CONFÉRENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVÉ
HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

TITRES INTERMÉDIÉS
INDIRECTLY HELD SECURITIES

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TABLEAU RÉSUMANT LES OBSERVATIONS REÇUES SUR LA VERSION PROVISOIRE DE « L'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 (Doc. prél. No 8)

Préparé par le Bureau Permanent

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CHART SUMMARISING THE COMMENTS RECEIVED ON THE PROVISIONAL VERSION OF THE "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 (Prel. Doc. No 8)

Prepared by the Permanent Bureau

Document préliminaire No 9 de mars 2002
à l'intention de la Commission spéciale sur les titres intermédiés

Preliminary Document No 9 of March 2002
for the attention of the Special Commission on indirectly held securities

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OBSERVATIONS REÇUES SUR LE « PROJET DE FÉVRIER 2002 » (DOC. PRÉL. NO 8)

COMMENTS RECEIVED ON THE "FEBRUARY 2002 DRAFT" (PREL. DOC. NO 8)

Afin d'éviter tout contresens sur les observations soumises, le Bureau Permanent a reproduit (dans la mesure du possible) ces observations dans leurs langue et présentation originales.

In order to avoid any misrepresentation of the comments submitted, the Permanent Bureau has reproduced (as far as possible) these comments in their original form and language.

ARTICLE:	OBSERVATIONS / COMMENTS:	AUTEUR / AUTHOR:
1(1) to (3): **definitions in general**	We would like to **support current definitions** and advice against any re-opening of discussions on this Article at this stage.	Belgium
	We are aware that some commenting parties have raised questions regarding the drafting of certain definitions in Article 1(1). **We do not believe, however, that any of those definitions as they appear in the January Draft Convention require amendment**.	ISDA
1(1): **"securities" – definition in general**	The Canadian delegation continues to be of the view that the **definition of *securities* should clearly include *securities held with an intermediary*** to ensure that the Convention applies to situations involving multiple tiers of intermediaries. If it is not included in the definition, the Canadian delegation is of the view that the Explanatory Report should confirm that the term securities is intended to include securities held with an intermediary to ensure that courts have a clear understanding of what is covered under the Convention. As a suggestion, the Explanatory Report could indicate that the terms "financial assets" and "or any interest therein" are sufficiently broad to capture securities held with an intermediary. La délégation canadienne continue de penser que la définition des *titres* devrait clairement	Canada

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	comprendre les *titres détenus auprès d'un intermédiaire* pour s'assurer que la Convention s'applique aux situations mettant en jeu des niveaux multiples d'intermédiaires. Si cela n'est pas inclus dans la définition, la délégation canadienne estime que le rapport explicatif devrait confirmer que le terme *titres* vise à inclure les *titres détenus auprès d'un intermédiaire*, de manière à ce que les tribunaux aient une compréhension claire de ce que couvre la Convention. À titre de suggestion, le rapport explicatif pourrait indiquer que les expressions « actifs financiers » et « tout droit sur ces titres » sont suffisamment larges pour inclure les *titres détenus auprès d'un intermédiaire.*	
	L'énumération prévue dans cette disposition peut être source d'incertitude quant aux titres couverts par l'avant-projet. Cela peut conduire à des qualifications nationales différentes et donc nuire à l'application uniforme dans les États contractants de la règle de conflit de lois conventionnelle. Toutefois, il semble délicat sinon impossible de se lancer dans une énumération des produits financiers susceptibles d'être considérés comme des titres. Par contre, il serait opportun de rappeler dans la définition que **seuls les titres « inscrits en compte et transférables de compte à compte » sont couverts**.	France
	The main concern in the drafting of the definition of securities has been its flexibility, in order to establish a concept that is adjustable to new instruments and products. Therefore, the definition that has been adopted covers, apparently, all financial instruments. We say apparently since the **explanatory report of preliminary document nº 3 suggests that «physical commodities and instruments representing physical commodities (such as metal warrants and bills of lading) are not securities and hence are not within the scope of the proposed Convention»** (Preliminary Document nº 3 ("Annotated July 2001 draft"), page 4). This exclusion seems to **comprise instruments over commodities that are qualified by some jurisdictions as financial instruments** (for example, tradable futures and options contracts over commodities). Therefore, those jurisdictions would include the mentioned financial instruments within the scope of the Convention, since Article 1 refers to «any financial instruments or assets» without any other restriction. As the **definition in the project seems broader than the description of securities in the explanatory report**, we would like to ask for some clarification in regard to this specific issue.	Portugal

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	According with Article 1 in this Convention "securities" means "financial assets (other than cash)". Though we agree with the idea of flexibility of the concept of securities, **we cannot foresee what kind of products/instruments would be included due to the use of the expression "financial assets", that are not already comprised in the expression "financial instruments".** Therefore, it would be useful if the explanatory report could give some examples about the financial assets that cannot be considered financial instruments and still are intended to be within the scope of the Convention.	
	The present drafting is consistent with the demand, supported by Italy, of **including derivatives** in the scope of the Convention through the definition of securities.	Italy
	1. The definition in Article 1 of the scope of securities to be covered by the Convention is **different from the formulation used in the proposed EU Collateral Directive**. What are the likely practical consequences of this difference and can it be assured that such difference will not lead to the existence of parallel legal regimes in those EU Member States adopting the Convention?	EFMLG (one of three questions on which the group seeks clarification) / Giovannini group
1(1): "securities" – cash issue	In Article 1(1) the definition of the term "securities" includes financial instruments or assets other than cash. The words "other than cash" are set in brackets. As far as the German head delegate can remember, the Special Commission didn't adopt the text version including brackets. The Federal Ministry of Justice **recommends deleting the brackets**. [comment CB: this is probably a misunderstanding of the purpose and nature of round and square brackets]	Germany
	As far as the exclusion of cash from the definition of securities in Article 1(1) goes, it is commonly accepted that cash is not a security in proper terms, but it can be given as collateral and **can therefore be included in the provision related to "financial instrument or asset"**, as many delegations pointed out in The Hague and some operators are suggesting in local meetings. Therefore, the Italian Delegation will **consider this issue in meetings and contacts at European level** in order to decide whether cash must be included or not in the scope of the Convention. In this	Italy

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	regard it should be remarked that the draft of the European directive on financial collateral arrangements expressly includes cash in its scope. Nevertheless the same draft does not include cash in the assets for which conflict of laws rules apply.	
1(1): "intermediary"	The Canadian delegation is of the view that the **latter part of this definition "or both for others and for its own account" should be deleted** from the definition, as it is more interpretative in nature. The current draft is **confusing**. It is not clear to us that the expression "and is acting in that capacity" is intended to refer to the business or activity of maintaining securities accounts for others only. The definition of "intermediary" should read instead: *"intermediary" means a person that in the course of a business or other regular activity maintains securities accounts for others and is acting in that capacity;* The Canadian delegation is also of the view that **the word "person" should be defined**. Many market participants, such as trusts and unincorporated associations, would not necessarily be considered persons under Canadian law. Governments would also not be considered persons under Canadian law. As governments are significant investors in the global market place, it would be a huge mistake if the scope of this Convention inadvertently omitted such investors as "account holders". **The definition of "person" need not be exclusive**. Defining "persons" with concepts may be more inclusive and bring flexibility to the definition. The definition of "person" should include the following concepts: *(1) individuals or natural persons, including such persons acting in some capacity for another;* *(2) legal persons endowed with juridical personality such as body corporates;* *(3) entities not endowed with juridical personality such as partnerships, unincorporated associations, unincorporated syndicates, unincorporated organizations;* *(4) governments or agencies thereof;* La délégation canadienne estime que **la dernière partie de cette définition « ou aussi bien pour**	Canada

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	autrui que pour son propre compte » devrait être retirée, car elle est davantage de nature interprétative. Le projet actuel est **confus**. Il n'est pas clair pour nous que l'expression « et agit en cette qualité » vise à référer à l'activité professionnelle ou à l'activité de tenir des comptes de titres pour autrui seulement. Il faudrait plutôt pouvoir lire la définition de « intermédiaire » de la façon suivante : *« intermédiaire » désigne toute personne qui, dans le cadre de son activité professionnelle ou à titre habituel, tient des comptes de titres pour autrui et agit en cette qualité ;* La délégation canadienne estime également que **le terme « personne » devrait être défini**. De nombreux acteurs du marché, tels que les trusts et les associations non dotées de la personnalité morale, ne seraient pas nécessairement considérés comme des personnes aux termes de la loi canadienne. Les États ne seraient pas non plus considérés comme des personnes aux termes de la loi canadienne. Comme les États sont d'importants investisseurs sur le marché mondial, ce serait une grave erreur que cette Convention omette par inadvertance ces investisseurs en tant que « titulaires de comptes de titres ». **La définition de « personne » ne doit pas être exclusive**. Définir les « personnes » par des concepts pourrait être plus inclusif et apporter une certaine souplesse à la définition. La définition de « personne » devrait inclure les concepts suivants : *(1) Les individus, tels que la personne physique, agissant de façon quelconque pour une autre…;* *(2) Les personnes morales dotées d'une personnalité juridique telles que « body corporates »…. ;* *(3) Les entités non dotés d'une personnalité juridique tels que les partenariats, les associations non constituées en personnes morales, les syndicats non constitués en personnes morales, les organismes non constitués en personnes morales;* *(4) Les États ou leurs organismes;*	
1(1): "intermediary" –	Appa rently no agreement has been reached as to whether the definition of "intermediary" would cover central securities depositaries (CSDs) and international central securities depositaries	European Banking

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CSD/ICSD issue	(ICSDs). Clearly it should. In order to avoid any confusion on this point, we would **recommend to include CSDs and ICSDs in the definition**. One could **suggest the following wording** for the definition of "intermediary": *"any custodian, depositary or other person including central securities depositaries (CSDs) or international central securities depositaries (ICSDs) that in the course of business maintain securities accounts either for others and/or for their own account and are acting in that capacity, regardless of whether it holds these securities directly or indirectly."* Should the above definition not be amended, it should at least be made clear in the **explanatory memorandum or the preamble** to the Convention that CSDs and ICSDs are covered in the definition of "intermediary".	Federation (see further comments under 1(4))
1(1): **"relevant intermediary"**	***Proposal to change current wording:*** *"relevant intermediary" means the intermediary that maintains the securities account for the account holder;* This change to the definition makes consistent the use of the term "maintain" across the terms intermediary, relevant intermediary, account holder and securities account.	USA
1(1): **"relevant intermediary" / "relevant securities"**	We also take the opportunity to **lance the idea of introducing the term "relevant securities"** which could be defined as "the securities which the disposition in question concerns". In line with that, the definition of **"relevant intermediary" could be slightly changed**, we would suggest the following wording: "Relevant intermediary" means the intermediary with whom the account holder maintains the securities account [to which the relevant securities are credited at the time of the disposition in question]. This **would take care of e.g. the situation where securities do not remain with the collateral provider but the collateral taker has not yet got the securities**.	Sweden[?]
1(1):	Proposal to change current wording:	USA

[?] The comments in this paper are made with a note taken to the competence that might fall to the European Union.

ARTICLE:	OBSERVATIONS / COMMENTS:	AUTEUR / AUTHOR:
"securities account"	*"securities account" means an account maintained by an intermediary to which securities are credited;* This change to the definition makes consistent the use of the term "maintain" across the terms intermediary, relevant intermediary, account holder and securities account.	
1(1): **"account holder"**	As we have emphasized previously, the definition of an account holder is **still unclear**. The phrase "in whose name an intermediary maintains a securities account" may give an impression that the intermediary is acting as an agent to the account holder which is problematic in the **Nordic countries**. There was a common understanding in the Special Commission that the agents of the account holders, e.g. the "account operators" of the Nordic book-entry systems are not intermediaries. This was the original "Nordic exclusion" and the original reason for the present Article 1(4) although the function of that paragraph is now different, namely to solve the "CREST problem." We **recommend returning to the old formulation in the "annotated July 2001 draft" ("a person to whose securities account securities are credited")**.	Finland
1(1): **"disposition"**	As to the definition of "disposition" we wonder if the use of "transfer of title" clearly enough shows that "disposition" means the **inter partes connection** and not the relationship with third parties. If there is an uncertainty in this respect the wording "transfer of title" could be exchanged to **"agreement regarding transfer"** or something similar. Furthermore, it seems that this clearer mark the difference between the terms "disposition" and "perfection".	Sweden[?]
1(1): **"insolvency administrator"**	It would be helpful to be reminded of the reasons **why this was dropped from the draft**, given the importance of this notion in the EU Insolvency Regulation.	Giovannini group
1(2): **"lien by**	Article 1(2) includes statutory liens in favour of the relevant intermediary in the scope of the Convention. The term "lien" **should be defined more precisely.** In particular, it should **only cover liens that are created by the custodial relationship**. The Federal Ministry of Justice ***proposes the***	Germany

[?] The comments in this paper are made with a note taken to the competence that might fall to the European Union.

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operation of law"	***following wording***: *"..., as well as a lien by operation of law, in favour of the account holder's intermediary, with regard to such intermediary's claims resulting from the purchase, administration or safekeeping of the respective securities."* Furthermore, the term "lien" would have to be **distinguished from the term "security interest"** used elsewhere in the text. Finally, it would have to be made clear that **statutory liens under a law other than the PRIMA law are excluded**.	
	The enlargement of the scope of the Convention to the situations of «lien by operation of law» should be **clarified in the explanatory report**. The report should be drafted in order to exclude the application of the Convention to situations of public law nature.	Portugal
	Article 1(2) includes statutory liens in favour of the relevant intermediary in the scope of the Convention. We believe that the **term "lien" should be defined more precisely**. In particular, it should **only cover liens that are created by the custodial relationship**. The Convention ***could read as follows***: *"..., as well as a lien by operation of law, in favour of the account holder's intermediary, with regard to such intermediary's claims resulting from the purchase, administration or safekeeping of the respective securities."* Furthermore, the term "lien" would have to be **distinguished from the term "security interest"** used elsewhere in the text. Finally, it would have to be made clear that statutory liens under a law other than the PRIMA law are excluded.	Bundesver-band deutscher Banken (German Banks)
	The use of the words 'as well as' implies that a lien by operation of law is not a disposition. The word 'including' might be better.	Giovannini group
1(4): **Options A and B**	We **favour Option A** which appears to us as less disputable and more accurate for the purposes of addressing the exclusion of registrar functions in relation to the issuer. We suggest the deletion of Option B. Should the case of Crest system in relation to Irish equities not be satisfactorily addressed under Option A – What about the position of **Irish authorities**? We	Belgium

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	are however open to address it through any other wording.	
	We are **still open to both Option A and Option B of Article 1(4)**. *The problem of definitions direct and indirect holding* Traditionally, the Nordic CSDs have been regarded as "direct" holding systems. However, there are different concepts for a "direct" system and an "indirect" system that impede rational discussion on the role of the CSD in the future world of the Convention. For the ***United States***, the essential element of direct holding, either in paper form or dematerialised form, is that the beneficial owners of securities have a direct relationship with the issuer of the securities, either directly or through "transfer agent" (see the Prefatory Note to Revised (1994) Article 8 of the Uniform Commercial Code). In "indirect holding" systems, by the U.S. definition, "the issuer's records do not show the identity of all of the beneficial owners. Instead, a large portion of the outstanding securities of any given issue are recorded on the issuer's records as belonging to a depository." **For other jurisdictions, the directness vs. indirectness has more to do with the intermediary's relationship to a security certificate than to the issuers' records**. The multi-layered pyramid of banks is often connected to the definition of "indirectness" but that is not necessary or the main point (see also Randall D Guynn, Modernizing Securities Ownership, Transfer and Pledging Laws. A Discussion Paper on the Need for International Harmonization. Capital Markets Forum, Section on Business Law, International Bar Association (1996, available in pdf format on the Internet at http://www.dpw.com/iba/modernization.pdf), p. 14 (claiming that indirect holding is not connected with dematerialized securities but holding securities through accounts with one or more tiers of intermediaries). So, the **dichotomy directness-indirectness seems somewhat confused** and above all inoperative and should not be laid as bedrock for any common international instrument without further examination and analysis. There is, however, a **recital 8 in the common position on collateral directive according to which the choice of law rules do not apply to "directly-held" securities**. Comparing the proposed collateral directive and the Convention text it is not entirely clear what exactly "directly-held" securities would mean in different circumstances.	Finland

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	As explained above, the dichotomy between "directly-held" and "indirectly-held" securities may prove impractical in different fact-patterns involving different jurisdictions of issuance. Therefore the practical way to solve the problem is to **concentrate to the definition of an "intermediary" as done in the present draft of the future Convention**. In line with this, we interpret recital 8 of the proposed directive so that the law of the account rule of the proposed directive can be applied also to CSDs when they are acting as intermediaries. In our opinion, the **proposed directive is not a hindrance for regarding CSDs as intermediaries in the context of this Convention**, as explained below. Furthermore, according to the Council's and the Commission's common understanding, when this future Convention has been finalised, it shall be examined, whether the choice of law rules of the collateral directive may have to be reviewed in the light of the future Convention. The Commission shall be invited to inform then the Council and to make appropriate proposals, where necessary. This kind of positive argumentation toward the role of CSDs as intermediaries is also reflected in the present draft of the Convention. **All references to directness and indirectness have been deleted and the emphasis is concentrated on the concept of intermediary, both in the title and the draft Convention text itself**. According to Article 1(1) of the present draft, an 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." **We see that the Nordic CSDs, i.e. Swedish VPC, Norwegian VPS, Danish VP and Finnish APK, are in principle intermediaries when they maintain securities accounts "directly" for the account holder. When they act in their other roles, e.g. hold shareholder registers for the issuers, they do not, of course, act as intermediaries and the future Convention does not apply to those activities**. It is important to note that there has been **no problem so far in determining the applicable law to the accounts maintained by the Nordic CSDs**. According to our national legislations, the law of the CSDs is applied to the accounts maintained by them, i.e. Danish law for VP, Finnish law for APK, Norwegian law for VPS, and Swedish law for VPC, respectively. This has worked well and we do not want to change this. It must be born in mind that the **Nordic CSDs have a special status**	

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	of their own. They carry a public responsibility of maintaining our national book-entry systems for domestic securities under national public legislation and the Convention should not change this situation. On the other hand, **when CSDs are maintaining accounts for foreign securities they are, however, clearly in a comparable position with other intermediaries with no special restrictions**. *Some observations concerning the two options for Article 1(4)* This complex situation should be taken into consideration in the future Convention, and it can be done by both in Option A and in Option B of Article 1(4). Article 4(2) is based on a restrict principle of freedom of contract. There is no contract, at least **when the Finnish APK is concerned, between the CSD and the account holder**. In our opinion, the Convention would not change present situation because **Article 4(4) is directly applied**, and the applicable law is also according to the Convention the law of the CSD, as it is now. **Considering Option A, there are public policy reasons to restrict the national CSDs right to agree on foreign law when domestic securities are concerned**. We understand also the political problems forming the background for UK's position and CREST. We see that both these objectives can be reached under Option A. **National legislation might also be a solution for the UK in solving the CREST problem**. These question should be addressed also in the Explanatory Notes when discussing the special public policy roles of the Nordic CSDs and the special status of CREST. **Option B is acceptable also**. It would give us an **explicit possibility to restrict the freedom of choice of the CSDs to agree on foreign law by opting them out with a declaration from the Convention when domestic securities are concerned**. In Option B, it is **not, however, entirely clear what a "primary record of entitlement" means** and which CSD-type of institutions could or should be declared under Option B in order to preserve the present recognised legal structure of such systems. This ambiguity might cause unnecessary declarations when a State is not sure whether an intermediary is maintaining securities accounts in a manner which can be interpreted by	

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	someone as being "primary record of entitlement." On the other hand, there might be a State whose government does not make the declaration because it is for it "self-evident" that the intermediary in question is an intermediary and not a person maintaining primary records. **In both Options, it is important that the brackets are deleted in Article 1(4)(a)**. It is **essential that the account operators acting as mere agents for the Nordic CSDs are excluded outside the definition of the intermediary**. The agreement between the account operator and the account holder should never determine the applicable law to the account maintained by the CSD.	
	Both options provided for under Article 1 (4) exempt certain persons who record dispositions of securities in registers, books, etc. from the term "intermediary" as defined in the Convention. **The reason for such a differentiation is not apparent.** One reason may be due to differences in how the law is understood in the different States. **It may be necessary to further clarify the underlying situation and to take a closer look at the need for such exemptions.** The Federal Ministry of Justice points out in this connection that **the more exemptions are allowed, the more the aim of the Convention, namely simplifying arrangements in practice, will be jeopardised**. In this light, the Federal Ministry of Justice is not convinced of the exemptions from the term "intermediary" as they would mean that it would virtually no longer be possible to clearly determine the applicable law. Allowing exemptions runs counter to the practical needs of the parties to dispositions of securities.	Germany
	The Italian Delegation **strongly supports Option B** with the following comments: - in **para. 4, litt. (a)**, the words **"registrar or" should be kept in the text out of brackets**; - It is not clear from the text of **para. 5** if the declaration is conceived in order to express in general terms the fact that a certain model of maintaining records "of particular securities which constitute the primary record of entitlement to them" provided for by the law of the declaring State is to be treated as an intermediary under the Convention, or if it will consist of a specific case-by-case declaration. While the latter will allow to indicate clearly which systems fall under the Convention, but it will have to be updated from time to time, the former will permit to describe a certain regime within the State in a more comprehensive way.	Italy

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	In any case Italy is convinced that **national Central Depository systems should be included** in the scope of the Convention either by means of such a declaration, or by a direct inclusion in the definitions of the Convention. Nevertheless, Italy is convinced that the **present drafting includes already these systems** and that, in reality, the **declaration referred above should be used for their exclusion**. Apart from that, the possibility of including systems under which some intermediaries keep securities records on their own account should be considered. Otherwise such systems would fall outside the Convention following the new version of the definition of "intermediary" in Art. 1(1).	
	A priori **l'option (A)** de l'article 1 (4) est privilégiée étant donné qu'elle est en harmonie avec l'objet que la Convention a depuis le début visé, à savoir la couverture des titres détenus auprès d'un intermédiaire et non pas des titres détenus auprès du détenteur primaire pour lequel il existe a priori peu de discussions quant à la loi applicable. Le Ministère de Justice se réserve cependant le droit de revoir sa position après la finalisation de ses consultations avec les professionnels concernés.	Luxembourg
	To avoid any uncertainty the **Convention should apply to all intermediaries who maintain securities accounts on behalf of others**. References to primary record, directness and indirectness should not be a determining factor as the definitions of these terms varies from jurisdiction to jurisdiction. In our opinion **the Nordic CSDs are clearly intermediaries when they maintain securities accounts "directly" for the account holder**. In addition the Nordic CSDs also maintain the shareholder registers for the issuers. The Convention of course does not apply to activities the CSDs carries out in this capacity. Conflicts of rights related to securities held in so-called direct holding systems will rarely involve other jurisdictions than the one governing the CSD when the right in question is connected to a domestic security. However this is not a valid reason to exclude such CSDs from being covered by the Convention. On the other hand, **if the security in question is not domestic, even if it is issued through the CSD (i.e. shares in a Danish company issued in the Norwegian CSD), there would**	Norway

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	be a need for clear rules relating to choice of law. The Convention should make it clear that even though VPS in the example acts as the primary record (or registrar) for the Danish issuer, it is Norwegian law that governs transactions on the account of the account holders. In addition to this, there is a need for certainty to which law applies when direct holding systems operate links to other CSDs. Option B could lead to the assumption that it was another rule than PRIMA that applied to securities held through links operated by direct holding CSDs before the declaration was submitted. Therefore we are **strongly in favour of Option A**. We think that the main rule should be that it is the place of the relevant intermediary that determines the applicable law, regardless if it is a direct or indirect holding system. However, we do appreciate that the UK have some difficulties if there is no possibility to withdraw certain institutions from this rule. We therefore would encourage the drafting committee to **consider an opt-out** facility for this purpose.	
	It is of **utmost importance that Nordic CSDs are covered by the Convention**. The **distinguishing between directly and indirectly held systems is not essential**. The definition of "intermediary" covers in our opinion central securities depositaries in general and therefore also the Nordic CSDs. **When Nordic CSDs maintain securities accounts directly for the account holder they should be considered as intermediaries. In the light of these comments we are in favour of Option A**. To avoid a wrongful use of the Article, and more specifically the word "merely", we wonder whether the **introductory lines could be adjusted as follows**: A person shall not be considered an intermediary [regarding a certain disposition] for the purposes of this Convention merely because [it regarding such disposition] – . Consequently, the **word "it" in the beginning of (a) and (b) should be deleted**.	Sweden[?]
	Both options provided for under Article 1(4) exempt certain persons who record dispositions of securities from the term "intermediary" as defined in the draft Convention. **We do not understand the need for such exemptions**. **The exclusion of certain market participants does not reflect**	European Banking Federation

[?] The comments in this paper are made with a note taken to the competence that might fall to the European Union.

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	daily business reality. The Convention would therefore provide for exemptions that are not regarded as such within the relevant capital markets. The more exemptions are allowed, the more the added value of the Convention will be diminished as the determination of the applicable law for these exemptions will not be possible. The definition of "intermediary" should apply regardless of **whether securities are held in physical form or in dematerialised form**. In addition, as already mentioned, central securities depositaries (CSDs) and international central securities depositaries (ICSDs) must be included in the definition of "intermediary".	(see further comments under 1(1) – intermediary)
	Both options provided for under Article 1(4) exempt certain persons who record dispositions of securities in registers, books, etc. from the term "intermediary" as defined in the Convention. It is **not quite clear to us why such a differentiation is made**. This may be due to differences in how the law is understood in the different States. It may be **necessary to further clarify the underlying situation** and to take a closer look at the need for such exemptions. It should be remembered in this connection that the more exemptions that are allowed, the more the aim of the Convention, namely simplifying arrangements in practice, will be jeopardised. In this light, we **reject exemptions from the term "intermediary" that are not perceived by the market**, as they would mean that it would virtually no longer be possible to clearly determine the applicable law. Allowing exemptions runs counter to the practical needs of the parties to dispositions of securities. We also believe that **the mere fact that securities are dematerialised cannot be allowed to determine that a system which administers these dematerialised securities as book entries is not an intermediary**. Instead, the term "intermediary" should apply regardless of whether securities are held in physical form (be it global certificates) or in dematerialised form. Furthermore, our understanding is that **final custodians (e.g. central securities depositories) are also intermediaries**. The **declaration mechanism proposed under Option B is unlikely to simplify things** here. Experience made with the European Investment Funds Directive has shown that such declarations are not furnished in most cases and ultimately not requested either. If, however, States do not	Bundesverband deutscher Banken (German Banks)

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	furnish the required declarations, so that an up-to-date list of intermediaries cannot be made available to the interested parties, this would lead to considerable legal uncertainty.	
	We have some issues with this, both as to Option A and Option B (and in that case also as to Articles 1(5) and 1(6)). Generally, there appears to be unanimity as to the policy that records onto which securities are issued should not be (and do not need to be) covered by the Convention. The role played by records is constitutive of the issue, and not part of the secondary market trading in the issue. Whilst in some cases entities maintaining such records may initially appear to be intermediaries, there are in fact no upper tier holdings in respect of which they play any intermediating role. That being so, we wonder **whether the matter could not be addressed in the definition of '*intermediary*', rather than in special provisions of this nature**. To do so might in one fell swoop deal with the other issues mentioned below. ✍ What consideration has been given to the difficulty of **meshing the declaratory regime proposed in option B with the existing declaratory regime provided for in the Settlement Finality Directive**? ✍ In Article 1(4)(b) (Options A and B) the drafting could make better use of defined terms ***so as to read***: *"(b) it records in its own books details of ~~securities credited to~~ securities accounts <u>for the account holders of which</u> ~~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."* ✍ Article 1(5) says that each Contracting State **'*shall declare*': this appears to be a positive obligation imposed every time a security is issued onto the books of a person.** We are not sure this is workable – it would require state involvement in every issue of securities and would in so doing introduce unwelcome public role into a market function. Not is it clear how in fact each state would be able to monitor its obligation under this paragraph. ✍ Article 1(6)(b) seems to **extend the obligation to States that might not be party to the**	Giovannini group

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	Convention. ✍ Article 1(5) introduces the term **'primary record of entitlement'** - it is not clear what this means, nor that its meaning is unambiguous. ✍ **How is it proposed that the text in Article 1(6)(a) will operate** to identify the relevant States proposed to be empowered to make a declaration, where the very difficulty of identifying in which State a record is maintained is that which is given rise to the problems that the Convention as a whole seeks to solve?	
1(5)	Paragraph 5 is not only geared to the time of ratification of the Convention but also allows subsequent modifications of the declaration. This raises the question of **how it can be ensured that such subsequent modifications do not affect determination of the law applicable to dispositions that have been agreed or concluded**. Paragraph 4 has been amended to include the wording "... operates a system or arrangement for the transfer of those securities on records of the issuer". It is questionable whether this additional differentiation is required. It is also not clear how the wording "... maintains records of entitlement to securities which constitute the primary record of entitlement to them ..." in paragraph 5 is to be understood compared with the wording used in subparagraphs (a) and (b) of paragraph 4 and what it is actually supposed to mean. It should also be noted that, if exemptions from the term "intermediary" are actually allowed, **it may have to be examined whether German custodians also constitute such an exemption**.	Bundesverband deutscher Banken (German Banks)
2(1) **vs 2(2)**	It was stated during the Special Session that the broad effect of Article 2 is to limit the Convention to conflict of law issues, and not substantive law rules. In this sense, the Convention determines the law that will govern proprietary matters. It does not answer the question whether a right will be proprietary or contractual, but it does determine which law will supply that answer: the PRIMA law. **Nonetheless, there remains a query whether the split between the issues specified in Article 2(1) and those in 2(2) is exact, in that some of the rights arising in relation to securities are of their nature contractual**. Suppose, by way of **hypothetical example**, there are two claimants to the same debt security and	Giovannini group

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	that, under the Convention, the PRIMA law is that of country A and, as to the Article 2(2) issues, the law is that of country B. Is it possible that one claimant might successfully assert under law A that he owns the security (an Article 2(1) issue) at the same time as the other successfully asserts under law B (an Article 2(2) issue) that he is the one entitled as a matter of contract (i.e. under the terms of the debt) to be paid? If the essence of a debt security is a contractual right to be paid, **is there a difference between saying 'I own this security' and 'I have a contractual right to be paid'?**	
	In Articles 2(1)(d) and 8(3) we are **concerned about the use of the terms "priority over a competing interest" and "priorities between competing interests"** and the potential confusion that may arise without explanation of the intended operation of these words. It is understood that these phrases are intended to cover the situation where there are competing interests in relation to the same securities. However, there is some potential for them to be interpreted in a number of jurisdictions as referring to priorities associated with competing interests in all the property of a person subject to insolvency proceedings. The Australian delegation put forward suggested amendments to the wording at the January 2002 meeting although little support was received for the proposed amendments. We are still concerned about the potential for confusion that may arise if no clarification is provided. One means by which this could be clarified is to **include in the explanatory material accompanying the Convention a statement indicating the intended use of these terms**, emphasising that they do not refer to priorities in the context of insolvency.	Australia
2(1)(f)	**Are the words 'an interest in' necessary?** Securities are already defined as including interests in securities.	Giovannini group
2(2)(c)	In relation to the Eurobond market, it is important that the Convention (and other legislation in this area) should leave alone the contractual arrangements set out in a bond (and other documents constituting the issue), which should continue to be governed by whatever law the parties to the bond chose. In particular, the issuer should not have to look beyond the terms of the bond, interpreted under its governing law, to determine how it gets a good discharge for its debt and how the bond is to be legally transferred.	Giovannini group

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	The draft gives significant comfort on these points. However, Article 2(2)(c) does not cover all the situations that need to be covered. This is because bonds often contain provisions which are not necessarily "rights" or "duties" of the issuer. For example, bonds contain provisions for meetings of bondholders, detailing who can attend and vote at meetings and in what circumstances majority decisions can bind minorities. Are these provisions "rights" of the issuer? If there is a vote to default the issue, the "right" to participate in the meeting arguably belongs to the bondholder, rather than the issuer. If so, would it be covered by Article 2(2)? In addition, bonds frequently have other parties apart from issuers - the most obvious example being a guaranteed bond. Article 2(2)(c) would not save these other parties from being sucked into the Convention. Since the draft makes it clear that the rights and duties of an issuer in relation to any other person are not altered by the Convention, why does it not also make it clear that the rights and duties of the holder in relation to any person other than the issuer are also not so altered?	
4: **"timing issue"**	As we have stressed before, it is **important to clarify explicitly the relevant time that determines the applicable law so that the contracting parties would not be able to change the applicable law freely to detriment of third parties**. This is essential if we accept the freedom of contract suggested in Article 4(2) but it **has never been properly addressed**. At least the **Finnish market has expressed its concerns of this source of legal uncertainty**. Therefore, there should be a rule in the Convention protecting validly established rights from change of law by an agreement between the intermediary and the account holder. It is not tolerable that the intermediary and the account holder could by agreeing on the chance of applicable law affect the legal status of third parties and so put their property rights and their established priority perfected according to the then applicable PRIMA law on risk.	Finland
	It should be made clear that it is the **time of the perfection of the registrations** that is decisive as to the law applicable. It should be made absolutely clear that the account holder and the intermediary can not alter the agreement as to where the intermediary is located, whit the effect that a perfected transaction that involves a third party becomes unperfected under the new jurisdiction.	Norway

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	There is no definition in the Draft Convention of the time at which the applicable law is determined. In our mind it is **absolutely crucial to clarify explicitly what is the relevant time that determines the applicable law**. As we see it there are **three different questions**. · At what time should the relevant intermediary be decided? · At what time should the State of the relevant intermediary be decided? · At what time should the relevant intermediary have an office within that State engaged in a business or other regular activity of maintaining securities accounts? When deciding the three questions **the decisive fact should be at what time the disposition in question was made**. The **first question** could be dealt with already in the **definitions**, see below the definition of relevant intermediary, whilst the **second** and **third question** could be answered in **Article 4(2)**. One solution would be to ***state in the text***: *That State is the State within which the account holder and the relevant intermediary [at the time of the disposition in question] have agreed [that] the securities account will be maintained, provided that the relevant intermediary [at the same time] has an office …or another State.*	Sweden[?]
	We are aware that some commenting parties have suggested that a rule should be included determining the time at which the applicable law is to be determined. **We do not see the necessity for such a rule**. The time for determination of which law applies **will depend on the question that is being considered**, and we believe that a court is likely to determine that time according to general principles of broader application than the Convention.	ISDA
	There is no definition as yet in the draft Convention of the **time at which the applicable law is determined**. Problems may arise if, in the period between the disposition and subsequent litigation concerning the disposition there has been a **change in the actual circumstances** which would affect the determination of the applicable law. In such a case, the applicable law should not be the one applicable at the moment that the dispute is brought before the court. In order to ensure legal	European Banking Federation

[?] The comments in this paper are made with a note taken to the competence that might fall to the European Union.

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	certainty, the applicable law should be the one applicable **at the moment of perfection of the disposition agreement**.	
	The draft Convention does not yet contain any provision dealing with the question of the time that is important in determining the applicable law. **Problems may arise if, in the period between the disposition and subsequent litigation concerning the disposition or subsequent lien enforcement, there has been a change in the actual circumstances which would affect determination of the applicable law**. The parties to a disposition can only determine the applicable law at the time of the disposition. Any subsequent change in the reference point should not be allowed to lead to a different law then being applicable to the disposition.	Bundesverband deutscher Banken (German Banks)
4(1): **Super-Prima / page 37-problem** (see also p. 28)	1. The Japanese delegation in principle supports this "Indirectly Held Securities" project of the Hague Conference on Private International Law and strongly hopes to have a successful Convention on this matter. As this delegation has pointed out in the series of meetings since January 2001, however, this delegation has one **great concern about the preliminary draft from the viewpoint of consistency with many countries' substantive laws**. A serious problem emerges, in our view, especially on the occasion when the State of the place of an account holder's relevant intermediary is different from the State of the place of its counter party's relevant intermediary. *Example:* 2. Suppose, for instance, that an account holder (X) provided 1,000 titles of its rights to another account holder (Y) in their collateral or sales transactions and the State of the place of X's relevant intermediary (A) is different from the State of the place of Y's relevant intermediary (B). In the substantive law systems of many countries, including Japan, the relevant rights are deemed to be directly transferred, from the legal point of view, from X to Y, even if the data of the rights are actually transferred from A to B via their mutual relevant intermediary (C). In other words, from the legal viewpoint of these countries, these transactions are deemed to be **not four dispositions (X-A, A-C, C-B and B-Y) but only one disposition (X-Y)**. On the contrary, from the legal viewpoint of a number of countries, including the United States, which adopted so-called "security entitlement" systems in its substantive law, these transactions are deemed to be **not one disposition (X-Y) but four dispositions (X-A, A-C, C-B and B-Y)**. This treatment is based on one	Japan

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	fundamental principle maintained in the substantive law systems of these countries: the rights X has provided are the completely same ones as the rights Y has received. Under this principle, if X alleges that the transactions between X and Y were invalid or ineffective, the proprietary aspect of the rights will be usually decided in the lawsuit which X directly brings against Y. (Even in the United States, there is a similar type of lawsuit called as "Adverse Claim".) If X is granted to recover the rights in the lawsuit, it automatically means that Y is not the proprietor of the rights. If Y is approved to maintain the rights in the lawsuit, it automatically means that X is not the proprietor of the rights. **Under this principle, in other words, if X wins the case, Y will lose it. If Y wins the case, X will lose it. And the total amounts of the rights are always fixed in these systems.** This delegation believes that we should consider the existence of such a principle or system in many countries in the further discussion of this draft Convention. 3. If the law applicable to the issues specified in Article 2 (1) regarding X's rights is the law of the State of the place of A and the law applicable to the issues specified in Article 2 (1) regarding Y's rights is the law of the State of the place of B, **the above principle or system cannot be maintained any more in these countries**. Theoretically, there is an occasion that X's rights are perfected according to the law of the State of the place of A and, at the same time, Y's rights are also perfected according to the law of the State of the place of B. First, it follows that the dispute between X and Y cannot be resolved any more in the lawsuit which X directly brings against Y. In addition to the fact that the law applicable to X's direct claim against Y is still unclear, especially on this contradictory occasion, the court must be puzzled for making a decision on the direct claim. Second, if X can recover 1,000 titles of the rights and, at the same time, Y does not lose 1,000 titles of the rights, the total amounts of the rights increase by 1,000 titles. We have to face another serious problem: who should bear a responsibility about the increased rights? (There are many States that have no countermeasure against such increased rights in their substantive laws. Although a number of States, including Japan, have countermeasures for the multiplied data or rights in their substantive laws, these countermeasures may not work well for the unexpectedly	

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	increased rights on the above occasion. Since the policies of the countermeasures of these States more or less differ, even if some of these countermeasures do work for this occasion, the law applicable to this matter has to be decided. But the choice-of-law rules on this matter are still unclear, too.) (Further, the treatment of the increased rights is more serious in many countries on the occasion when an issuer has to identify its shareholders or bondholders.) 4. These problems are **extremely serious especially for the countries which adopt the above-mentioned principle or system in their substantive laws**. To avoid these problems, for instance, there might be an idea described in the Work. Doc. No.21 ("Proposal by the delegation of Japan") in the meeting on January 2001: "In case of two or more relevant intermediaries are involved in a disposition, the law applicable to the issues specified in paragraph 1 of Article 2 is the law of the place of the relevant intermediary of the account holder who is the recipient of the disposition." (As the Association of German Banks mentioned in its comment complied in the Prel. Doc. No. 5, the Section 17(a) of the German Safe Custody Act (Depotgesetz) adopts a similar idea.) However, this delegation understands that such an idea has another problem. (It is practically, or sometimes theoretically, impossible, for instance, to identify its own counter party especially in the sales transactions in the securities market.) (There might be another idea to avoid these problems: for instance, to get the above-mentioned direct claim out of the scope of this Convention or to limit the scope of the Convention only to the collateral or sales transactions made solely between an account holder and its intermediary. However, this delegation understands that these ideas have other problems, too.) 5. This delegation sincerely requests all the Member and non-Member States to examine this serious issue considering their own substantive law systems.	
	We generally welcome reference to the relevant intermediary (PRIMA), as this would make it easier in many cases to determine the law applicable to a cross-border disposition of securities. However, **stipulating that different laws apply to the different stages of a custody chain is likely to mean that conflicting rights in respect of the same securities may be established**. The Convention should therefore contain a provision covering these cases. For this purpose, it may be necessary to identify such cases and appropriate solutions beforehand.	Bundesver-band deutscher Banken (German Banks)

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4(2): general principle	We **strongly support** the current wording.	Belgium
	The Canadian delegation recognizes that the current Article 4(2) reflects a compromise and that it should be the basis of our comments. However, we would like to reiterate our **fundamental concern that the substance of draft Article 4(2) contradicts the most basic element of PRIMA by imposing a reality test that focuses on the location of maintenance of the account instead of the location of the intermediary**. Assuming that Article 4(2) remains as is currently drafted, we believe the concept of a "white list" as set out in Article 4bis becomes absolutely necessary in order to remove uncertainty about the meaning of "an office within that State engaged in a business or other regular activity of maintaining securities accounts..." in Article 4(2). Without such a "white list", it would be extremely difficult for a third party to determine whether the place agreed meets the "reality test" in Article 4(2). Please see our comments below on Article 4bis. La délégation canadienne reconnaît que l'actuel paragraphe 4(2) est le reflet d'un compromis et qu'il devrait constituer la base de nos commentaires. Or, nous aimerions rappeler notre **préoccupation fondamentale face au fait qu'en substance le projet de paragraphe 4(2) contredit l'élément le plus fondamental de la loi PRIMA en imposant une épreuve de réalité fondée sur le lieu de la tenue de ces comptes plutôt que sur le lieu où se trouve l'intermédiaire.** En supposant que le paragraphe 4(2) soit conservé dans sa formulation actuelle, alors, à notre avis, le concept d'une « liste blanche », tel qu'énoncé à l'article 4bis devient absolument nécessaire afin de supprimer toute incertitude quant à la signification de « un établissement dans cet État exerçant à titre professionnel ou habituel une activité de tenue de comptes de titres… » que l'on trouve au paragraphe 4(2). Sans cette « liste blanche » il serait extrêmement difficile pour un tiers d'établir si le lieu convenu répond à l'épreuve de réalité visée au paragraphe 4(2). Veuillez vous reporter à nos commentaires ci-dessous concernant l'article 4bis.	Canada

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	La délégation française se félicite que la volonté des parties soit le critère de localisation principal du lieu de l'intermédiaire pertinent. Cette localisation par la volonté apparaît en effet comme la **seule option opérationnelle**. Elle est de plus sans danger dès lors que la volonté est encadrée par des critères qui attestent de la réalité de la tenue de compte et qui garantissent à ce titre une certaine sécurité juridique.	France
	The Italian Delegation **supports** the present version of the PRIMA rule as the **only possible compromise** achieved by the Special Commission.	Italy
	2. The formulation of the PRIMA rule set out in Article 4 of the Convention is **worded differently from the formulation adopted for the proposed Collateral Directive**, the Settlement Finality Directive, the Directive on the Winding-Up of Credit Institutions and the Insolvency Regulation. To what extent is this difference one of substance, and what will be the practical consequences for those EU Member States adopting the Convention?	EFMLG (one of three questions on which the group seeks clarification)
	Article 4 represents the heart of the proposed Convention. We **support** the current approach of Article 4 and, in particular, the test set out in paragraph (2) of Article 4. Assuming that it is accompanied by a so-called "white list" and (possibly) a so-called "black list" (regarding which see below), this approach appears to command **widespread support among ISDA's members**.	ISDA
	The amendments to Article 4 (2) mean that more scope is allowed in agreeing the relevant intermediary. This is ensured, firstly, by reference to the State instead of the place and, secondly, by the updated "reality test". **Generally speaking, the current wording appears acceptable** if a reality test is still regarded as necessary, with the interpretation under Article 4 bis assuming particular importance.	Bundesverband deutscher Banken (German Banks)
	It is **not clear that there is unanimity about the meaning of the current wording in Article 4(2)**. This concern is increased by the observation that the legal systems of the 15 EU Member States pay **different levels of regard to explanatory texts published alongside international treaties**, implying that, from the EU perspective, relegating clarifications to the report that will accompany the Convention may not offer much comfort.	Giovannini group

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	The experience of A**rticle 9(2) of the 1998 Settlement Finality Directive** (the first introduction of the PRIMA concept in European legislation) is illustrative. In the implementation of that Directive it became clear that different views were held as to its meaning. Since the 4(2) provision of this Convention will alter (indeed, identify) the legal nature of the property of investors in securities, it seems to us crucial that its meaning should be clear. It would therefore be of great assistance to know the views of the Permanent Bureau and the Drafting Committee as to the following: ✍ **Does the proviso within 4(2) require that the particular account in question must have any connection with the offices referred to in the proviso?** If not, there may be inconsistency with Article 9(2) of the Settlement Finality Directive and the national implementations thereof, Article 10 of the Collateral Directive, and Article 24 of the Directive on the Winding-Up of Credit Institutions. ✍ **Does 4(2) apply merely upon there being an agreement of the account holder and the relevant intermediary as to the State within which the securities account is to be maintained, or is it required in addition that that agreement is in fact performed**? If so, what would be the consequence if place agreed and place in fact used did **not coincide**? ✍ If there is no need to perform the agreement, are there any legal systems that would in consequence not construe what has been agreed as an 'agreement' for the purposes of the Convention? ✍ The drafting seems to leave unresolved the type of case informally referred to as **'the page 37 problem'**. This arises where are transfer is made from one intermediary to another, or across the books of one intermediary, from an account for which the PRIMA law is that of country A into an account for which it is that of country B. In both cases it is possible to imagine a conflict of laws arising from the draft Convention's attempt to resolve conflicts of laws. How is it proposed to address this? It has been suggested that, at least in the latter example, the problem could be avoided if each intermediary only ever used one country for the purposes of Article 4(2). Is that what is intended (such an intention underlies the Settlement Finality Directive)? It was mentioned in the Special Session that the intention is that, in these cases, the law of country B will prevail. This raises two further questions. First,	

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	is that result clear from the draft? Secondly, that result in turn raises the question whether country B is to be the 'winner' by virtue of being second, or last. If there is a further accounting event from B to C (so that there are three claimants, A, B and C), is C now the 'winner'? If so, C cannot be certain of his rights unless he is sure there is no 'D', and so an ad infinitum. **We very strongly echo the comments made by the delegation from Japan that a solution should be found in the draft to this these issues, failing which it is hard to see in what way the Convention would bring legal certainty to the EU financial markets.** ✍ **What is the relationship between the PRIMA test in Article 4(2) and the tests found in Community law?** The formulation of the PRIMA rule set out in Article 4 of the Convention is worded differently from the formulation adopted in the proposed Collateral Directive, the Settlement Finality Directive, the Winding-Up of Credit Institutions Directive and the Insolvency Regulation. To what extent is this difference one of substance, and what will be the practical consequences for those EU Member States adopting the Convention? ✍ **Does the agreement in Article 4(2) of the account holder and the intermediary have to be made with each other?** It is quite common for an investor to enter into a broking agreement with a bank and for securities purchased under that agreement to be held in the name of the bank's nominee company. **In that situation, the nominee would be the relevant intermediary (i.e. "with whom the account holder maintains the securities account"). But Article 4 seems to anticipate only localising agreements made by the intermediary.** Should not the drafting be widened to cover these cases?	
4(2): **reality test**	The **last part of the paragraph 2** ("whether alone or together with other offices of the relevant intermediary, in that or another State") **should be kept in square brackets** to remind that it has been included in the text at the end of the Special Commission session, but that no exhaustive discussion had taken place on Working documents No. 24 and 28 that had proposed it. The elimination of such brackets depends to a certain extent upon the content of the **"white list"** of Article 4 bis (1), if agreement will be reached on its inclusion in the Convention. The Italian Delegation reminds that the present version **allows the parties to open an account in a**	Italy

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	State and to agree that the account will be maintained in a different State for purposes of this paragraph, provided that the agreement complies with a "reality text", even if a partial one. This conclusion should be expressed very clearly in the Explanatory Report in order to avoid possible misunderstanding before the courts and to exclude any possibility of arbitrary interpretations of choice-of-place clauses. The "reality text" is aimed at ensuring effective protection of the parties by the way of linking the choice of the law with the activity of the intermediary.	
4(3): express / implied	In general we would prefer a period after the word express (i.e. **deletion of the reference to implied agreement**). We do not believe asking judges to search for the parties implied agreement serves ex ante certainty.	USA
	Article 4 (3) refers to an express agreement on the State of the relevant intermediary or an arrangement implied from the terms of the custody agreement as a whole. We assume that **mention of the place or State of the relevant intermediary in the General Business Conditions is sufficient** and would very much welcome confirmation of this in the explanatory report.	Bundesverband deutscher Banken (German Banks)
4(4): fall-back rule	The Canadian delegation suggests drafting changes to this paragraph. **The English and French versions of subparagraphs 4(4)(a) and (b) are inconsistent.** We believe the **French version is a better reflection of the intent of the provision**. The French version of **Article 4(4)(a)** states: « si l'intermédiaire pertinent est doté de la personnalité morale, l'état dont le droit régit la constitution ». In translating this provision into English using terminology that is familiar to "civilists" under the English version of the Québec Civil Code of 1994, this provision would likely read as follows: « if the relevant intermediary is a legal person, the state under which it was constituted ». Another acceptable version could be: «if the relevant intermediary is endowed with juridical personality, the state under which it was constituted». The French version of A**rticle 4(4)(b)** states: « si l'intermédiaire pertinent est une entité non dotée de la personnalité juridique, l'état dont le droit régit son organisation ». Again, if we translate this section using the terminology as discussed above, it should read: « if the relevant intermediary is	Canada

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	not endowed with juridical personality, the state under whose law it is organised ;». There are entities or bodies in Canada that are not legal persons or are not endowed with full juridical personality. For example, some partnerships are not legal persons and are not endowed with full juridical personality although they benefit from numerous attributes of the juridical personality. **Subparagraph 4(4)(b) in particular - English** If the general comments above in relation to 4(4)(a) and (b) are not accepted, the Canadian delegation would suggest deleting in the English versions the references to "an" and "body" in subparagraph (b) to align it with the wording in subparagraph (a). La délégation canadienne aimerait suggérer des changements au libellé de cet article. Par exemple, **il semble que le libellé de la version anglaise de l'al. 4b) soit incompatible avec celui de l'al. 4a), alors que la version française est plus cohérente**. Voici la version française de **l'al. 4 (4)a)** : « si l'intermédiaire pertinent est doté de la personnalité morale, l'État dont le droit régit la constitution ». Si l'on traduit en utilisant la même terminologie que celle du Code civil du Québec de 1994, cet alinéa devrait se lire ainsi : «if the relevant intermediary is a legal person, the state under which it was constituted» Une autre version acceptable serait : «if the relevant intermediary is endowed with juridical personality, the state under which it was constituted». Voici la version française de **l'al. 4 (4) b)** : « si l'intermédiaire pertinent est une entité non dotée de la personnalité morale, l'État dont le droit régit son organisation ». Ici encore, si l'on traduit en utilisant la même terminologie que ci-dessus, il faudrait lire : «if the relevant intermediary is a body not endowed with juridical personality, the state under whose law it is organised». Au Québec ces entités existent. Par exemple, certains partenariats ne sont pas des personnes morales et ne sont dotés que d'une personnalité juridique incomplète, même s'ils bénéficient de nombre des attributs de la personnalité juridique. **L'alinéa 4(4)b) – surtout pour la version anglaise** Si les commentaires ci-haut quant aux alinéas 4(4)(a) et (b) ne sont pas acceptés, la délégation	

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	canadienne suggèrerait de supprimer les renvois à « an » et à « body » contenus à l'alinéa b) pour s'aligner sur l'énoncé de l'alinéa a).	
	Proposal to ***change current wording of the chapeau:*** *"If the State of the place of the relevant intermediary <u>is</u> not determined under paragraph 2,…"* The word "cannot" suggests that we are asking a judge to strive to find an answer under Article 4(2). In fact, the **fallback should be automatically applicable if 4 (2) is not satisfied either because there is no agreement or because the proviso is not satisfied.** ***Proposal to change current wording of sub-paragraph b:*** *"(b) if the relevant intermediary is unincorporated, the State under whose law it is organised; or"* We think the **word "body" is unnecessary and introduces confusion** for an intermediary that is not a corporation but also is not a "body".	USA
4 bis (1): white list	We appreciate that determining the location of the intermediary has been one of the most contentious issues in developing the Convention. The current draft includes both a negative and positive list for determining location. At a general level we are **concerned about the complexity** that the inclusion of such lists injects into the issue and we **question whether in fact the lists add anything to the test**. In terms of the items contained in the positive list (Article 4bis(1)) we **question what limiting impact the list of items would have**. There are potentially a range of relevant factors that could be considered when determining if the intermediary is engaged in a business or other regular activity of maintaining securities accounts. While the items that are listed in the positive list do provide an indication of factors that may be relevant in determining when someone is engaging in a business, there may be other factors that could point to this as well. We therefore consider that there is potential for the list to limit the factors that may point to circumstances when someone is engaging in a business. Our preference would therefore be to **delete both the negative and positive lists**. However, we appreciate that there has been strong support for the lists. If they are to be retained,	Australia

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	closer scrutiny of the particular items identified in the lists may be warranted.	
	We ***suggest the following amendments:*** In the chapeau of paragraph (1), **deletion of the words "but not by way of limitation"** [too broad]. **Deletion of subparagraphs (a) to (d) and (f)**, as they are not relevant. **Subparagraph (e)** should read: "entries to a securities account by the intermediary are made or managed at that office (and position monitoring is made at that place), such as the booking, recording, transferring, or pledging of interests in securities"	Belgium
	The Canadian delegation **strongly supports the retention of the "white" and "black" lists.** We recognize that the current draft of paragraph (1) of Article 4bis is preliminary, and requires more work to develop and properly articulate the criteria needed for the "white list". In the "chapeau" of paragraph (1) of Article 4bis, we would suggest **modifying the reference to "regular" to better reflect the French text which refers to "habituel"** – a more accurate reflection of the intended meaning. Perhaps "regular" could be replaced by "ordinary or regular". We also note that **paragraph (1) of Article 4bis is very broad**, which seems necessary because it is impossible to list everything that might constitute "maintaining an account". As the most important criterion for "white list" factors is that they must be objectively determinable by third parties, we ***suggest adding the following criteria:*** *"(_) legal process may be effectively served upon the intermediary at such office;"* For intermediaries registered in Canada, this would be the only criterion objectively determinable by third parties in every case because it is required by Canadian securities regulators and determinable through the public records maintained by the regulators. La délégation canadienne **appuie fortement l'idée du maintien de la « liste blanche » et de la « liste noire »**.	Canada

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	Nous reconnaissons que le projet actuel de paragraphe (1) de l'article 4bis en est à un stade préliminaire et qu'il devra être retravaillé pour élaborer et correctement articuler les critères requis pour la « liste blanche ». Dans l'introduction du **paragraphe (1) de l'article 4bis, nous suggèrerions de modifier le qualificatif « regular » afin de mieux refléter la version française qui utilise le qualificatif « habituel »** – terminologie qui correspond davantage au sens qu'on a voulu donner. Peut-être que « regular » pourrait être remplacé par « ordinary or regular ». Nous remarquons également que le **paragraphe (1) de l'article 4bis est très large**, ce qui semble nécessaire vu l'impossibilité d'énumérer tout ce qui pourrait constituer une « activité de tenue de comptes ». Comme le critère le plus important des facteurs de la « liste blanche » est de pouvoir être établi de façon objective par des tiers, nous ***suggérons d'ajouter le critère suivant :*** *« (_) les actes de procédure doivent pouvoir être signifiés de façon efficace à l'intermédiaire auprès dudit établissement; »* Pour les intermédiaires enregistrés au Canada, cela constituerait l'unique critère pouvant dans chaque cas être objectivement établi par des tiers, car il est requis par les autorités canadiennes de réglementation des titres et peut être vérifié auprès des registres publics tenus par ces autorités.	
	There is a proposition of a white list and a black list in Article 4bis. These lists were originated by a U.S. suggestion. We have **nothing against such lists in principle**. Especially the black list in paragraph 2 is recommendable (cf. UCC § 8-110(f)). The white is, however, problematic though we understand the desire of the market for a "safe harbour.". There is a risk that the courts regard the list as exhaustive and not only a list of examples. On the other hand, it is in details totally unacceptable. For instance, mere computer centre cannot be seen as an office (paragraph 1(f), cf. paragraph 2(e)).	Finland
	La finalité de cette disposition est de définir l'exercice à titre professionnel ou habituel de l'activité de tenue de compte. Le maintien de cette disposition permet de **faciliter la mise en œuvre de**	France

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	l'article 4(2) puisqu'elle propose une liste blanche des activités permettant de cerner cette notion. Les deux activités dont il est fait état aux **alinéas (a) et (b) ne doivent en aucun cas être retenues**. En effet, le lieu de conclusion du contrat, comme le fait de pouvoir obtenir des informations auprès d'un établissement sont beaucoup trop aléatoires pour attester de l'exercice de la tenue de compte. Admettre ces deux critères dans la structure actuelle de l'article 4 bis (1) **conduirait indirectement à ouvrir la porte à une autonomie de la volonté totale et donc à nier toute utilité à l'article 4 (2)** et aux critères de réalité qu'il contient. De même **l'alinéa (f) ne doit pas être retenu puisqu'il contredit totalement l'actuel 4 bis (2) (e)**. Les activités décrites aux alinéas **(c) et (e) et sous réserve de certaines corrections, permettent de décrire avec plus de clarté l'activité de tenue de compte**. Ceci est tout particulièrement vrai pour l'activité de « suivi de positions et de la relation clientèle » de même que celle qui consiste à « tenir la comptabilité et à inscrire le transfert ou le nantissement des droits ».	
	The Federal Ministry of Justice is **convinced** that the **"white list"** contained in Article 4bis is **absolutely essential** to determine the applicable law, given the type of "reality check" selected in Article 4(2). Furthermore, the Federal Ministry of Justice supports the fact that Article 4bis(1) is **not conclusive**. For the purpose of the Convention, it is necessary for there to be no limitation on the activities of maintaining securities accounts, because due consideration should be given to further developments. Nevertheless, the Federal Ministry of Justice proposes **some deletions** in the text: Article 4bis (1), subparagraph **(d) should be deleted**, as the wording in the first half ("account statements bear an address of that office") means that the address of any office can simply be put on securities account statements, while the alternative in the second half ("or are prepared at that office") also appears to go too far, as it also covers, for example, purely printing-related activities. Article 4bis (1), subparagraph **(f) should also be deleted**, as it is likely to be at odds with Article 4bis (2), letter (e).	Germany / Bundesverband deutscher Banken (German Banks)
	The Italian Delegation is **very much concerned about the possible effects of the "white" list**, which includes some activities that cannot be taken into account since they do not comply with the	Italy

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	"reality text" because they cannot be properly considered as having significant contacts with a State. We **would not support the inclusion of litt. (b), litt (c) and litt. (f)** because the increasing use of call centres would lead to applying such provision without a substantive contact; the same applies to the consideration of the location of the technology, which would not pass the minimum contacts test in many States.	
	Il se pose la **question fondamentale de la nécessité d'insérer un article 4bis**. Les dispositions y prévues ont plutôt leur place dans un contrat privé et semblent déplacées dans une Convention internationale. Il est évident que des éléments aujourd'hui contenus à l'article 4bis pourraient utilement être repris dans le **rapport explicatif**. De plus, il est noté qu'il existe entre l'article 4bis (1) et l'article 4bis (2) certaines **contradictions**. Si pour certaines raisons l'article 4bis devait être maintenu, alors il semble impératif de donner à l'article 4bis (1) une **définition limitative** en supprimant dans le paragraphe introductif le terme "notamment". Ensuite il faudra sensiblement réduire les critères de définition. Certains éléments des sous-points (c) et (e) pourraient utilement être combinés, le sous-point (g) pouvant être intégralement maintenu.	Luxembourg
	From our point of view it is not necessary to have either a black or a white list. Regarding the white list we think it is a risk that it would **introduce more uncertainty** than certainty, and are therefore opposed to adopt it in the Convention.	Norway
	The so-called "white list" exemplifies some activities that would be deemed as "maintaining securities accounts" for the purposes of this Convention. Even though we **agree with the existence** of such list, we believe that the criteria that have been adopted are **too broad** and are detrimental to the idea of a reality check. Therefore, we consider that the current list should be **limited to the following activities**: (a) Account-holder-support functions of the intermediary relating to securities accounts occur at such office; (b) Position monitoring functions occur at such office;	Portugal

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	(c) 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.	
	Generally we are **opposed to the idea of having a white list** as it risks to raise more doubt than clarity..	Sweden[?]
	We would **delete sub-paragraph (f)** as an appropriate factor.	USA
	Article 4bis sets out a "white list" of activities that are indicative of whether an intermediary is "engaged in a business or other regular activity of maintaining securities accounts" and a "black list" of activities that should not count for this purpose. We note, however, that there appears to be **room for refinement** of each list. Also there are differing views on whether or not the white list should be an non-exclusive list, as currently drafted, or an exhaustive list. **Making the list exhaustive would appear to favour ex ante certainty. It appears, however, that a majority of members would favour a non-exclusive list**. The concern, which would of course depend on the final drafting of the list, would be that an exhaustive list would unnecessarily constrain the test should the nature of the custody business and how it is conducted by intermediaries (in particular, how different functions are divided and performed) change significantly over the coming years. We are sure that you will give these issues especially close attention. Our members are available to assist the Permanent Bureau and/or members of the Drafting Committee with any additional information that may be required concerning modern securities custody practices and procedures and likely future developments.	ISDA
	Article 4 bis (1) is intended to provide clear guidance and certainty to the relevant intermediary and its customer in their selection, for purposes of Article 4(2), of a jurisdiction which provides only some, but not all, services for a global custody account. It essentially serves as a **"safe harbor"** by setting forth a list of factors which the relevant intermediary and its customer can conclusively rely	Association of Global Custodians

[?] The comments in this paper are made with a note taken to the competence that might fall to the European Union.

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	upon in identifying and selecting locations where the relevant intermediary will be deemed to be "engaged in a business or other regular activity of maintaining securities accounts" within the meaning of Article 4(2). If the jurisdiction selected is covered by Article 4 bis (1), a court, in the context of an insolvency proceeding (or other type of proceeding which challenges the validity of the security interest) should not be able to overturn or reject such selection. **On the other hand, the "safe harbors" are not intended to be the only locations which satisfy the Article 4(2) requirements.** Relevant intermediaries and their customers should be able to agree upon other jurisdictions, but such selection may be subject to close judicial scrutiny and to possible rejection by the courts -- but that is always a risk of acting outside the protection of the "safe harbor." Consequently, the Convention must be **sufficiently flexible to accommodate such alternatives, as well as change and innovation which may occur in the future**. The Association also believes that, if Article 4 bis is included as mere commentary to Article 4, there may be less certainty that the location selected will be upheld in proceedings challenging the validity of such selection, particularly in those jurisdictions in which the courts do not recognize commentary as a legal source of guidance in the interpretation of treaty provisions. To minimize risk to the relevant intermediary, the list of factors that determine the locations which the relevant intermediary and its customer may conclusively rely upon must be in the Convention and **not relegated to commentary.** (From the lender's perspective, the inclusion of this list is equally important. A lender performing due diligence will be confident in perfecting a security interest in the jurisdiction specified in the agreement between the relevant intermediary and its customer if the location so specified is consistent with, and is clearly covered by, the Convention.) **In general, the Association supports the inclusion of Articles 4 bis (1)(a)-(g)** in the Preliminary Draft because the activities described in these provisions essentially comprise and define, in the aggregate, a global custody account. Consequently, any one of the locations where such activities are performed by the relevant intermediary should be, at a minimum, sufficient to satisfy Article 4(2). The Association recognizes, however, that these provisions may be viewed by some delegations as being too general and not sufficiently descriptive, requiring some modification and clarification. In addition, the Association believes that certain provisions are sufficiently unclear to	

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	warrant clarification. Accordingly, the Association offers the following suggestions and guidance. **Article 4 bis (1)(b)** refers to those locations where accountholders can communicate with the relevant intermediary with regard to their securities account. To the Association and its members, this provision is intended to refer to the location at which **administrative services** are provided by personnel of the relevant intermediary -- often referred to as account administrators, relationship managers, client service representatives and by other similar titles -- who are **assigned to specific customers**, who are generally responsible for the relationship with customers and who are available to communicate and meet, on a regular and ongoing basis, with customers regarding their securities accounts. It is **not intended to include, for example, telephone answering centers**. Similarly, with respect to **Article 4 bis (1)(a)** the location where a relevant intermediary executes contracts or receives contracts regarding securities accounts -- the Association also interprets this provision as referring to locations **where sales and administrative services are provided on a regular basis**. Agreements are typically signed by the relevant intermediary's sales force and then forwarded to the administrative staff (referred to in Article 4 bis (1)(b) above). These are appropriate locations for the purpose of Article 4(2). The criteria currently contained in Article 4 bis (1)(a) can either be incorporated in (1)(b) or can be included as a separate provision as in the Preliminary Draft. The Association notes, however, that **agreements are only one of several account opening documents forwarded to such location**; and the Association recommends that consideration be given to **expanding this provision to include the location to which all account opening documentation is sent in connection with the establishment of global custody accounts**. The Association, however, does **not intend for the provision to encompass locations such as central mail rooms or central file rooms** with which the customer has minimal contacts -- both of which are locations where agreements might be deemed to be "received." **Article 4 bis (1)(c)** refers to those locations of the intermediary where legal, regulatory, auditing, position monitoring, or accountholder support functions are provided. While we generally agree that some of these services are relevant to global custody accounts and that the locations at which they are performed should be acceptable for compliance with Article 4(2), we also believe that, to the extent these services are appropriate, they **may overlap with services which are covered by or are included within other provisions** (for example, accountholder support functions would likely	

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	fall within those activities covered in Article 4 bis (1)(b) and position monitoring may fall within Article 4 bis (e) discussed below). However, it is **not clear to the Association what is intended by certain of the referenced services (such as legal, regulatory and auditing)**. Consequently, the Association believes that this provision should either be **further clarified, incorporated in other provisions or deleted as unnecessary**. **Article 4 bis (1)(d)** refers to the location of the address appearing on an account statement or the location where account statements are prepared. Typically, the address on an account statement or the address at which the account statement is prepared is **merely a processing center and not an actual location of an office of the relevant intermediary**. These locations can easily be changed and **may not bear a reasonable relationship to the location at which global custody services or functions are provided**. It is **unlikely that the Convention intended to include such transitory locations** and, indeed, to the extent the location is simply a processing center, **may be excluded under Article 4 bis (2)**. Therefore, the Association believes that this provision should be deleted. If the Permanent Bureau determines to leave this reference in, the Association suggests more clearly defining the locations that are intended to be included in this reference. In the Association's view, **Articles 4 bis (1)(e) and (f)**, should be referring to those locations where **fundamental or core activities are performed and services are provided relating to the maintenance and operation of a global custody account**. The Association therefore believes that these two provisions in the Preliminary Draft should be **significantly revised** to more clearly indicate that Article 4(2) includes those locations of the relevant intermediary where **one or more fundamental or core global custody functions relating to the maintenance or operation of a securities account occurs and fundamental client services relating to a global custody account are provided**. Examples of such core functions and services include the **locations where customer accounts are updated, trade and settlement instructions are received and processed, corporate actions are received and processed, cash management services are provided, asset reconciliation services are provided, tax reclamations are processed and account statements are prepared and issued**. These examples should be reflected either in the Convention itself or in the commentary accompanying the Convention. Finally, **Article 4"bis"(1)(g)** refers to those locations where a single account number, bank code or	

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	other means of identification exists that identifies the office as maintaining securities accounts. This provision, as contained in the Preliminary Draft, is acceptable to the Association and it has no recommendations for change.	
	Given the type of "reality test" selected in Article 4(2), the "white list" **seems to be necessary** to determine the applicable law. **However, Article 4 bis (1), subparagraph (d) should be deleted.** The wording in the first half ("account statements bear an address of that office") allows that the address of any office can be put on securities accounts statements. The alternative in the second half ("or are prepared at that office") also appears to go too far, as it would cover purely printing-related activities. Finally, **Article 4 bis (1), subparagraph (f) should also be deleted** as it is likely to be at odds with Article 4 bis (2), subparagraph (e).	European Banking Federation
	The inclusion of "white" and "black" lists seems sensible, as long as there is no clear and unambiguous definition of 'maintenance of securities accounts'. **However, the white list may need to be revisited, when its proposed drafting has been settled**. Throughout Article 4 the **concept of office is sometimes given human attributes** (e.g. being engaged in a business, receiving contracts) and sometimes not (e.g. account holders can communicate with the intermediary at such office). This should be conformed, for example as follows: ***Article 4(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 at which it is engaged in a business or other regular activity of maintaining securities accounts, whether there alone or also at together with other offices of the relevant intermediary or with other persons acting for the relevant intermediary, in that or another State."* ***Article 4bis (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 at an office if any one or more of the following activities occurs there – (a) contracts regarding*	Giovannini group

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	securities accounts are executed at such office or received at by such office; … (g) a single account number, bank code, or other means of identification exists that identifies such intermediary office as maintaining securities accounts at that office;…" **Article 4bis (1)(e)**: are the words 'an interest in' necessary? Securities are already defined as including interests in securities. **Article 4bis (1)(h):** it may be necessary to submit further comments or queries when the text of (h) has been settled, either as to that text, or as to the impact such text has on the rest of the "white list", or even as to the Convention as a whole.	
4 bis (2): **black list**	We appreciate that determining the location of the intermediary has been one of the most contentious issues in developing the Convention. The current draft includes both a negative and positive list for determining location. At a general level we are **concerned about the complexity** that the inclusion of such lists injects into the issue and we **question whether in fact the lists add anything to the test**. Article 4(2) outlines the matters that are relevant in determining location on the basis of where the account is maintained – i.e. where the account holder and the intermediary have agreed where the securities account is maintained provided the intermediary has an office within that State engaged in a business or other regular activity of maintaining securities accounts. With this as the primary basis for determining location we consider that the items listed in the negative list (Article 4bis(2)) are superfluous and should not, in the ordinary application of this test, be taken into account. However, we appreciate that there has been strong support for the lists. If they are to be retained, closer scrutiny of the particular items identified in the lists may be warranted.	Australia
	The "black list" should be **removed** from the Convention and be included in the **Explanatory Report**.	Belgium
	The black list in paragraph 2 is **recommendable** (cf. UCC § 8-110(f)).	Finland
	Le maintien de cette disposition (liste noire) **dépend du caractère ouvert ou fermé de la liste blanche** de l'article 4 bis (1). Si comme cela est souhaitable, **l'article 4 bis (1) permet de dégager des critères précis de l'activité de tenue de compte et revêt donc le caractère d'une liste**	France

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	fermée, l'article 4 bis (2) devient inutile. Dans ce cas, les interdictions qui figurent à l'article 4 bis (2) devront être reprises dans le **rapport explicatif**.	
	The "black list" in Article 4bis (2) is, on the one hand, **very helpful**, as it makes clear which factors are not taken into account when a judge determines the applicable law. On the other hand, the "black list" **takes account of the fact that the white list is not conclusive**. Last but not least, the Federal Ministry of Justice points out that having the black list in the Convention, instead of having a black list in the explanatory report, would have the great advantage that a **Court is bound to comply with the text of the Convention**. For clarification purposes, the Ministry of Justice submits the ***following proposals:*** The wording at the beginning of Article 4bis (2), sentence 1, appears open to misunderstanding. By way of clarification, the words *"... account shall be taken only of the agreement between the account holder and the relevant intermediary and ..."* should therefore be **deleted**. The words *"except for purposes of satisfying the condition set forth in the proviso to Article 4(2), ..."* in Article 4bis (2), subparagraph (e) should also be **deleted**. To sum up, the Federal Ministry of Justice is of the opinion that **both lists are very useful and none of them should be deleted**.	Germany / Bundesverband deutscher Banken (German Banks)
	The same general considerations apply to the **"black" list, which the Italian Delegation cannot support as it stands now** because it does not add any useful element in case the parties have expressed their agreement in a clear and straight way under Article 4(3). However, the Italian Delegation would support the "black" list if it is intended to guide the judge in establishing the agreement of the parties "implied from the terms of the contract considered as a whole", because it would then be a very useful limitation to the evaluation of the court in order to exclude the consideration of other elements of the case. Following our position on the "white" list, litt. (e) of the "black" list should start from "the places where the technology…".	Italy
	L'insertion d'un article 4bis (2) est intellectuellement, au vu des dispositions claires de l'article 4 (2), **peu satisfaisante**. De plus, cet article devient inutile si la définition contenue à l'article 4bis (1) devient une définition limitative. Ce n'est que si la définition de l'article 4bis (1) devait être une	Luxembourg

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	définition ouverte que cet article pourrait avoir une fonction utile. Il est cependant rappelé que le Ministère de la Justice luxembourgeois est hostile à une définition ouverte à l'article 4bis (1).	
	From our point of view it is not necessary to have either a black or a white list. However we are **not opposed** to the black list. If the black list is adopted, **litra (d) seems superfluous and should be deleted**.	Norway
	As we think that the so-called "black-list" will be an element of confusion we suggest its **deletion**.	Portugal
	As for the black list we would be **in favour of keeping it**, with **exception of subparagraph (d)** which must be considered as obvious.	Sweden[?]
	In sub-paragraph (e), **delete the words "except for purposes of satisfying the condition set forth in the proviso to Article 4(2)";**,	USA
	The Association is **in favor of retaining** this provision in the Convention and has no recommended changes.	Association of Global Custodians
	As a drafting matter, in paragraph (2) of Article 4*bis* it is **not clear that the following words are necessary or even accurate: "account shall be taken only of the agreement between the account holder and the relevant intermediary and".** In relation to the test in Article 4(2), account is taken not only of the agreement between the account holder and the relevant intermediary but also of whether or not the intermediary is "engaged in a business etc" in the relevant State. Article 4*bis*(2) would appear to work satisfactorily without the additional words referred to above. There appears to be some differences of view among ISDA members as to the utility of the "black list" in Article 4*bis*(2). **A majority of members, however, appear to support its inclusion**, subject to some refinement of the drafting. In particular, attention should be paid to ensure that there is **no inconsistency** between the white list and the black list, as there currently appears to be between paragraph 1(f) and paragraph 2(e). (The words "except for purposes of satisfying the	ISDA

[?] The comments in this paper are made with a note taken to the competence that might fall to the European Union.

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	condition set forth in the proviso to Article 4(2)" do not appear entirely to reconcile the inconsistency. For what other purpose would one be looking at this factor?)	
	Article 4 bis (2) sets forth the list of those factors that should not be considered in determining the location pursuant to Article 4(2) -- the so-called "black" list. The Association believes that the inclusion of the "black" list in the text of the Convention is **equally important** as the inclusion of the "white" list for the same reasons noted above. The inclusion of the "black" list provides **certainty** that the enumerated factors, and resulting locations, will not be used as the basis for determining compliance with Article 4(2). This becomes particularly important in the context of parties which are not relying on the "safe harbors" of Article 4"bis"(1).	Association of Global Custodians
4bis 2(b)	'the places where …'	Giovannini group
5: Insolvency	We are still of the opinion that the **future Convention should not affect national insolvency legislation. The relation between this Article and the EU Insolvency Regulation and the EU Regulation on reorganisation and winding up of credit institutions and insurance undertakings is still unresolved**. In paragraph 2, it should be emphasized that the paragraph consists only of examples and the list is **non-exhaustive**. The paragraph should be reformulated to include a specific and clear reference to the fact that the list is a non-exhaustive one.	Finland
	Article 5 of the Draft Convention, which deals with questions relating to cross-border insolvency proceedings, takes a **route that differs from the one otherwise selected in International Insolvency Law**. The provision does not determine the insolvency law governing, for instance, the effectiveness of a security, but lays down that certain legal relationships shall not be affected by an insolvency proceeding that was opened in accordance with a law other than PRIMA law. This approach gives rise to a level of legal certainty lower than that achieved by the other instruments in International Insolvency Law (IIL). **Usually**, the IIL-instruments proceed from the International Insolvency Law general principle that the **law of the State where the insolvency proceeding is opened shall apply** to an insolvency proceeding and to the effects thereof. In the interest of general legal relations or of creditors in special need of protection, **exceptions are then made**, for which special links are created. By way	Germany

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	of example, reference is made here to Articles 20 *et seq*. of Directive 2001/24/EC (reorganisation and winding up of credit institutions). If one were to apply this approach consistently to the Draft Convention, Article 5 would merely make it clear that **also where an insolvency proceeding is opened, the effects of such proceeding in respect of the issues specified in para. (1), letter (a) and (b) will be governed by PRIMA law**. The importance such a clarification would have in respect of insolvency is illustrated by the cases referred to in Article 2(1), subparagraphs (b) and (d), which are to be governed by PRIMA law. Particularly in an insolvency situation, it is obviously important whether a security is effective vis-à-vis third parties or whether a security enjoys priority over other comparable securities. Last but not least the Federal Ministry of Justice points out that **Article 5(1) might be at odds with the European Settlement Finality Directive** (98/26/EC), particularly Article 3 thereof. Article 5 para. (1), letter (b) stipulates that the opening of insolvency proceedings under a law other than the PRIMA law does not affect dispositions of securities that have been "perfected" in accordance with the PRIMA law. This wording can also mean that a disposition which has not been perfected is not protected in insolvency proceedings. This result is in contradiction with Article 3 of the European Settlement Finality Directive. This Article states that claims and payments resulting from transfer agreements that have been entered into a system at the time insolvency proceedings are opened, and presumably also those that are entered into a system on the day insolvency proceedings are opened, may be set off if set-off takes place no later than the day on which insolvency proceedings are opened. Such set-off cannot be revoked by avoidance, nor is an order resulting from a transfer agreement invalidated by the opening of insolvency proceedings.	
	The reference to Article 2(1) in Article 5(1)(a) should be **limited to those issues which can come into consideration in case of an insolvency proceedings** and which shall continue to be governed by the law determined through Article 4. The inclusion of litt. (d), for example, might conflict with the provision of Article 5(2)(a), as litt. (f) might do with reference to Article 5(2)(b). Due to the fact that the present version of Article 4 points to the place of the **account** as agreed by the parties rather than to the place of the **relevant intermediary** as such, it would be better to clarify the provision of Article 5(1)(b) by adding at the end **"as determined under Article 4 of this**	Italy

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	Convention".	
	As we have stated before the wording of Article 5 leaves **some uncertainties** as to the impact. We would **prefer just ascertaining that the interest/right created and perfected under the law designated by PRIMA is recognized as valid even in the case of insolvency**. **All other effects of insolvency proceedings should, in our opinion, be left outside the Convention**. Thus, we would be in favour of only giving examples of those insolvency rules that remain in force. One possibility of doing this is to state in Article 5(2): "*Nothing in this Convention affects the application of [especially] – …*".	Sweden[?]
	Article 5(1)(b) stipulates that "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 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". In other words, the opening of insolvency proceedings under a law other than the PRIMA law would not affect dispositions of securities that have been perfected in accordance with the PRIMA law. A contrario, this provision means that a disposition which has not been perfected would not be protected in insolvency proceedings. **This provision does not seem to be in line with Article 3 of the Settlement Finality Directive**, which provides some protection for the participants in a clearing system against a participant's insolvency. Pursuant to Article 3, claims and payments resulting from transfer agreements that have been entered into a system before the opening of insolvency proceedings may be set-off. For European parties, it would be **very important that Article 5 be harmonised with Article 3 of the Settlement Finality Directive**.	European Banking Federation
	Article 5 (1), subparagraph (b) stipulates that the opening of insolvency proceedings under a law other than the PRIMA law does not affect dispositions of securities that have been perfected in accordance with the PRIMA law. This wording can also mean that a disposition which has not been perfected is not protected in insolvency proceedings. This is, however, **at odds with the European**	Bundesver-band deutscher Banken (German

[?] The comments in this paper are made with a note taken to the competence that might fall to the European Union.

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	Settlement Finality Directive (98/26/EC), particularly Article 3 thereof, which was transposed into German law by way of, inter alia, Sections 96 (2), 116, sentence 3, and 147 of the Insolvency Code. These state that claims and payments resulting from transfer agreements that have been entered into a system at the time insolvency proceedings are opened, and presumably also those that are entered into a system on the day insolvency proceedings are opened, may be set off if set-off takes place no later than the day on which insolvency proceedings are opened. Such set-off cannot be revoked by avoidance, nor is an order resulting from a transfer agreement invalidated by the opening of insolvency proceedings. These provisions are designed to protect the participants in a clearing system against a participant's insolvency. They also ensure that a clearing system does not have to be stopped during the day and orders traced back. In addition, they protect dispositions that have not yet been fulfilled by way of a credit to an acount, i.e. perfected. **The Convention and the rules contained in the European Settlement Finality Directive should therefore be synchronised.**	Banks)
	Does the Permanent Bureau or the Drafting Committee have any views on the question **whether the Convention contains provisions which are potentially capable of affecting Community legislation**, in particular the 1998 Finality Directive, the 1998 Directives on re-organisation and winding-up of credit and insurance undertakings, the 2000 Insolvency Regulation and the 2000 Collateral Proposal? It seems that the overruling of the effects of insolvency law by the Convention **might be inconsistent with the 2000 Insolvency Regulation**, which allows in some residual cases the application of the lex concursus to rights in rem.	Giovannini group
5(2)(a)	In Article 5(2)(a), the term "fraud of creditors" is used. In Australia's domestic legislation, we **no longer have a concept of "fraud of the creditors"**. Instead we use concepts such as "unfair loan transactions" and "uncommercial transactions" so that in the insolvency context, a transaction can be avoided on the ground that it is uncommercial or, in the case of a loan, it is unfair. The objective of the Australian legislative provisions is to ensure that an insolvent company does not favour one unsecured creditor to the detriment of creditors as a whole. However, unlike in some other jurisdictions, there is no requirement that there be 'fraud of the creditors.	Australia

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	Nonetheless, it is considered that these transactions should equally get the benefit of Article 5(2) as they serve the same purpose as those already listed in the article and are intended to achieve the same policy aim. One way of addressing our concern is for the **explanatory material** accompanying the Convention to indicate that the use of the term "fraud of creditors" is intended to capture provisions in an individual State's legislation that have the same underlying policy intention as the concept of 'fraud of creditors'.	
5(2)(b)	Add square brackets	Belgium
8: **Public policy / internationally mandatory rules**	Afin qu'aucune confusion ne soit permise et que le droit de l'insolvabilité soit préservé, peut-être conviendrait-il d'ajouter **« Sous réserve des dispositions de l'article 5(2) » au début de l'article 8(3)**.	France
8(3)	In Articles 2(1)(d) and 8(3) we are **concerned about the use of the terms "priority over a competing interest" and "priorities between competing interests"** and the potential confusion that may arise without explanation of the intended operation of these words. It is understood that these phrases are intended to cover the situation where there are competing interests in relation to the same securities. However, there is some potential for them to be interpreted in a number of jurisdictions as referring to priorities associated with competing interests in all the property of a person subject to insolvency proceedings. The Australian delegation put forward suggested amendments to the wording at the January 2002 meeting although little support was received for the proposed amendments. We are still concerned about the potential for confusion that may arise if no clarification is provided. One means by which this could be clarified is to **include in the explanatory material accompanying the Convention a statement indicating the intended use of these terms**, emphasising that they do not refer to priorities in the context of insolvency.	Australia
	As currently drafted, we do not believe Article 8(3) works as appears to be intended. A law of the forum may impose a requirement with respect to perfection or relating to priorities between	ISDA

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	competing interests that are based on substantive principles beyond the scope of this Convention. An example would be the **requirement under the UK Companies Act 1985 to register** certain types of charges. This requirement is not an alternative conflict of laws rule to the PRIMA rule established by the Convention, but instead a requirement, based on a long-standing policy of the UK companies legislation, that is <u>in addition</u> to a requirement that the relevant charge be perfected under the *lex situs* (*lex rei sitae*). We believe that there may be similar rules of other jurisdictions that cannot properly be addressed in this way in this Convention.	
9: **Multi-unit State**	What about **"Regional Economic Integration Organisation"?** The **same regime of *renvoi*** should apply.	Belgium
	Paragraph 9(2) The Canadian delegation would like to **strongly support this paragraph**, particularly the words "anywhere within" in the chapeau of the provision. This ensures that the territorial unit agreed upon by the account holder and the relevant intermediary pursuant to subparagraph (a) will not necessarily have to be the territorial unit in which the relevant intermediary has an office engaged in a business or regular activity of maintaining securities accounts. This is a **critical point for Canada**. ***Paragraph 9(4)*** We **question the value** of this paragraph. ***Paragraph 9(5)*** The Canadian delegation prefers the retention of **"may"**. ***Sub-paragraph 9(6) b)*** We believe there is a **translation error** in the last sentence. It should read: *« …et, en l'absence d'un lieu unique, l'unité territoriale dans laquelle est situé son principal lieu d'activité.»*. Draft 8 actually reads : « …et, en l'absence d'un lieu unique, l'État dans lequel est situé son principal lieu	Canada

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	d'activité.» ***Le paragraphe 9(2)*** La délégation canadienne aimerait **fortement appuyer ce paragraphe**, particulièrement l'expression « dans un lieu quelconque » dans l'introduction de la disposition. Cela garantit que l'unité territoriale convenue entre le titulaire de comptes et l'intermédiaire pertinent conformément à l'alinéa a) ne devra pas nécessairement être l'unité territoriale dans laquelle l'intermédiaire pertinent a un établissement dans lequel il exerce à titre professionnel ou habituel une activité de tenue de comptes de titres. Ceci est un **point très important pour le Canada**. ***Le paragraphe 9(4)*** Nous **mettons en question la valeur** de ce paragraphe. ***Le paragraphe 9(5)*** La délégation canadienne préfère retenir le verbe **« peut »**. ***L'alinéa 9(6) b)*** Nous croyons qu'il y a une **erreur de traduction** dans la dernière phrase. Il faudrait lire : *« …et, en l'absence d'un lieu unique, l'unité territoriale dans laquelle est situé son principal lieu d'activité.»*. Le projet 8 se lit actuellement ainsi : « …et, en l'absence d'un lieu unique, l'État dans lequel est situé son principal lieu d'activité ».	
	Our position is **neutral** to the present texts of Articles 9 and 16. As we have stressed before, for us it is important that the Contracting States with territorial units are themselves satisfied with the future Convention, on the general condition, of course, that the clauses chosen do not cause additional legal uncertainty.	Finland
	The Italian Delegation **agrees with the principle underlying this provision**, though it finds that its present wording is **too complicated** and it would lead to uncertainties and misunderstandings, mainly because it will be applied most frequently by the courts of State other than Multi-unit States,	Italy

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	which are less familiar with their system of law. Therefore, an easier text should be drafted, based upon the model of the proposal of the distinguished Delegation of China of Work Doc No 15. The result may be reached by adding to this Work Doc paragraphs (3) and (6) of the Prel. Doc. No 8 version, with some adjustments, such as the replacement of "Multi-unit State" with "the State concerned", as the definition of "multi-unit State" is already given in para. (1) of Work Doc 15. A general definition which applies also to Article 16 is not deemed necessary as this Article too explains directly what a Multi-unit State is with respect to its application. Consequently, para. (5) of the Prel. Doc. No 8 version of Article 9 would not be needed as it is already included in the wording of para. (2) of the Work Doc 15 version (where reference is made to the object of the declaration as "identifying the internal conflict of law rules…"). Finally, the reference to the "place of the relevant intermediary" in para. (1) of Work Doc 15 version should change in accordance with the present version of Article 4, which points to the law of the State of such place. The words "as determined under Article 4" should be added.	
	We consider that this article should be **shortened and simplified** to obtain a rule that will be simple to apply. Furthermore, we think that, for achieving the desirable certainty, Multi-unit States, that intend to apply their internal choice of law rules, should be able to do so by declaration. However, that declaration has to identify the content of the choice of law rules.	Portugal
	Proposal to change current wording of paragraph 1: *"In this Article "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 relation to any of the issues specified in Article 2(1)."* This term "Multi-unit State" only seems to be used in Article 9 and the heading of Article 16. We propose a change to the heading to Article 16 to conform it to the style of the heading of Article 9 which would not use the term. The expression "*in relation to"* is the terminology used in Article 16. ***Proposal to change current wording of paragraph 2:***	USA

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	In the chapeau of paragraph 2, it is proposed to replace the opening word "where" with "if". "If" expresses that this is a condition and has no geographic implications. ***Proposal to change current wording of paragraph 2, sub-paragraph (b):*** *"if the account holder and the relevant intermediary have agreed that the securities account will be maintained in specified a Multi-unit State but not a particular territorial unit of that Multi-unit State, the applicable law shall be determined by the law, including the choice of law rules applicable in 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]."*(Brackets mean probably should be deleted) The language "*agreed that the securities account will be maintained in*" conforms to Article 4. ***Proposal to change current wording of paragraph 3:*** *"A Multi-unit State may declare 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 business or other regular activity of maintaining securities accounts."* We know of no reason why the declarations in paragraph (3) and (4) may only be made at a certain time. These are matters that should be addressed in the final clauses in any event. The language "*business or other regular activity"* conforms to Article 4. ***Proposal to change current wording of paragraph 4:*** *"A Multi-unit State may declare that if pursuant to paragraph 2(a) or, pursuant to Article 4(4) and paragraph 6(b) of this Article, the applicable law is the law of a territorial unit, the law including the choice of law rules applicable [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."* Choice of law rules need to be preserved for the fallback rule as they are in Paragraph 2 a and b. We believe that the effect of declarations is a matter that will affect not only the declaration under	

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	Article 9 but also other declarations and will need to be addressed in the final clauses. ***Proposal to change current wording of paragraph 5:*** *["A declaration according to paragraph 4 may contain or [shall] be accompanied by information concerning the content of the choice of law rules of that Multi-unit State and of its territorial units applicable pursuant to paragraphs 2(a) and 2(b). The Permanent Bureau shall then make that information available to interested parties by appropriate means."]* ***Proposal for a new paragraph 5 bis:*** *The applicable law under the Convention shall be determined by Article 4(4) and paragraph 6(b) of this Article when the account holder and the relevant intermediary have not agreed on the State within which the securities account is maintained pursuant to Article 4(2) and (3), the relevant intermediary does not have an office that meets the terms of the proviso of Article 4(2), the relevant intermediary does not meet the terms of a declaration pursuant to paragraph (3) of this Article, or there is no applicable law determined pursuant to paragraph 2 (b) of this Article.* This is a comprehensive list of the circumstances which lead one to the fallback. ***Proposal to change current wording of paragraph 6:*** In sub-paragraph (a), *comma* after "the references in Article 4(4)". In sub-paragraph (b), the opening words should read: *"if the relevant intermediary is incorporated or organised under the laws of the Multi-unit State and not that those of any of the territorial units,…"*	
	We note that Article 9 continues to attract significant attention. **ISDA members do not necessarily share a single point of view on the issues raised by this provision**, but we shall be following the evolution of these clauses closely. It is particularly important, when attempting to reconcile the constitutional issues raised by a Multi-unit State, to bear in mind also the **objective of *ex ante* certainty** for any final rule.	ISDA

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	Article 9 grants States with more than one legal system ("Multi-unit States") the right to make their **internal choice of law rules** applicable to cross-border disposition of securities transactions. Such an approach would bring **considerable legal uncertainty** by jeopardising the purpose of the Convention, namely an easy ex ante determination of the applicable law. In addition, by trying to cover as many situations as possible, this provision would be **unworkable in practice**. It would also be in **contradiction with Article 7** of the draft Convention. Instead of making a reference to the choice of law rules, we would rather recommend that reference be made to the substantive rules of law of the relevant territorial unit of a Multi-unit state.	European Banking Federation
	Article 9 gives states with more than one legal system the right to make their internal choice of law rules applicable to cross-border dispositions of securities. Such an **approach generally makes determining the applicable law more complicated**. Moreover, by trying to cover as many cases as possible, this provision is now **virtually incomprehensible and probably unworkable in practice**. The declaration mechanism meets the reservations already expressed about Article 1(4), so that instead of making it easier to determine the applicable law in the cases covered by Article 9, it is likely to lead to more legal uncertainty. With this in mind, it would be much better from a practical angle if, in the case of States with more than one territorial unit, **reference would be made directly to the substantive rules of law applicable in the respective territorial unit**. **Reference to the choice of law rules of the territorial unit could only be considered if this unit has no rules of its own on the points dealt with in Article 2 (1)**. Here, too, it should be borne in mind that such exceptions generally jeopardise the purpose of the Convention, namely easy ex ante determination of the applicable law. If reference were to be made to the substantive rules of law of the territorial unit, **Article 4(2) could also refer again to the place of the relevant intermediary**.	Bundesver-band deutscher Banken (German Banks)
	Article 9(6)(a): comma to be inserted at end of third line. Article 9 tries to take account of situations where, within a multi-unit state, a different form of the PRIMA principle is already in application. **Within the EU there has since 1998 been an application of one formulation of PRIMA, which is stricter and more objective than that in the proposed Convention.** The principle contained in the Settlement Finality Directive and the	Giovannini group

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	draft Collateral Directive has succesfully acchieved the aims of achieving immediate ex-ante certainty, by applying the law of location of a securities, whilst at the same time preventing systemic risk by allowing only one law to be applied in relation to any given security settlement system and the securities accounts maintained therein. It is acknowledged that, outside the EU, there might be uncertainties on where to locate an account, which do not occur within the EU, so that in the context of dispositions of securities on accounts outside the EU, the PRIMA rule of the draft Convention is sensible. **But, as in the case of multi-unit states, if there is a proved and established PRIMA principle in place which goes even beyond what could be achieved by the draft Convention (by creating immediate ex-ante certainty without having the need to look into custody agreements and precluding systemic risk which would occur if systems could operate accounts under a multitude of legislations), this should be acknowledged in Article 9 as well**. Therefore, the exemption contained in Article 9 should apply not only to multi-unit states but also to the EU. One way to achieve this might be for **Article 14(3)** to make it clear that the Convention treats the Community as potentially being a State as well as being a Contracting State.	
11: **Review practical operation**	**Delete square brackets.**	Belgium
	The Italian Delegation **strongly supports** the creation of a mechanism of reviewing the practical operation of the Convention.	Italy
	We support **removing the brackets**.	USA
12: **Amendments**	Delete all square brackets in the provision	Belgium

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	The proposal of a fast-track procedure for amending the Convention needs **further consideration**.	Italy
	Proposal to change current wording of paragraph 1: *"A Contracting State may submit proposed amendments…"* This is consistent with phrasing in last line. **Remove square brackets**.	USA
14: **in general /**	Is there a need to clarify that a Multi-State is not included in Regional Organisation? Est-il besoin de préciser qu'un « État à plusieurs unités » n'est pas inclus dans une organisation régionale?	Canada
14: **in general / role of the EU in particular**	There is no common EU stand concerning this future Convention so far. The question is in the EU institutions and **we hope that the Commission could soon take part in the negotiations not only as an observer but as a negotiating party**. From the EU point of view, it is worth mentioning that 5 March 2002 a common position was reached in the Council on the proposed EU Directive on financial collateral arrangements. In that occasion, both the Council and the Commission saw it desirable that the choice of law provisions of the directive (Article 9 of the text adopted by the Council) are in line with this future Convention. The common position is discussed next in the European Parliament. We hope it adopts the common position.	Finland
16: **Multi-unit States**	Our position is **neutral** to the present texts of Articles 9 and 16. As far as Article 16 is concerned, we support it on the condition that is **acceptable for the Danish delegation** (the Greenland question).	Finland
	Proposal to change the current wording of the heading *Applicability of the Convention in States with more than one legal system* This conforms the title of Article 16 to the text of Article 16.	USA
	Article 16(1): in the second line, it might be better to refer to ' … any matters …'.	Giovannini

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		group
17: **Pre-existing rights**	Overall **we prefer the provisions contained in Option A**. We wonder however whether the provision could be drafted in a more straight forward fashion. That is, Article 17(1) indicates that the Convention will only apply to a contracting State after the Convention has entered into force in that State. The remainder of paragraph (1) gives the Convention retrospective application. However the retrospective application appears to be almost completely cancelled out by the provisions of Article 17(2). We would recommend that the provision be streamlined while still covering a priority dispute between pre-Convention and post-Convention perfected interests. We are **less supportive of Option B. We are somewhat sceptical that the proposal can achieve its aims and fear that it may cause significant harm if adopted**, particularly in relation to those countries that question the constitutionality of a provision that retrospectively reverses priorities. Given that certain countries that are favourably disposed to the Convention have indicated that they may have problems adopting it if there are potential constitutional issues, the benefits of Option B must be very clear before including it. Consider the following **example**. A Ruritanian investor holds Australian-issued securities through Euroclear Bank in Belgium. On Day 1, the securities are pledged to Pledgee 1, who perfects under the law of the issuer by registering in Australia. On Day 10, the securities are pledged to Pledgee 2 who perfects under PRIMA, i.e. under Belgian law. To perfect under Belgian law, the securities are moved on the books of Euroclear Bank from a "Ruritanian investor account" to a "Pledgee 2 pledged by Ruritanian investor account". On Day 20, the Convention enters into force in Ruritania. Under Option B, Pledgee 1 would have a period to reperfect under PRIMA. Let's assume Pledgee 1 wishes to reperfect on Day 30 and, if Pledgee 1 were able to do so, Option B would result in a Ruritanian court treating the perfection under PRIMA as if it occurred on Day 1. <u>Scenario 1</u>. Assume that under Ruritanian law it is clear that the law governing perfection prior to the introduction of the Convention is the law of the place of the issuer of the securities. Pledgee 1 has a perfected interest by having registered in Australia. Option B would now entitle Pledgee 1 to reperfect under PRIMA (i.e. Belgian law) during the reperfection period (on Day 30)in order to	Australia

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	maintain its perfected position as of Day 1. However, **Pledgee 1 will not be able to perfect under Belgian law since this would require movement to a pledged account in favour of Pledgee 1 and the securities are already in a pledged account in favour of Pledgee 2**. Euroclear Bank is not going to move the securities of its own volition (depriving Pledgee 2 of its perfected pledge) and a Belgian court is highly unlikely to assist as under Belgian law perfection at all relevant times involved movement to a pledged account; consequently Pledgee 2 has a perfected interest that is unlikely to be disrupted. Scenario 2. **Assume that under Ruritanian law it is unclear prior to the introduction of the Convention whether the law of the issuer or the law of the secured party is the correct answer**. In these circumstances it has been suggested that retroactivity is needed to clarify the legal position of both of Pledgee 1 (to ensure it gets a perfected interest) and Pledgee 2 (to ascertain whether there is a perfected pre-existing interest it is subject to). Yet Option B does not achieve these aims and we are not sure retroactivity can help here. In the current circumstances, **Pledgee 1 will only be permitted to reperfect under PRIMA and have the perfection backdated to Day 1, if Pledgee 1 would have had a perfected interest under pre-Convention law**. Consequently, the reperfection, if possible (which as stated above would not be possible where the PRIMA jurisdiction is one like Belgium), would only assist Pledgee 1 if Pledgee 1 really should have perfected under Australian law (as decided later by a court in Ruritania). If Pledgee 1 should have perfected under its own law, as the law of the secured party, then reperfecting under PRIMA will not help. Similarly, Option B will not remove the "cloud" over Pledgee 2's title -- that there may be a pre-Convention perfected interest that would threaten Pledgee 2's interest. The Convention does not remove the uncertainty until we are sure what the rule is under Ruritanian law pre-Convention. Here because of the uncertainty under Ruritanian law we would still need to wait for a court decision for clarity. Thus, if Pledgee 1 reperfects on Day 30 in accordance with PRIMA (which, again, as stated above would not be possible where the PRIMA jurisdiction is one like Belgium), still that reperfection would only maintain perfection as of Day 1 if the perfection on Day 1 were valid under the law of Ruritania. Finally, as we have been thinking this through we wondered whether another issue should be addressed in Article 17. **Assume that Pledgee 1 has perfected pre-Convention in a first in time**	

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	state and Pledgee 2 has perfected post-Convention in a first to register jurisdiction. Both have perfected interests. Under any version of Article 17, what law should govern the priority dispute under these circumstances? Should not the rule be specified in the Convention? Our initial reaction is that the priority dispute has arisen post-Convention and therefore PRIMA should govern -- if the priority dispute had arisen with respect to two pre-Convention perfected interests, then the pre-Convention priority rule should govern. We would welcome clarification of this in Article 17.	
	Heading: change to "Treatment of pre-existing **situations**" We favour as a matter of principle the **non-retroactivity** which seems less problematic in this context. We are not convinced so far by the need to have this regime for pre-existing situations unless it would be demonstrated that this treatment is justified in certain cases (and to that limited extent only). Moreover, we believe that a distinction should be made between pre-existing agreements referred to in Article 4.1 – which should in our view be subject to the actual 17 bis rule- and pre-existing dispositions to be governed by this Article. **Option A, paragraph 1**: delete the words: "and, subject to the following provision, to all dispositions concluded before its entry into force for that State". **Option A, paragraph 2(a)**: delete the square brackets around "validly".	Belgium
	La délégation canadienne aimerait exprimer sa **préférence pour l'option B** qui traite de façon plus équitable des droits existants. The Canadian delegation would like to express its **preference for Option B** as it deals more fairly with existing interests.	Canada
	We **prefer Option A and strongly object Option B of Article 17.** The most difficult problems for us in the present draft, from both **practical and constitutional law perspective**, are the rules governing pre-Convention rights and agreements in Articles 17 and 17bis. **From practical point of view, the "re-perfection" procedure suggested in Option B might prove to be cumbersome, expensive and risky** to defects when large number of property rights are	Finland

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	re-perfecting according to new laws. Additional, this kind of rule would encourage to over-contracting, to changing the contracts for sure. **From constitutional point of view, it is clear that clauses which would retroactively interfere or directly affect the material contents of proprietary rights, i.e. collateral rights, are in conflict with the property clause (§ 15) of the Finnish Constitution**. On the other hand, procedural rules or rules that only decrease legal uncertainty without material effects are allowed (see Committee Report (PeVL 37/1998) of the Constitutional Committee of the Finnish Parliament on the Governmental Bill on guarantee and pledge on other person's debt). Because the constitutional review must take into account the facts of each case, we shall give **some examples** to describe the problem. According to § 5 a (4) of the Finnish Act on Book-Entry Accounts (827/1991, FABEA), **if the holder of a custodial nominee account or a client of the holder keeps a register or an account of the rights pertaining to book-entries in another State, the law of that State shall be applicable to the rights of a right holder, unless the registrations pertaining to the account state otherwise**. This rule is rather recent in written law, acted as an amendment of FABEA in 1999 (1085/1999). However, it codifies a general principle of PRIMA that was applicable in Finnish law also before the amendment. The rule is written in a general form and it applies to all property rights on accounts in book-entry form (see Government Bill 99/1999. A PRIMA rule of a general nature can be found in § 12 (3) of the Act on Certain Conditions of Securities and Currency Trading as well as a Settlement System (1084/1999)). In practice there have been problems interpreting the rule when the account holder is maintaining a custodial nominee account for a sub-holder maintaining securities accounts in a third country so the future Convention is a step forward in specifying the rule. **Pursuant to the general applicability of the PRIMA rule in Finnish law, it is very likely that Finnish courts would apply the PRIMA rules of Article 4 of the future Convention also to pre-Convention property relationships concerning securities accounts**. That is why it is unlikely, in principle, as far as Finnish law is concerned, that a different law would be applied to dispositions concluded before and after the Convention's entry in force.	

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	However, the detailed PRIMA rules of Article 4 are based on an agreement between the intermediary and the account holder, and such an agreement (including a reference to the place of the account) must **always be interpreted**. There might occur situations in Finnish courts where the pre-Convention and post-Convention law is different and this could cause the following constitutional problems. 1. **The Finnish law does not necessarily recognize all property interests**. The legal contents and consequences of different concepts of property interest might be also different. For instance, collateral arrangements in some forms of title transfer have been problematic and not necessarily recognizable erga omnes although binding inter partes due a lacking perfection (publicity). **Thus the change of applicable law due to the Convention could cause a loss of a property interest**. 2. **The "re-perfection" solution in Option B, paragraph 1(a) is problematic in itself**. a) **It is not acceptable that the Convention could cause a change of priority between creditors**. **The re-perfection could lead to that**. The Finnish law does not recognize "re-perfection." If a perfection effected in accordance with foreign law is not honoured, a "re-perfection" would cause a loss of priority compared to those creditors whose interest has been perfected before the re-perfection. b) It is not acceptable that the other party, let us say the debtor who has given a collateral could with her own passivity (e.g. by avoiding the creditor or even refusing to agree on the re-perfection) to prevent the re-perfection and so cause a loss of a property right. 3. An even more concrete example: Let us assume that the pre-Convention law is foreign law and post-Convention law Finnish law. Let us further assume that the securities interest is pledged to a third party validly in accordance with foreign law but in a manner that is not recognized by the Finnish law as a valid property interest. **If the "re-perfection" is effected during a suspect period before bankruptcy, a risk of recovery is possible**. According to § 14 of the Finnish Recovery Act (758/1991), a collateral provided shall be returned to the bankruptcy estate or company in reorganization if the collateral has been provided less than three months, or two years if granted to a "related party," before the application for bankruptcy or reorganization was filed with the competent court, provided that the granting of the collateral was not perfected without undue delay after the	

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	entry into the collateral or the granting of collateral was not agreed upon at the time the parties entered into the transaction. It would be unacceptable if the Convention were to cause a recovery and a loss of the interest of the collateral taker. 4. **Finland does not have explicit legislation on property rights, especially on priority questions and good faith acquisition, on securities accounts of second or lower tiers in a multi-tiered holding pattern**. The Finnish legislation on these matters relates either to physical securities or to book-entry accounts. This might cause problems if the Convention were to change the law from, let us say that of Belgium with specific legislation to that of Finland with no specific legislation at all.	
	Pour des raisons évidentes de sécurité juridique, l'option A est en toute hypothèse préférable à l'option B qui obligerait les États contractants à rendre conforme au droit matériel désignée par la règle conventionnelle de conflit de lois, un nombre incalculable de sûretés prises sur des titres antérieurement à l'entrée en vigueur de la Convention. En ce qui concerne l'option A, il est souhaitable **d'affirmer au paragraphe 1 le principe général de la non-rétroactivité, pour tous les transferts de titres mais également pour tous les accords-cadres**. Dans des cas exceptionnels la rétroactivité pourrait être admise sous réserve d'identifier de manière précise l'utilité d'une telle dérogation au principe général. Dans cette perspective, l'article **17 bis perd l'essentiel de son intérêt**.	France
	As far as Article 17 is concerned, the Federal Ministry of Justice **rejects the retroactive effect** of the Convention proposed under Option B of Article 17. First, from the constitutional law angle, it gives cause for concern that the holder of a real security interest or a similar security interest is to be allowed to be deprived of this interest by entry into force of a Convention. Secondly, such retroactive effect would mean that every single collateral agreement would have to be checked to determine whether, after entry into force of the Convention, a different law is applicable and whether the requirements for the creation of the security interest have been fulfilled under this different law as well. Should this not be the case, additional action is required for final creation of the security interest. These are operations that are likely to involve **considerable costs**. In this connection, a retroactive effect clause may also mean a **competitive advantage for financial institutions in States which already apply PRIMA**.	Germany

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	Furthermore the retroactive effect of the Convention in Article 17 Option A (1) is **not necessary**. The Federal Ministry of Justice **proposes a combination of Article 17 Option A and 17bis as a new proposal**: *"Article 17:* *(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. In respect of all dispositions made and perfected before the entry into force of this Convention for that State the conflict of laws rules of that State in force before this Convention entered into force shall apply.*	
	The Italian Delegation deems that the **Convention should not have any retroactive effect** on dispositions of securities made before its entry into force. However, it **also agrees with the general principle underlying Option A of Article 17**, i.e. that there are strong arguments in favour of allowing a disposition validly made or perfected before such date under a law other than the one determined by the Convention to be considered valid in all Contracting States and to keep the "position" so acquired in respect to competing rights. The rights validly acquired under the law applicable at the time of the acquisition would then enjoy the same favourable Convention treatment as rights acquired after its entry into force under the application of the "Article 4" law. The present version of **Option B** of Article 17, on the contrary, seems to **cause more problems than it might solve**, in relation both to the costs of "re-perfection" or re-negotiation of existing agreements, and to the discriminations it would cause in all cases in which re-perfection would not be possible under the "Article 4" law or it would change considerably the content of the respective rights of the parties concerned and the expectations of their enforcement.	Italy
	En ce qui concerne le régime des droits préexistants tel que défini à l'article 17, le Ministère de Justice luxembourgeois est d'avis qu'il faudrait **retenir comme principe la non-rétroactivité** de la Convention. Si les professionnels devaient pouvoir, sur base d'exemples concrets, démontrer l'intérêt pratique d'une rétroactivité dans certains cas, alors **certaines exceptions limitatives** au principe de non-rétroactivité pourraient être prévues.	Luxembourg

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	We **prefer Option A** and are **opposed to Option B**. Option B would represent a retroactivity that easily could be in conflict with the Norwegian Constitution and thus might be impossible to implement.	Norway
	Option B has been drafted in order to ensure legal certainty. However, we consider that **retroactive application of the Convention contends with other values** that should prevail such as acquired rights and legitimate expectations. We are concerned that in some cases **re-perfection might not even be possible**, and if that is so, the account holder will inevitably loose priority despite his own diligence. Moreover, re-perfection may oblige the account holder to agree on PRIMA law, even if such law would be contrary to its interests, since without PRIMA the account holder will loose its priority. This means that re-perfection is an encumbrance to the account holder. Furthermore, if the account holder does not know that the Convention has entered into force and if the financial intermediary fails to inform its client, the account holder will not re-perfect and will loose its priority. In addition to these considerations re-perfection involves huge costs. Therefore we believe that this solution should not be adopted in the Convention, which should **only apply to dispositions made after its entry into force**.	Portugal
	We **prefer Option A and are strongly against the retroactive effect proposed under Option B**. A solution like the one in Option B would be very difficult for us to implement. Such retroactivity would probably run counter to our legal system. With Option B the possibility that third parties rights in some situations would be affected in a negative way cannot be ruled out.	Sweden[?]
	Suggestion for new language replacing Option B *(1) This Convention applies in a State to all dispositions of securities held with an intermediary*	USA

[?] The comments in this paper are made with a note taken to the competence that might fall to the European Union.

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	concluded before or after its entry into force for that State, subject to the following provisions. *(2) Where a court of a State has to determine a matter concerning a Pre-Convention Disposition, and* *(a) the party to whom a Pre-Convention Disposition was made* *(i) reasonably relied on the assumption that the governing law was other than as specified in this Convention, and* *(ii) took appropriate action under the law specified in this Convention within six months after this Convention entered into force in that State, and* *(b) no party with a competing interest asserted in the litigation establishes that it reasonably relied on the assumption that the law governing law was as specified in this Convention,* *the Court shall apply this Convention as if the action had been taken before this Convention took effect. "Pre-Convention Disposition" means a disposition made prior to the entry into force of this Convention for a particular State.* *(3) This Convention does not affect a legal proceeding commenced in the courts of a State before its entry into force for that State.*	
	We note that Articles 17 and 17*bis* also have attracted significant attention. At this stage, ISDA has **no official position on these Articles**, but clearly the transitional issues need to be addressed.	ISDA
	We are **strongly against the retroactive effect proposed under Option B of Article 17** of the draft Convention. Such retroactivity would run counter the legal system of many countries. In addition, such a retroactive effect would imply that every single collateral agreement would have to be checked in order to determine whether, after the entry into force of the Convention, a different law is applicable and, if this is the case, whether the requirements for the creation of the security interest have been fulfilled under such different law as well. Such checks would involve **considerable costs** without guaranteeing legal certainty which it should be aiming at. Finally, such a retroactive effect may offer a **competitive advantage to financial institutions in States which already apply the PRIMA approach**.	European Banking Federation

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	Furthermore, **problems could occur when the relevant legal system under the Convention does not recognise the security instruments previously used**. Moreover, it may be that the law applicable under the Convention does not recognise a "re-perfection" but assumes that a new lien is created. This can mean that the lien holder loses his previously obtained ranking. It can also mean that the period during which the right of avoidance under insolvency law may be exercised (suspect period) is triggered again. In addition, if re-perfection requires the participation of other persons, it may be difficult to arrange. The legal act that may then be necessary may also prove impossible to enforce. For the same reasons, we have **major reservations concerning paragraph 2 of Option A** of Article 17. We therefore **recommend to amend Article 17 and to adopt it as follows**: *"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."*	
	3. The transitional rules set out in Article 17 open up the possibility that there may be an avoidance of validly established collateral arrangements due to an eventual retroactivity of the Convention. Is there any information about the likely practical consequences of this provision and its effects on the EU financial markets?	EFMLG (one of three questions on which the group seeks clarification)
	We **reject the retroactive effect of the Convention proposed under Option B of Article 17**. Firstly, it gives cause for concern from the angle of **constitutional law** that the holder of a real security interest or a similar security interest is to be allowed to be deprived of this interest by the entry into force of a Convention. Secondly, such retroactive effect would mean that **every single collateral agreement would have to be checked** to determine whether, after the entry into force of the Convention, a different law is applicable and whether the requirements for the creation of the security interest have been fulfilled under this different law as well. Should this not be the case, action is, in addition, required to finally create the security interest. These are operations that are likely to involve **considerable costs**.	Bundesverband deutscher Banken (German Banks)

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	Another problem could be cases in which the relevant legal system under the Convention **does not recognise the security instruments previously used**. This may be the case for different types of liens but also for the transfer of security or for similar fiduciary instruments. **It is also questionable whether re-perfection can establish more security if, for example, liens were created successively on the same securities under different legal systems and the subsequent lienholder is unaware that a lien was previously created because a different law was applied and this law did not require identification of the securities account as having been pledged as collateral**. It is highly doubtful whether it is possible without any trouble in practice to reconstruct the order in which liens are created and demonstrate at the same time that legally effective liens were created each time. Moreover, it may be that the **law applicable under the Convention does not recognise such re-perfection but assumes that a new lien is created**. This can mean that the lienholder loses his previously obtained ranking. It can also mean that the period during which the right of avoidance under insolvency law may be exercised (**suspect period**) is triggered again. In addition, if re-perfection requires the participation of other persons, it may be difficult to arrange. The legal act that may then be necessary may also prove impossible to enforce. A transitional provision should instead provide that legally effective dispositions concluded before the entry into force of the Convention should remain effective after its entry into force. The contracting parties would of course be free to, for example, create a lien under the PRIMA law, if they deem appropriate. Option A would therefore be preferable, although its wording still needs to be revised, e.g. the use of "concluded" in paragraph 1 and of "made and perfected" in paragraph 2, subparagraphs (a) and (b). It would also be welcomed if a provision could be found which allows the parties, in anticipation of the entry into force of the Convention in the States concerned, to already make a legally effective disposition under the PRIMA law. A revised option A could be worded on the following lines: *"This Convention applies in a Contracting State to all dispositions of securities held with an intermediary made or perfected after its entry into force for that State. In respect of all dispositions made and perfected before the entry into force of this Convention for that State the conflict of laws*	

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	rules of that State in force before this Convention entered into force apply. *Notwithstanding the foregoing, if parties to a disposition have agreed in advance of this Convention entering into force that this Convention shall determine the law applicable to the issues referred to in Article 2 (1) in respect of securities held with an intermediary under their contract as soon as this Convention enters into force, then a court in a Contracting State in determining the issues referred to in Article 2 (1) shall apply this Convention if this Convention has entered into force at the time of the relevant court decision."*	
	In assessing further the question what impact the Convention would have on existing rights, it may **be useful to know what the United States experience was**. It may be noted that the **UCC 8 paragraph 8-603 sets out similar provisions to those proposed here**, with a transitional period of **four months** and that the official comment on that paragraph predicted few significant transition problems on the ground that the new substantive rules introduced by the UCC 8 revisions were mostly based on the then current practices. In this Convention, by contrast, it being intended that there should be there be no alteration to substantive rules, the existing and varying constellation of substantive rules remains. Is there not a risk that the switch from one set of substantive rules to another might give rise to transition problems not encountered in the USA experience? **Article 17, option A (2)**: the reference in the final paragraph to 'conflicts of laws' should be conformed to the terminology used in Articles 3 and 7: 'choice of laws'. **Article 17, option B (1)**: "…issues specified referred to in Article 2(1) …"	Giovannini group
17bis: **Pre-Convention agreements**	OK, but should be moved to Art 17(2).	Belgium

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	La délégation canadienne continue d'appuyer une disposition de ce genre. The Canadian delegation continues to support a provision of this type.	Canada
	We are very interested in finding a solution in Article 17bis. Concerning the interpretation of pre-Convention agreements itself in the light of the discussion on Article 17, **we support in principle a provision like in Article 17bis as far as it only increases legal certainty and not affects existing material rights**. According to Article 4(2) of the present draft, the PRIMA is based on limited freedom of contract, so the definition of "agreement" in that Article is crucial. **Article 17bis extends the interpretation of an "agreement" on PRIMA to all agreements between the account holder and the intermediary on 1) the agreed law of the intermediary and 2) the agreed law of the agreement**. It is problematic, though, does this correspond the will of the parties in a situation when there has been no intent to agree on the law of their securities interest but only of the agreement itself, e.g. when the rules defining the law of the interest were compulsory. On the other hand, it is **odd that this interpretation rule applies only to agreements entered prior the entry into force of the Convention and not to all similar agreements**. Should the rule be a general interpretation clause, maybe as a part of Article 4 itself (cf. UCC § 8-110(e))? This alternative was discussed in the "annotated July 2001 draft" To go to details, it must be mentioned that one situation not discussed specifically in Article 17bis are **clauses stating that disputes are solved according to State X's law**. These kind of clauses must be also interpret to mean that the account is maintained in State X, and this situation must be discussed in the Article. The custodians may in practice have in their standard agreements such clauses with the intention to cover not only the question of dispute resolution but also the general law applicable to the contract. Such clauses reflect the Brussels Convention of 1968 and subsequent Lugano Convention.	Finland
	Article 17 seems to apply to cases in which acts of disposition were perfected, before the entry into force of the Convention, under a law determined through the lex rei sitae principle or agreed upon by the will of the parties without the "reality test" of Article 4(2) and the case is brought before the	Italy

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	courts of the respective State, i.e. before the court of a lex rei sitae principle State or of a "free will of the parties" State after the entry into force of the Convention for such State. Each State applies its own conflicts of laws rules in force at the time of the agreement. Article 17 bis has a **completely different effect**: in case the parties to an account agreement entered into before the entry into force of the Convention agreed upon the application of a specified law and such choice is valid under the said law, which allows the parties to choose the law applicable to rights in respect of securities, then all other Contracting States, and in particular lex rei sitae principle States, will have to recognise such choice and apply the law chosen by the parties even if the "Article 4(2) reality test" conditions are not satisfied. To a certain extent, this provision introduces an **exception to the exclusion of *renvoi* rule** of Article 7, in so far as it provides for the application of a conflicts of laws rule of a "free will of the parties" State by the court of a *lex rei sitae* principle State. It is also an exception to Article 17, which provides, as we just pointed out, that each State applies its own conflicts of laws rules. The Italian Delegation **agrees upon the principle** embodied in this provision because it guarantees the enjoyment of validly acquired rights without any re-perfection and thus **limiting the costs** which the industry would otherwise have to bear. Nevertheless, the Delegation of Italy underlines the need to submit this provision to the **following limitations and conditions**: - the provision needs a **better and clearer wording**, as the discussions which were held after the January Special Commission show that it might lead to misunderstandings even among industry operators that are familiar with these matters. The text should be as clear and simple as possible in order to be easily interpreted and applied by any court within the Contracting States; - it should **expressly and clearly limit its application to choice of law agreements concluded before the entry into force of the Convention for the State which law is agreed upon**, otherwise it would allow parties to continue to choose the law applicable to rights in securities without any reality test in those States which do allow it now, even after the entry into force of the Convention for such States, and it **would consequently put a heavy and permanent burden on *lex rei sitae* principle States**. Finally, the Italian Delegation **proposes to merge the provisions of Articles 17 and 17 bis into**	

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	one Article under the heading "Treatment of pre-existing rights" because both cases deal with the recognition of pre-existing rights, which arose under the law that applied before the entry into force of the Convention, irrespective of the connecting factor under which such applicable law was determined. The new Article should **end with the provision of Article 17, Option B, litt. (d)** in order to exclude any effect on legal proceedings commenced before the entry into force of the Convention in the State of the forum.	
	L'utilité de l'article 17bis doit être appréciée au regard du caractère rétroactif ou non de la Convention. Si, en fonction du choix qui sera fait à l'article 17, l'article 17bis conserve une utilité, alors il faudra supprimer le renvoi à la clause de loi applicable et intégrer dans ce paragraphe les dispositions contenues à l'article 4 (3) qui prévoit que l'accord sur la tenue du compte titre doit résulter soit expressément soit implicitement du contrat.	Luxembourg
	Suggestion for new language *(1) The following provision applies only with respect to an agreement between an account holder and the relevant intermediary which (i) was made before the Convention entered into force pursuant to Article 15(1) and (ii) does not contain an express agreement as to where the securities account will be 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 any of the issues specified in Article 2(1) shall be treated, for the purpose of determining the State of the place of the relevant intermediary under Article 4(2), as an express agreement that the securities account will be maintained within that State.* This text could be placed in 4(2) or immediately following it, because it is a rule to be used in determining whether there is an express agreement under 4(2).	USA
	Article 17 bis addresses the applicability of the Convention to agreements that were finalized prior to the effective date of the Convention but do not expressly address the location of the securities	Association of Global

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	to the effective date of the Convention but do not expressly address the location of the securities account in compliance with Articles 4(2) and (3). The Association believes that such agreements should not have to be amended after the adoption of the Convention in order to comply with the Convention. **Many existing agreements have "jurisdictional tests" embodied in them which should be sufficient for compliance with Article 4(2)**. One obvious "jurisdictional test" is the governing law provision -- which is incorporated in Article 17 bis of the Preliminary Draft. Another clear "jurisdictional test," at least for banks, is the **specific reference to a branch or office** in the agreement. The Association urges that the Convention include, either in Article 17 bis or in Article 4(3), a provision which recognizes, for pre-Convention agreements, traditional "jurisdictional" indicators -- such as governing law and reference to a particular branch or office of the relevant intermediary. Such a provision will **obviate the need to amend thousands of agreements which would have been entered into prior to the adoption of the Convention** -- something which would be quite burdensome and will undermine the effectiveness of the Convention.	Custodians
	We note that Articles 17 and 17*bis* also have attracted significant attention. At this stage, ISDA has **no official position** on these Articles, but clearly the transitional issues need to be addressed. In particular, **it seems as though some provision along the lines of Article 17*bis* is needed**, however the drafting needs to be revised carefully. In relation to both Articles, ISDA members clearly wish to avoid a result that would necessitate significant due diligence and compliance costs for our members at the time of the coming into effect of the Convention in any Contracting State.	ISDA
	As the law applicable under Article 4 (2) also follows from the securities account holder's custody agreement, rules on the interpretation of existing custody agreements that do not specify the place at which the securities account is maintained are **necessary**. **Article 17 bis is, however, unlikely to be any great help in jurisdictions (like, e.g., Germany), in which provisions such as "the relevant intermediary's jurisdiction is a particular State" are not or only very rarely used**, and the understanding is that the law determined by the governing law clauses only covers the contractual relations between the counterparties, but not the legal aspects listed in Article 2(1) (which aspects have been understood to fall within the lex rei sitae rule). **The entry into force of the Convention must not make it necessary for the banks concerned to check all their custody**	Bundesver-band deutscher Banken (German Banks)

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	agreements. For this reason, the transitional provision should include as broad a fall-back clause as possible, taking into account current contract practice. Its wording could read as follows: *"If it is reasonably evident that, at the time when the agreement between the account holder and the relevant intermediary was made, it was the (explicit or implied) understanding of those parties that the account was to be maintained in a specific jurisdiction, this shall be treated for the purposes of Article 4 (2) as an agreement that the securities account will be maintained within that State."* To illustrate this clause, the explanatory report could refer to the case in which a domestic client has opened a securities account at a domestic branch without any further arrangements.	
	Can it be argued that what is said in this paragraph would **true in any event?** If so, what are the arguments in favour of its inclusion in the Convention?	Giovannini group
Tagged accounts	Finally we note that the question of "tagged accounts" generated significant discussion at the Special Session in January. We believe, however, that the issues relating to tagged accounts **may be adequately addressed on the basis of general principles**, including the principles outlined in the Draft Convention, without the need for a special set of rules in the Convention.	ISDA
Costs, benefits and impact	There is some uncertainty in assessing the impact of this Convention, both generally and from the EU point of view. ✍ Do the Permanent Bureau or the Drafting Committee have any views on the **likely alteration to businesses practices that this Convention would result in?** ✍ In particular, would it result in a **gravitation across the financial markets towards particular systems of law and, if so, which ones?** ✍ **Do the answers to these questions differ if one were to imagine some, but not all, of the EU Member States entering into the Convention?**	Giovannini group
Drafting	The Canadian delegation has noticed **inconsistent use of the plural and singular forms**	Canada

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Comments	**throughout the draft Convention**. For example, "securities account" is used in Article 4bis (1)e) but "securities accounts" is used in Article 4bis (1)(a), (b) and (c). **There are also inconsistencies in the use of the plural and singular forms between the English and French texts**. For example, "comptes de titres (plural form)" is used in Article 4bis (1)e) but "securities account (singular form)" is used in Article 4bis (1) a), b) and c). It would also be useful for the Drafting Group to **align expressions such as law applicable and law determined by the Convention found in Articles 6 and 8**. La délégation canadienne a noté, **dans tout le projet de Convention, des incohérences dans l'utilisation des formes au singulier et au pluriel**. Par exemple, « securities account » est utilisé à l'alinéa 4bis (1)e) alors qu'on utilise « securities accounts » aux alinéas 4bis (1) a), b) et c). Il y a également des **incohérences dans l'utilisation des formes du singulier et du pluriel entre les versions anglaise et française**. Ainsi, « comptes de titres (forme au pluriel) » est utilisé à l'alinéa 4bis (1)e) mais « securities account (forme au singulier) » est utilisé aux alinéas 4bis (1) a), b) et c). Il serait utile que le Groupe de rédaction fasse **concorder des expressions comme « loi applicable » et « loi désignée par les dispositions de la Convention », que l'on retrouve aux articles 6 et 8.**	