

Doc. prélim. No 13
Prel. Doc. No 13

mai / May 2002

PROPOSITION POUR UNE VERSION REMANIÉE DES ARTICLES 4 et 4 bis

soumise par le Bureau Permanent

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PROPOSAL FOR A REDRAFT OF ARTICLES 4 AND 4 BIS

submitted by the Permanent Bureau

*Document préliminaire No 13 de mai 2002
à l'intention de la Commission spéciale sur les titres intermédiés*

*Preliminary Document No 13 of May 2002
for the attention of the Special Commission on indirectly held securities*

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Explanatory Notes

This document contains a proposal for a redraft of Article 4 and a new Article 4 bis (the current version of Articles 4 and 4bis is reproduced in the Appendix).

Despite the delicate nature of this provision and the fragile consensus reached thus far, the Permanent Bureau is of the opinion that the current draft of this crucial provision would benefit from further refinement. It is against this background and with a view to streamlining the current text that we submit a new draft, the basic characteristics of which may be summarised as follows:

1. The subject matter of the original paragraphs 1 and 2 have been merged into a new paragraph 1

The original paragraph 1 does not seem to fulfil any other function than to lay out the PRIMA principle. In particular, it does not provide any specific guidance as to how to apply the principle. The original paragraph 2, however, does provide the essentials of the principal connecting factor (agreement and reality test), thereby explicating the PRIMA principle. Therefore, its content may as well appear in the first paragraph of Article 4. The reference to the PRIMA principle could be moved to the preamble of the Convention.

2. The reference to the State "as the place where the securities account is maintained" has been placed in brackets

Some experts have argued that the original language, although centred on the concept of the place of the maintenance of the account, does not provide a guarantee that the place agreed is in fact the place where the account will be maintained. Taking into account the difficulties in locating an account at one place with precision, it is argued that the provision should no longer focus on the concept of the place of the maintenance of an account, but rather on the connection between the relevant intermediary and the State chosen as reflected in the reality test. Thus, the provision would refer to the law of the State chosen, without qualifying that State as the place where the account is maintained. The requirement of the reality test would remain, immediately following the reference to the State agreed. In light of the importance of this provision, we would particularly welcome your views on whether the bracketed language should be retained or discarded.

If the reference to the "place where the account is maintained" were deleted, the subsequent reference to multiple places of maintenance ("whether alone or together with other offices of the relevant intermediary or with other persons acting for the relevant intermediary, in that or another State") no longer appears to be necessary (see, however, *infra* paragraph 4). This additional deletion would make the text less complex.

3. The "white list" containing the relevant reality test factors is moved from the original Article 4bis to the new paragraph 1

The aim of this restructuring is to ensure that all the relevant information is accessible in one single provision, thus rendering the core part of the Convention easier to apply.

The content of the white list in sub-paragraphs (a) to (d) has not been changed from the language proposed by the Permanent Bureau in the Appendix to Preliminary Document No 10. Of course, these sub-paragraphs remain subject to further discussion.

4. Subparagraph (e) is new: its specific function is to keep the white list "open"

It does so by referring to the idea that the relevant intermediary's office can 'otherwise be engaged in a business or other regular activity of maintaining securities accounts' (in other words, the concept of the 'place where securities accounts are maintained' is only used to keep the white list "open", but not as the main concept underlying the whole provision anymore).

As this sub-paragraph refers to the concept of the place where the securities account is maintained, we think it is appropriate to keep, at least in brackets and for further discussion, the heavily negotiated reference to multiple places of maintaining the account. Again, we would welcome your views on whether the bracketed language should be retained or discarded.

5. Paragraph 2: a first black list

This first black list specifically excludes several activities from being regarded as important enough to qualify for the activity of maintaining securities accounts. This is a new provision. Its aim is to keep the "open" elements of the white list meaningful and to make it subject to a reality test.

6. Paragraph 3 is the same as the old paragraph 3

7. The fallback rule now appears in a separate Article (new Article 4 bis, to become Article 5)

There is no change in the provision on the fallback test, which now appears in the new Article 4bis(1).

Paragraph 2 contains a second black list that explicitly excludes the connecting factors that ought not to be considered anymore (no look-through, etc.).

It remains to be determined whether the opening words in the second black list in Article 4bis(2) should refer to paragraph 1 of 4bis only, or to all the rules of the Convention. Again, comments on this specific point would be particularly welcome.

By splitting the "black elements" into two different lists, each list appears more homogeneous and not, as in the original black list, a jumble of various elements which are not necessarily connected.

The Drafting Committee will assess ***comments received before the 15th of May*** at its meeting in London to be held on the 21st and 22nd May, and, if necessary, suggest new language. The Permanent Bureau will prepare and distribute the final version of the preliminary draft Convention as soon as possible after that meeting.

We look forward to your comments and thank you for your cooperation.

Christophe Bernasconi

Richard Potok

Article 4 Determination of the applicable law - Primary rule

- (1) The law applicable to any issue specified in Article 2(1) is the law of the State agreed by the account holder and the relevant intermediary [as the State in which the securities account is maintained], provided that the relevant intermediary has, at the time of the agreement, an office in that State, and**
- (a) the making and updating of entries to securities accounts are managed or monitored at such office;**
 - (b) the management and administration of dividend, interest and redemption payments, corporate events and other items relating to securities held with the intermediary are performed at such office;**
 - [c) account holder support functions of the intermediary relating to securities accounts occur at such office;]**
 - (d) a single account number, bank code, or other means of identification exists that identifies such office as maintaining securities accounts at such office; or**
 - (e) that office is otherwise engaged in a business or other regular activity of maintaining securities accounts [, whether alone or together with other offices of the relevant intermediary or with other persons acting for the relevant intermediary in that or another State].**
- (2) An office is not regularly engaged in a business or other regular activity of maintaining securities accounts merely because it is a place where –**
- (a) the technology supporting the bookkeeping or data processing for the securities account is located;**
 - (b) call centers for communication with account holders [and others?] are located or operated;**
 - (c) the mailing relating to securities accounts is organised and file rooms are located; or**
 - (d) ...**

- (3) The agreement referred to in paragraph 2 must be express or, if not express, implied from the terms of the contract considered as a whole.**

New Article 4 bis (eventually to become Article 5) Fallback rule

- (1) If the applicable law is not determined under Article 4, that law is –**
- (a) the law of the State under whose law the relevant intermediary is incorporated or organised; or**
 - (b) failing this, the law of the State in which the relevant intermediary has its place of business or, if the relevant intermediary has more than one place of business, its principal place of business.**
- (2) In determining the applicable law [pursuant to paragraph 1] [under the rules of this Convention], no account shall be taken of the following factors –**
- (a) the place where the issuer of the securities is organised or incorporated or has its statutory seat, central administration, principal place of business or its registered office;**
 - (b) the places where certificates representing or evidencing securities are located;**
 - (c) the place where a register of holders of securities maintained by or on behalf of the issuer of the securities is located;**
 - (d) the place where any intermediary other than the relevant intermediary is located.**

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**Articles 4 and 4 bis as reproduced in the "April 2002 preliminary draft"
(Prel. Doc. 10)**

Article 4 Determination of the applicable law

- (1) The law applicable to any issue specified in Article 2(1) is the law of the State of the place of the relevant intermediary [at the time of the event giving rise to that issue.]**

- (2) That State is the State agreed by the account holder and the relevant intermediary as the State in which the securities account is maintained, provided that at the time of the agreement the relevant intermediary has an office within that State engaged in a business or other regular activity of maintaining securities accounts, whether alone or together with other offices of the relevant intermediary or with other persons acting for the relevant intermediary, in that or another State.**

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

- (4) If the State of the place of the relevant intermediary is not determined under paragraph 2, that State is –**
 - (a) the State under whose law the relevant intermediary is incorporated or organised; or**

 - (b) failing this, the State in which the relevant intermediary has its place of business or, if the relevant intermediary has more than one place of business, its principal place of business.**

Article 4bis [as reproduced in the Annex to Prel. Doc. No 10]

For the purposes of this Convention, but not by way of limitation, an office of an intermediary is engaged in a business or other regular activity of maintaining securities accounts if any one or more of the following activities regularly occurs:

- (a) the making and updating of entries to securities accounts are managed or monitored at such office;**

- (b) the management and administration of dividend, interest and redemption payments, corporate events and other items relating to securities held with the intermediary are performed at such office;**

- [c) account holder support functions of the intermediary relating to securities accounts occur at such office;] or**

- (d) a single account number, bank code, or other means of identification exists that identifies such office as maintaining securities accounts at such office.**