

**AVANT-PROJET DE CONVENTION SUR
LA LOI APPLICABLE À CERTAINS DROITS SUR DES TITRES DÉTENUS
AUPRÈS D'UN INTERMÉDIAIRE**

Propositions d'amendement à l'avant-projet d'avril 2002

*soumis par le Bureau Permanent
suite à la réunion du Comité de rédaction à Londres en mai 2002*

(à désigner « avant-projet de juin 2002 »)

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**PRELIMINARY DRAFT CONVENTION ON
THE LAW APPLICABLE TO CERTAIN RIGHTS IN RESPECT OF SECURITIES
HELD WITH AN INTERMEDIARY**

Suggestions for amendment of the "April 2002 preliminary draft"

*submitted by the Permanent Bureau
following the meeting of the Drafting Committee in London in May 2002*

(to be referred to as the "June 2002 preliminary draft")

*Document préliminaire No 15 de juin 2002
à l'intention de la Commission spéciale sur les titres intermédiés*

*Preliminary Document No 15 of June 2002
for the attention of the Special Commission on indirectly held securities*

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Article 1 Definitions and interpretation

(1) In this Convention –

“securities” means any shares, bonds or other financial instruments or assets (other than cash), or any interest therein;

“intermediary” means a person that in the course of a business or other regular activity maintains securities accounts for others or both for others and for its own account and is acting in that capacity;

“relevant intermediary” means the intermediary that maintains the securities account for the account holder;

“securities account” means an account maintained by an intermediary to which securities are credited;

“securities held with an intermediary” means the rights of an account holder resulting from a credit of securities to a securities account, whether such rights are property, contract, or other rights;

“account holder” means a person in whose name an intermediary maintains a securities account;

“disposition” means any transfer of title whether outright or by way of security and any grant of a security interest whether possessory or non-possessory;

“perfection” means completion of any steps necessary to render a disposition effective against persons who are not parties to that disposition;

“insolvency proceeding” means a collective judicial or administrative proceeding, including an interim proceeding, in which the assets and affairs of the debtor are subject to control or supervision by a court or other competent authority for the purpose of reorganisation or liquidation;

“Multi-Unit State” means a State within which two or more territorial units of that State, or both the State and one or more of its territorial units, have their own rules of law in respect of any of the issues specified in Article 2(1).

(2) References in this Convention to a disposition of securities held with an intermediary include –

(a) a disposition of a securities account;

(b) a disposition, as well as a lien by operation of law, in favour of the account holder’s intermediary.

- (3) A person shall not be considered an intermediary for the purposes of this Convention merely because –**
- (a) it acts as registrar or transfer agent for an issuer of securities; or**
 - (b) it records in its own books details of securities credited to securities accounts maintained by an intermediary in the names of other persons for whom it acts as manager or agent or otherwise in a purely administrative capacity.**
- (4) Subject to paragraph (5), a person shall be regarded as an intermediary for the purposes of this Convention in relation to securities which are credited to securities accounts which it maintains in the capacity of a central securities depository or which are otherwise transferable by book entry across securities accounts which it maintains.**
- (5) In relation to securities which are credited to securities accounts maintained by a person in the capacity of operator of a system for the holding and transfer of such securities on records of the issuer or other records which constitute the primary record of entitlement to them as against the issuer, [the Contracting State under whose law those securities are constituted] [the Contracting State in which the system is operated] may by a declaration provide that the person which operates that system is not to be regarded as an intermediary for the purposes of this Convention.**

Article 2 Scope of the Convention and of the applicable law

- (1) This Convention determines the law applicable to the following issues in respect of securities held with an intermediary –**
- (a) the legal nature and effects against the intermediary and against third parties of the credit of securities to a securities account, including whether the rights resulting from such a credit are property, contract, or other rights;**
 - (b) the legal nature and effects against the intermediary and against third parties of a disposition of securities held with an intermediary;**

- (c) the requirements, if any, for perfection of a disposition of securities held with an intermediary;
 - (d) whether a person's interest in securities held with an intermediary extinguishes or has priority over another person's interest;
 - (e) the duties, if any, of an intermediary to a person other than the account holder who asserts in competition with the account holder or another person an interest in securities held with that intermediary;
 - (f) the requirements, if any, for the realisation of an interest in securities held with an intermediary; and
 - (g) whether a disposition of securities held with an intermediary extends to entitlements to dividends, income, other distributions or redemption, sale or other proceeds.
- (2) This Convention does not determine the law applicable to –
- (a) the contractual or other personal rights and duties of parties to a transaction in securities;
 - (b) the contractual or other personal rights and duties arising from relations between an intermediary and an account holder; or
 - (c) the rights and duties of an issuer of securities or of an issuer's registrar or transfer agent, whether in relation to the holder of the securities or any other person.

Article 3 Internationality

This Convention applies in all cases involving a choice between the laws of different States.

Article 4 Determination of the applicable law - Primary rule

- (1) The law applicable to the issues specified in Article 2(1) is the law of the State agreed by the account holder and the relevant intermediary

Option A¹

as the State whose law governs those issues,

Option B²

as the State in which the securities account is maintained,

provided that the relevant intermediary has, at the time of the agreement, an office in that State, and

- (a) entries to securities accounts are effected or monitored at such office;
 - (b) the administration of payments or corporate actions relating to securities held with the intermediary is performed at such office;
 - (c) an account number, bank code, or other specific means of identification identifies securities accounts as being maintained at such office; or
 - (d) that office is otherwise engaged in a business or other regular activity of maintaining securities accounts [, whether alone or together with other offices of the relevant intermediary or with other persons acting for the relevant intermediary in that or another State].
- (2) An office is not engaged in a business or other regular activity of maintaining securities accounts merely because it is a place where –
- (a) the technology supporting the bookkeeping or data processing for securities accounts is located;
 - (b) call centres for communication with account holders are located or operated; or
 - (c) the mailing relating to securities accounts is organised and file rooms are located.

¹ For a slightly modified version of Option A which partially addresses the *Multi-unit State issue* in the main provision of Article 4, see Appendix I (and also Appendix II).

² For a slightly modified version of Option B which partially addresses the *Multi-unit State issue* in the main provision of Article 4, see Appendix I (and also Appendix II).

- (3) The agreement referred to in paragraph 1 must be express or, if not express, implied from the terms of the contract considered as a whole.**

Article 5 Determination of the applicable law - Fallback rule

If the applicable law is not determined under Article 4, that law is –

- (a) the law in force in the State or the territorial unit of a Multi-unit State under whose law the relevant intermediary is incorporated or organised;**
- (b) if the applicable law cannot be determined under paragraph (a), the law in force in the State or the territorial unit of a Multi-unit State in which the relevant intermediary has its place of business or, if the relevant intermediary has more than one place of business, its principal place of business; or**
- (c) if the relevant intermediary is incorporated or organised under the laws of a Multi-unit State and not those of one of its territorial units, the law in force in the territorial unit of that Multi-unit State in which the relevant intermediary has its place of business or, if the relevant intermediary has more than one place of business, its principal place of business.³**

Article 6 Factors to be disregarded

In determining the applicable law under the rules of this Convention, no account shall be taken of the following factors –

- (a) the place where the issuer of the securities is organised or incorporated or has its statutory seat, central administration, place or principal place of business or registered office;**
- (b) the places where certificates representing or evidencing securities are located;**

³ This paragraph (c) and the language inserted in paragraphs (a) and (b) referring to “the territorial unit of a Multi-unit State” may be seen as a way of clarifying and shortening the issues relating to Multi-unit States otherwise addressed in Article 11.

- (c) the place where a register of holders of securities maintained by or on behalf of the issuer of the securities is located;
- (d) the place where any intermediary other than the relevant intermediary is located.

Article 7 Insolvency

- (1) The opening of an insolvency proceeding under a law other than the law applicable under Article 4 or, as the case may be, Article 5 does not affect –
 - (a) the determination of issues specified in Article 2(1) in respect of securities that have been credited to a securities account; or
 - (b) a disposition of securities held with the relevant intermediary that has been perfected in accordance with the law of the State of the place of that intermediary.
- (2) Nothing in this Convention affects the application of any rules of substantive or procedural insolvency law relating to –
 - (a) the ranking of categories of claim or the avoidance of a disposition as a preference or a transfer in fraud of creditors; or
 - (b) the enforcement of rights after the opening of an insolvency proceeding.

Article 8 General applicability

This Convention applies whether or not the applicable law is that of a Contracting State.

Article 9 Exclusion of choice of law rules (*renvoi*)

In this Convention, the term “law” means the law in force in a State other than its choice of law rules.

Article 10 Public policy and internationally mandatory rules

- (1) The application of the law determined by this Convention may be refused only if the effects of its application would be manifestly contrary to the public policy of the forum.**
- (2) This Convention does not prevent the application of those provisions of the law of the forum which, irrespective of rules of conflict of laws, must be applied even to international situations.**
- (3) This Article does not permit application of provisions of the law of the forum imposing requirements with respect to perfection or relating to priorities between competing interests, unless the law of the forum is the law determined by Article 4 or, as the case may be, Article 5.**

Article 11 Determination of the applicable law for Multi-unit States⁴

- (1) If the account holder and the relevant intermediary have agreed**
 - For Option A in Art. 4(1): on the law of a specified territorial unit of a Multi-unit State, then -**
 - For Option B in Art. 4(1): that the securities account is maintained within a specified territorial unit of a Multi-unit State, or at a specified place which is situated within a territorial unit of a Multi-unit State, then -**
 - (a) the reference to the agreed State in Article 4(1) is to that territorial unit;**
 - (b) the reference to "that State" in the proviso to Article 4(1) is to the Multi-unit State itself.**
- (2) A Multi-unit State may declare that if,**

⁴ For an alternative proposal of Article 11, based on a main provision (Art. 4) that partially addresses the Multi-unit State issues, see Appendix I (and also Appendix II).

(a) under Article 4, the account holder and the relevant intermediary have agreed

For Option A in Art. 4(1): on the law of that Multi-unit State without specifying the law of a particular territorial unit of that Multi-unit State,

For Option B in Art. 4(1): that the securities account is maintained in that Multi-unit State without specifying a particular territorial unit of that Multi-unit State,

(b) under Article 5, the applicable law is that of the Multi-unit State or one of its territorial units,

the internal choice of law rules in force in that Multi-unit State shall determine whether the substantive rules of law of that Multi-unit State or of a particular territorial unit of that Multi-unit State shall apply. A Multi-unit State that makes such a declaration [may] [shall] communicate information concerning the content of those internal choice of law rules to the Permanent Bureau.

(3) If the account holder and the relevant intermediary

For Option A in Art. 4(1): have agreed on the law of a Multi-unit State without specifying the law of a particular territorial unit of that Multi-unit State,

For Option B in Art. 4(1): have agreed that the securities account is maintained in a Multi-unit State without specifying a particular territorial unit of that Multi-unit State,

and that Multi-unit State has not made a declaration under paragraph 2 or that Multi-unit State has made a declaration under paragraph 2 but the internal choice of law rules in force in that Multi-unit State point to the law of another State, the applicable law shall be determined in accordance with Article 5.

- (4) A Multi-unit State may declare that if the applicable law under Article 4 is that of one of its territorial units, the law of that territorial unit only applies if the relevant intermediary has an office within that territorial unit engaged in one of the activities mentioned in Article 4(1), sub-paragraphs (a) to (d). Such a declaration shall have no effect on dispositions made before that declaration becomes effective.

Article 12 Uniform interpretation

In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application.

Article 13 Review of practical operation of the Convention

The Secretary General of the Hague Conference on Private International Law shall at regular intervals convene a Special Commission to review the practical operation of the Convention and to consider whether any amendments to this Convention are desirable.

Article 14 Amendments to the Convention

- (1) A Contracting State may submit proposals for amendments to this Convention to the Secretary General of the Hague Conference on Private International Law, who shall then consult the Contracting States, and [if a majority of [two thirds] of the Contracting States approves the proposal] shall convene a Special Commission to consider the proposed amendments.
- (2) Any amendments approved by the Special Commission shall be laid down in a Protocol. Articles 15 to 17 apply to this Protocol.

Article 15 Signature, ratification, acceptance, approval or accession

- (1) This Convention shall be open for signature by all States.

- (2) This Convention is subject to ratification, acceptance, approval or accession by the signatory States.**
- (3) Any State which does not sign this Convention may accede to it at any time.**
- (4) The instruments of ratification, acceptance, approval or accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, Depositary of the Convention.**

Article 16 Regional organisations

- (1) A Regional Economic Integration Organisation which is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, accept, approve or accede to this Convention. The Regional Economic Integration Organisation shall in that case have the rights and obligations of a Contracting State, to the extent that that Organisation has competence over matters governed by this Convention. Where the number of Contracting States is relevant in this Convention, the Regional Economic Integration Organisation shall not count as a Contracting State in addition to its Member States which are Contracting States.**
- (2) The Regional Economic Integration Organisation shall, at the time of signature, acceptance, approval or accession, make a declaration to the depositary specifying the matters governed by this Convention in respect of which competence has been transferred to that Organisation by its Member States. The Regional Economic Integration Organisation shall promptly notify the depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration under this paragraph.**
- (3) Any reference to a "Contracting State" or "Contracting States" in this Convention applies equally to a Regional Economic Integration Organisation where the context so requires.**

Article 17 Entry into force

- (1) The Convention shall enter into force on the first day of the month following the expiration of [three] [six] months after the deposit of the third instrument of ratification, acceptance, approval or accession referred to in Article 15.**

- (2) Thereafter the Convention shall enter into force –**
 - (a) for each State subsequently ratifying, accepting, approving or acceding to it, on the first day of the month following the expiration of [three] [six] months after the deposit of its instrument of ratification, acceptance, approval or accession;**

 - (b) for a territorial unit to which this Convention has been extended by a declaration under Article 18(1), on the first day of the month following the expiration of [three] [six] months after that declaration.**

Article 18 Multi-unit States

- (1) A Multi-unit State may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.**

- (2) Any such declaration shall be notified to the depositary and shall state expressly the territorial units to which the Convention applies.**

- (3) If a State makes no declaration under this Article, this Convention is to extend to all territorial units of that State.**

Article 19 Priority between pre-Convention and post-Convention dispositions

In a Contracting State, the law applicable under this Convention determines the priority between a disposition made before the Convention entered into force for that State and a disposition made after the entry into force.

Option A (if Option A in Article 4(1) is adopted):

- (1) The following provision applies only with respect to an agreement governing a securities account which -**
 - (a) was made before this Convention entered into force pursuant to Article 17(1); and**
 - (b) does not contain an express agreement, or an agreement implied from the terms of the contract considered as a whole, as to the law applicable to the issues specified in Article 2(1).**
- (2) An agreement that the securities account is maintained in a particular State shall be treated for the purposes of Article 4(1) as an agreement that the law of that State applies to the issues specified in Article 2(1).**

Option B (if Option B in Article 4(1) is adopted):

- (1) The following provision applies only with respect to an agreement governing a securities account which -**
 - (a) was made before the Convention entered into force pursuant to Article 17(1); and**
 - (b) does not contain an express agreement or an agreement implied from the terms of the contract considered as a whole, as to where the securities account is maintained.**
- (2) A provision in that agreement which would have the effect, under the law governing that agreement, that the laws of a particular State apply to the issues specified in Article 2(1) shall be treated, for the purposes of Article 4(1), as an agreement that the securities account is maintained in that State.**

Article 21 Denunciation

- (1) A Contracting State may denounce the Convention by a notification in writing addressed to the Depositary.**
- (2) The denunciation takes effect on the first day of the month following the expiration of twelve months after the notification is received by the Depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the Depositary.**

Article 22 Notifications by the Depositary

To be completed.

[Other final clauses]

To be completed. It was agreed to include a general clause on declarations, including a provision on possible modifications to declarations.

**Alternative proposal for Article 11
if references to the Multi-unit State issues are made in Article 4
(submitted by the Permanent Bureau)**

In all the previous drafts, the issue of how to determine the applicable law with regard to Multi-unit States was dealt with exclusively in a separate provision (see e.g. Art. 9 in Prel. Doc. No. 10). Some of the comments reflected in Preliminary Document No 14 seemed to indicate, however, that the drafting of the relevant provision could be further simplified if some aspects of this complex issue were directly addressed in the main provision, *i.e.* in Article 4. Thus, at the request of the Drafting Committee, the Permanent Bureau has drafted two new Options of Article 4: Each is based on one of the two original Options suggested under Article 4 in the main part of this draft (see page 6), but, in addition, builds in a reference to the Multi-unit State issues. If one of the following revisited Options of Article 4(1) were adopted, it would replace the original text suggested on page 6 and thus be moved to Article 4(1).

Option A (revisited)

Article 4

- (1) **The law applicable to the issues specified in Article 2(1) is the law in force in the State or territorial unit of a Multi-unit State agreed by the account holder and the relevant intermediary as the State or territorial unit whose law governs those issues, provided that the relevant intermediary has, at the time of the agreement, an office anywhere in that State, and [...]**

Option B (revisited)

Article 4

- (1) **The law applicable to the issues specified in Article 2(1) is the law in force in the State or territorial unit of a Multi-unit State agreed by the account holder and the relevant intermediary as the State or territorial unit in which the securities account is maintained, provided that the relevant intermediary has, at the time of the agreement, an office anywhere in that State, and [...]"**

The main effect of the approach taken in these revisited Options for Article 4(1) is to make paragraph (1) of Article 11 as suggested in the main part of the text (see p. 9) superfluous. The following draft for Article 11 contains language for both revisited Options of Article 4 presented above:

Article 11

(1) A Multi-unit State may declare that if,

(a) under Article 4, the account holder and the relevant intermediary have agreed

For Option A (rev.): on the law of that Multi-unit State without specifying the law of a particular territorial unit of that Multi-unit State,

For Option B (rev.): that the securities account is maintained in that Multi-unit State without specifying a particular territorial unit of that Multi-unit State,

(b) under Article 5, the applicable law is that of the Multi-unit State or one of its territorial units,

the internal choice of law rules in force in that Multi-unit State shall determine whether the substantive rules of law of that Multi-unit State or of a particular territorial unit of that Multi-unit State shall apply. A Multi-unit State that makes such a declaration [may] [shall] communicate information concerning the content of those internal choice of law rules to the Permanent Bureau.⁵

(2) If the account holder and the relevant intermediary

For Option A (rev.): have agreed on the law of a Multi-unit State without specifying the law of a particular territorial unit of that Multi-unit State,

⁵ This version of Article 11 reflects a tentative conclusion reached at the London meeting of the Drafting Committee that a reference to internal conflict of laws rules should be made only in the absence of an (explicit or implied) agreement between the account holder and the relevant intermediary (*i.e.* in a default situation) and when the parties have agreed on the law of a Multi-unit State without specifying a territorial unit. A proposal for an alternative approach is contained in Appendix II to this draft.

For Option B (rev.): have agreed that the securities account is maintained in a Multi-unit State without specifying a particular territorial unit of that Multi-unit State,

and that Multi-unit State has not made a declaration under paragraph 1 or that Multi-unit State has made a declaration under paragraph 1 but the internal choice of law rules in force in that Multi-unit State point to the law of another State, the applicable law shall be determined in accordance with Article 5.

- (3) A Multi-unit State may declare that if the applicable law under Article 4 is that of one of its territorial units, the law of that territorial unit only applies if the relevant intermediary has an office within that territorial unit engaged in one of the activities mentioned in Article 4(1), sub-paragraphs (a) to (d). Such a declaration shall have no effect on dispositions made before that declaration becomes effective.**

**Proposal for Article 11:
Memorandum submitted by the US delegation
(text in English only)**

The US delegation appreciates the idea of treating the issues relating to Multi-unit States in Article 4 (see Appendix I) and Article 5 (see main part of the text) directly, rather than by a more complex Article 11.

The US delegation continues to believe, however, that it is possible to simplify Article 11 further. As it stands in Appendix I, a declaration made pursuant to Article 11(1) is effective with respect to the principal rule in Article 4 only if the agreement selects the law of the Multi-Unit State, but does not appear to be effective where the agreement selects the law of a territorial unit thereof. Some of our prior drafts have also had that effect. Also, the language that the United States submitted before the London meeting could be read that way.

On further reflection, we have come to the view that this is not a good idea. We worry that we have come to a “magic words” rule – a declaration as to internal choice of law rules is effective if the agreement selects the law of the Multi-Unit State but the declaration has no effect if the agreement selects the law of a unit of the Multi-Unit State. That does not promote transparency, since resort to internal choice of law rules should be required whenever the parties so desire.

Furthermore, there are important constituencies in Multi-Unit States who feel that a declaration device is important. Those constituencies may not willing to accept a version of the Convention that makes the declaration effective only when the agreement between the account holder and the relevant intermediary selects the law of the Multi-unit State. We think that this issue is particularly important with respect to the continued effectiveness of federal law in Multi-Unit States, which is a matter of significant concern. It is important that Federal law be preserved with a high degree of certainty whether the parties have selected the law of the Multi-Unit State or the law of a unit of that State. The most effective way to achieve that is through the declaration device. It would be undesirable from our perspective for any negative inference to arise from the current wording that Federal law is overridden by the Convention where parties have agreed on the law of a unit of a Multi-Unit State.

Thus, we would suggest that Article 11 be revised so that (a) if a declaration is made, internal choice of law issues are governed by the internal choice of law rules identified, and (b) if no declaration is made, the Convention rules operate directly. We suggest the following draft:

- (1) A Multi-unit State may declare that if, the applicable law under Article 4 or 5 is that of the Multi-unit State or one of its territorial units, the internal choice of law rules in force in that Multi-unit State shall determine whether the substantive rules of law of that Multi-unit State or of a particular territorial unit of that Multi-unit State shall apply. A Multi-unit State that makes such a declaration [may] [shall] communicate information concerning the content of those rules to the Permanent Bureau.**

- (2) A Multi-unit State may declare that if the applicable law under Article 4 is that of one of its territorial units, the law of that territorial unit only applies if the relevant intermediary has an office within that territorial unit engaged in one of the activities mentioned in Article 4(1), sub-**

paragraphs (a) to (d). Such a declaration shall have no effect on dispositions made before that declaration becomes effective.

Subsection (2) above is included to accommodate those States which may think it appropriate to limit the permissible scope of parties choice. It is not a provision which the United States feels is necessary, so we leave it to others.

We do not think it is necessary to have a special provision, such as paragraph (2) of Article 11 as suggested in Appendix I or paragraph (3) of Article 11 as suggested in the main part of the text, to prevent the internal choice of law rules of a Multi-Unit State from referring to another State (capital S). That is already clear from the rule that the internal choice of law rules determine whether "the substantive law of that Multi-Unit State or of a particular territorial unit of that Multi-State shall apply." The point can be explicated by commentary.

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