Article 12(4)(b) ¹ applies with the following modifications (*specify the modifications*):

UNIDROIT 2009 - CONF. 11/2 – Doc. 5:	paras. 12-32 to 12-34
Official Commentary:	paras. 12-32 to 12-35

¹ A Contracting State should not made a declaration as provided in this form if it has made a declaration under Article 12(5)(c) of the Convention (Form No. 4 C) providing that Article 12(4) in general, or Article 12(4)(b) in particular, does not apply under its law.

Form No. 4 E – Declaration under Article 12(6)

(Name of State)

declares that, in relation to its declaration in relation to Article 12(3)(b) ¹ of the Convention, that a designating entry has the effect described in:

(delete whichever two of the following three options are not applicable)

- Article 1(I)(i) only;
- Article 1(I)(ii) only;
- both Article 1(I)(i) and Article 1(I)(ii).

UNIDROIT 2009 - CONF. 11/2 – Doc. 5:

paras. 12-32 to 12-34

Official Commentary:

paras. 12-32 to 12-35

¹ See Form No. 4 A.

Form No. 4 F – Declaration under Article 12(7)

(Name of State)

declares that, in relation to its declaration in relation to Article 12(3)(c) ¹ of the Convention, that a control agreement must include the provision described in:

(delete whichever two of the following three options are not applicable)

- Article 1(k)(i) only
- Article 1(k)(ii) only
- both Article 1(k)(i) and Article 1(k)(ii).

UNIDROIT 2009 - CONF. 11/2 – Doc. 5:	paras. 12-32 to 12-34
Official Commentary:	paras. 12-32 to 12-35

¹ See Form No. 4 A.

Form No. 6 – Declaration under Article 22(3)

(Name of State)

declares that under its non-Convention law an attachment of intermediated securities of an account holder made against or so as to affect (*identify by name or description the person, other than the relevant intermediary*)

has effect also against the relevant intermediary, and that the time at which such attachment becomes effective against the relevant intermediary is (*specify the time at which the attachment becomes effective against the relevant intermediary*)

UNIDROIT 2009 - CONF. 11/2 – Doc. 5:	paras. 22-21 to 22-24
Official Commentary:	paras. 22-19 to 22-22

Form No. 7 – Declaration under Article 25(5)

(Name of State)

declares that, in cases where all securities and intermediated securities held by an intermediary for its account holders, other than itself, are in segregated form under arrangements such as are referred to in Article 25(4) of the Convention, under its non-Convention law the allocation required by Article 25(1) of the Convention applies only to those securities and intermediated securities and does not apply to securities and intermediated securities held by an intermediary for its own account.

UNIDROIT 2009 - CONF. 11/2 – Doc. 5:	paras. 25-18 to 25-19
Official Commentary:	paras. 25-19 to 25-21

Form No. 8 – Declaration under Article 36(2)

(Name of State)

declares that Article 36(1)(a)(ii) of the Convention does not apply.

UNIDROIT 2009 - CONF. 11/2 – Doc. 5:	para. 36-20
Official Commentary:	para. 36-20

Form No. 9 – Declarations under Article 38

(Name of State) declares that

(delete whichever of the following is not applicable)

- Chapter V of the Convention does not apply ¹
- Chapter V of the Convention does not apply: ²

(delete whichever of the following are not applicable)

- (a) in relation to collateral agreements entered into by natural persons or other persons falling within the following categories *(specify the categories of persons)*
- (b) in relation to intermediated securities that are not permitted to be traded on an exchange or regulated market
- (c) in relation to collateral agreements that relate to relevant obligations falling within the following categories *(specify the categories of obligations)*

UNIDROIT 2009 - CONF. 11/2 – Doc. 5:	para. 38-7 to 38-11
Official Commentary:	para. 38-7 to 38-11

¹ Under Article 38(1) of the Convention.

² Under Article 38(2) of the Convention.

Form No. 10 – Declaration under Article 39(2)

(Name of State) declares that only those pre-existing interests that have become effective against third parties before (*specify the relevant date*) by satisfying a condition specified in the declaration made in accordance with Article 12(5)(a) shall retain the priority they enjoyed before that date.¹

UNIDROIT 2009 - CONF. 11/2 – Doc. 5:	paras. 39-11 to 39-15
Official Commentary:	paras. 39-12 to 39-16

¹ - Article 39(2) of the Convention provides: "A Contracting State may declare that a pre-existing interest shall retain the priority it enjoyed before the relevant date only if, at any time before that date, the interest has become effective against third parties by satisfying a condition specified in the declaration made by that Contracting State in accordance with Article 12(5)(a)."

- Article 39(3)(b) provides that in Article 39, "the relevant date" means "the date stated by a Contracting State in the declaration made under this Article and that date shall not be later than two years after the effective date of that declaration."

- Article 45(3) of the Convention determines the date that a declaration made by a Contracting State shall take effect. Pursuant to Article 39(4) of the Convention, Article 45(5) of the Convention, dealing with rights and interests arising prior to the effective date of a declaration, does not apply in relation to a declaration made pursuant to Article 39.

Form No. 11 – Declaration under Article 41(2)

(Name of Regional Economic Integration Organisation) declares that its member states have transferred to it competence over the following matters governed by the Convention *(specify the matters for which competence has been transferred)*:
.....

Official Commentary:

paras. 41-6 to 41-9

Form No. 12 – Declaration under Article 43(1)

(Name of State) declares that

(delete whichever of the following is not applicable)

- the Convention applies to all its territorial units

- the Convention applies to the following of its territorial units (*specify the relevant territorial units*): ¹.....

Official Commentary:

paras. 43-4 to 43-7

¹ Article 43(4) of the Convention provides: "If a Contracting State extends this Convention to one or more of its territorial units, declarations permitted under this Convention may be made in relation to each such territorial unit, and the declarations made in relation to one territorial unit may be different from those made in relation to another territorial unit."