

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

tel qu'adopté par la Commission spéciale le 17 janvier 2002

(version provisoire)

soumis par le Bureau Permanent

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

as adopted by the Special Commission on 17 January 2002

(provisional version)

submitted by the Permanent Bureau

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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 with whom the account holder maintains the securities account;

“securities account” means an account with 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.

(2) References in this Convention to a disposition of securities held with an intermediary include a disposition, as well as a lien by operation of law, in favour of the account holder’s intermediary.

(3) References in this Convention to a disposition of securities held with an intermediary include a disposition of a securities account.

Option A (December 2001 Draft)

- [(4) 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.]**

Option B (text developed at the Special Commission)

- [(4) Subject to paragraph 5, a person shall not be considered an intermediary in relation to securities for the purposes of this Convention merely because –**
- (a) it acts as [registrar or] transfer agent for the issuer of the securities or operates a system or arrangement for transfer of those securities on records of the issuer; 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.**
- (5) The Contracting State or States referred to in paragraph 6 shall declare whether a person who maintains records of particular securities which constitute the primary record of entitlement to them is to be treated as an intermediary in relation to those securities, and may modify such a declaration by submitting another declaration at any time.**
- (6) For the purposes of the preceding paragraph, the Contracting State or States are –**
- (a) the State in which the person concerned maintains the records; and**
 - (b) where the law of another State governs the transfer of the securities on the records of the issuer and that law requires [or permits] such securities to be transferred through the system operated by that person, that other State.]**

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) whether the rights resulting from the credit of securities to a securities account are property, contract, or other rights;
 - (b) the legal nature and effects 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 a competing interest;
 - (e) the duties, if any, of an intermediary to a person who asserts a competing 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 security interest in 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 rights and duties of parties to a transaction in securities;
 - (b) the contractual 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

- (1) The law applicable to the issues specified in Article 2(1) is the law of the State of the place of the relevant intermediary.**

- (2) That State is the State within which the account holder and the relevant intermediary have agreed the securities account will be maintained, provided that the relevant intermediary has an office within that State 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.**

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

- (4) If the State of the place of the relevant intermediary cannot be determined under paragraph 2, that State is –**
 - (a) if the relevant intermediary is incorporated, the State under whose law it is incorporated;**

 - (b) if the relevant intermediary is an unincorporated body, the State under whose law it is organised; or**

 - (c) in any other case, the 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.**

[Article 4^{bis} [Heading to be inserted]]

- (1) For the purposes of this Convention, but not by way of limitation, an office of an intermediary is engaged in a business or other regular activity of maintaining securities accounts if any one or more of the following activities occurs –**
 - (a) contracts regarding securities accounts are executed at such office or received by such office;**

 - (b) account holders can communicate with the intermediary at such office with regard to securities accounts;**

 - (c) legal, regulatory, auditing, position monitoring, or account-holder-support functions of the intermediary**

relating to securities accounts occur at such office;

- (d) account statements bear an address of that office or are prepared at that office;
 - (e) entries to a securities account by the intermediary are made, stored, or managed at that office, such as the booking, recording, transferring, or pledging of interests in securities;
 - (f) technology supporting bookkeeping or data processing for securities accounts is located at such office;
 - (g) a single account number, bank code, or other means of identification exists that identifies such office as maintaining securities accounts at that office;
 - (h) ...
- (2) In determining the State of the place of the relevant intermediary under Article 4(2), account shall be taken only of the agreement between the account holder and the relevant intermediary and no account shall be taken of the following factors –
- (a) the places where certificates representing or evidencing securities are located;
 - (b) the places where any register of holders of securities maintained by or on behalf of the issuer of the securities is located;
 - (c) the place where the issuer of the securities is organised or incorporated or has its statutory seat, central administration, principal place of business or its registered office;
 - (d) the place where any intermediary other than the relevant intermediary is located; or
 - (e) except for purposes of satisfying the condition set forth in the proviso to Article 4(2), the places where the technology supporting the bookkeeping or data processing for the securities account is located.]

Article 5 Insolvency

- (1) The opening of an insolvency proceeding under a law other than the law of the State of the place of the relevant intermediary 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 that 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 –
- (a) any rules of insolvency law relating to the ranking of categories of claim or to the avoidance of a disposition as a preference or a transfer in fraud of creditors; or
 - (b) any rules of substantive or procedural insolvency law relating to the enforcement of rights to property after the opening of an insolvency proceeding.

Article 6 General applicability

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

Article 7 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 8 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) Subject to paragraph 3, 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.

Article 9 Determination of applicable law in States with more than one legal system

- (1) In this Convention, “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) Where, under Article 4(2), the account holder and the relevant intermediary have agreed that the securities account will be maintained in a Multi-unit State and the relevant intermediary has an office anywhere within that Multi-unit State engaged in a business or other regular activity of maintaining securities accounts, the law applicable to the issues specified in Article 2(1) shall be determined as follows –**

 - (a) if the account holder and the relevant intermediary have agreed that the securities account will be maintained within a particular territorial unit of that Multi-unit State, the applicable law is the law of that territorial unit;**
 - (b) if the account holder and the relevant intermediary have specified a Multi-unit State but not a particular territorial unit of that Multi-unit State, the applicable law shall be determined by the choice of law rules of that Multi-unit State or, if none, by the law of the State determined by Article 4(4) and paragraph 6(b) of this Article.**
- (3) A Multi-unit State may declare at the time of signature, ratification, acceptance, approval or accession that paragraph 2(a) applies only if the applicable law is the law of a territorial unit within which the relevant intermediary has an office engaged in a regular activity of maintaining securities accounts.**
- (4) A Multi-unit State may declare at the time of signature, ratification, acceptance, approval or accession that if pursuant to paragraph 2(a) the applicable law is the law of a territorial unit, the choice of law rules in force in that territorial unit shall determine whether the substantive rules of law of that territorial unit, of another territorial unit of that Multi-unit State, or of that Multi-unit State apply. Such a declaration shall have no effect on dispositions perfected before that declaration becomes effective.**
- [(5) A declaration according to paragraph 4 [may] [shall] be accompanied by information concerning the content of the choice of law rules of that Multi-unit State and of its territorial units.**

The Permanent Bureau shall then make that information available to interested parties by appropriate means.]

(6) In relation to a Multi-unit State –

- (a) the references in Article 4(4), to the State under whose law the relevant intermediary is incorporated or organised or in which it has its place of business or principal place of business are references to the territorial unit under whose law the relevant intermediary is incorporated or organised or in which it has its place of business or principal place of business;**
- (b) if the relevant intermediary is incorporated or organised under the laws of the Multi-unit State and not those of any of the territorial units, the reference in Article 4(4) to the State under whose law it is incorporated or organised shall be treated as a reference to the territorial unit in which is situated its place of business or, if the relevant intermediary has more than one place of business, its principal place of business.**

Article 10 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 11 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 12 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 these States approves the proposal] shall convene a Special Commission to consider the proposed amendments.**

- (2) If the Special Commission approves the proposed amendments, they shall be laid down in a Protocol. Articles 13 to 15 apply to this Protocol.]

Article 13 **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) The instruments of ratification, acceptance, approval or accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, Depository of the Convention.

Article 14 **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 15 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 13.**

- (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 16(1), on the first day of the month following the expiration of [three] [six] months after that declaration.**

Article 16 Multi-unit States

- (1) If a State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it 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.**

Option A

- (1) This Convention applies in a Contracting State to all dispositions of securities held with an intermediary concluded after its entry into force for that State, and, subject to the following provision, to all dispositions concluded before its entry into force for that State.
- (2) Where a court of a Contracting State has to determine –
- (a) whether at a time before this Convention entered into force for that State a disposition of securities held with an intermediary has been [validly] made or perfected; or
 - (b) any issue of priority among competing dispositions of securities held with an intermediary made and perfected before this Convention entered into force for that State,
- the court shall apply the law determined by the conflict of laws rules of that State in force before this Convention entered into force for that State.

Option B

- (1) This Convention determines the law applicable in a Contracting State to the issues referred to in Article 2(1) whether the credit of securities, interest in securities, disposition of securities or security interest in securities was made or created before or after the entry into force of this Convention in that Contracting State, provided that –
- (a) the relative priority of an interest in securities held with an intermediary established under applicable law before the entry into force of this Convention in that Contracting State over a competing interest established before or after the entry into force of this Convention in that Contracting State shall be preserved, if the interest in securities established to be prior is perfected under the applicable law determined by this Convention prior to the date which is [six months] after this Convention has entered into force in that Contracting State;
 - (b) if a security interest in securities held with an intermediary is perfected under the law applicable at the

time this Convention enters into force in that Contracting State, and the action by which the security interest was perfected would suffice to perfect a security interest under the applicable law determined by this Convention, no further action is required to continue perfection;¹

- (c) if a security interest in securities held with an intermediary is perfected under applicable law at the time this Convention enters into force in that Contracting State, and the action by which the security interest was perfected would not suffice to perfect a security interest under the applicable law determined by this Convention, the security interest remains perfected for a period of [six] months after the date this Convention has entered into force in that Contracting State and continues perfected thereafter if appropriate action to perfect under the applicable law determined by this Convention is taken within that period; and
- (d) this Convention does not affect any legal proceeding commenced in the courts of that Contracting State before the entry into force of this Convention in that Contracting State.]

Article 17^{bis} Interpretation of pre-Convention agreements²

For purposes of determining the law of the State of the place of the relevant intermediary under Article 4(2) and (3), in the absence of an express agreement as to where the securities account will be maintained, if an agreement between the account holder and the relevant intermediary governing the securities account expressly provides that the relevant intermediary's jurisdiction is a particular State (or, in the absence of such a provision, expressly provides that the agreement shall be governed by the law of a particular State) and the law governing the agreement would treat such a provision as providing that the laws of that State are intended to apply to any of the issues specified in Article 2(1), such provision shall be treated for purposes of Article 4(2) as an agreement that the securities account will be maintained within that State for any agreement entered into prior to the Convention entering into force pursuant to Article 15(1).

¹ Further provisions will be needed to address cases where a) the State of the PRIMA law does not recognise the type of pre-existing interest as a property interest, so that re-perfection is not possible; and b) the re-perfection under the PRIMA law might be treated as a new agreement which might constitute a voidable preference.

² While the principle embodied in this provision was supported by a large number of delegates, it was agreed that it requires a more detailed analysis.

Article 18 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 19 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.