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36. CONVENTION ON THE LAW APPLICABLE TO CERTAIN RIGHTS IN RESPECT OF SECURITIES HELD WITH AN INTERMEDIARY¹

(Concluded 5 July 2006)

The States signatory to the present Convention,
Aware of the urgent practical need in a large and growing global financial market to provide legal certainty and predictability as to the law applicable to securities that are now commonly held through clearing and settlement systems or other intermediaries,
Conscious of the importance of reducing legal risk, systemic risk and associated costs in relation to cross-border transactions involving securities held with an intermediary so as to facilitate the international flow of capital and access to capital markets,
Desiring to establish common provisions on the law applicable to securities held with an intermediary beneficial to States at all levels of economic development,
Recognising that the “Place of the Relevant Intermediary Approach” (or PRIMA) as determined by account agreements with intermediaries provides the necessary legal certainty and predictability,
Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions –

CHAPTER I – DEFINITIONS AND SCOPE OF APPLICATION

Article 1 Definitions and interpretation

- (1) In this Convention –
- a) “securities” means any shares, bonds or other financial instruments or financial assets (other than cash), or any interest therein;
 - b) “securities account” means an account maintained by an intermediary to which securities may be credited or debited;
 - c) “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;
 - d) “account holder” means a person in whose name an intermediary maintains a securities account;
 - e) “account agreement” means, in relation to a securities account, the agreement with the relevant intermediary governing that securities account;
 - f) “securities held with an intermediary” means the rights of an account holder resulting from a credit of securities to a securities account;

¹ Dieses Übereinkommen, sowie diesbezügliche Dokumente sind auf der Internetseite der Haager Konferenz für Internationales Privatrecht (www.hcch.net) in der Rubrik „Übereinkommen“ verfügbar. Weitere Informationen zur Geschichte des Übereinkommens finden Sie in Hague Conference on Private International Law, *Proceedings of the Nineteenth Session (2002)*, Tome II, *Securities* (ISBN 9789004148550, Brill, 2006, 752 pp.).

- g) “relevant intermediary” means the intermediary that maintains the securities account for the account holder;
 - h) “disposition” means any transfer of title whether outright or by way of security and any grant of a security interest, whether possessory or non-possessory;
 - i) “perfection” means completion of any steps necessary to render a disposition effective against persons who are not parties to that disposition;
 - j) “office” means, in relation to an intermediary, a place of business at which any of the activities of the intermediary are carried on, excluding a place of business which is intended to be merely temporary and a place of business of any person other than the intermediary;
 - k) “insolvency proceeding” means a collective judicial or administrative proceeding, including an interim proceeding, in which the assets and affairs of the debtor are subject to control or supervision by a court or other competent authority for the purpose of reorganisation or liquidation;
 - l) “insolvency administrator” means a person authorised to administer a reorganisation or liquidation, including one authorised on an interim basis, and includes a debtor in possession if permitted by the applicable insolvency law;
 - m) “Multi-unit State” means a State within which two or more territorial units of that State, or both the State and one or more of its territorial units, have their own rules of law in respect of any of the issues specified in Article 2(1);
 - n) “writing” and “written” mean a record of information (including information communicated by teletransmission) which is in tangible or other form and is capable of being reproduced in tangible form on a subsequent occasion.
- (2) References in this Convention to a disposition of securities held with an intermediary include –
- a) a disposition of a securities account;
 - b) a disposition in favour of the account holder’s intermediary;
 - c) a lien by operation of law in favour of the account holder’s intermediary in respect of any claim arising in connection with the maintenance and operation of a securities account.
- (3) A person shall not be considered an intermediary for the purposes of this Convention merely because –
- a) it acts as registrar or transfer agent for an issuer of securities; or
 - b) it records in its own books details of securities credited to securities accounts maintained by an intermediary in the names of other persons for whom it acts as manager or agent or otherwise in a purely administrative capacity.
- (4) Subject to paragraph (5), a person shall be regarded as an intermediary for the purposes of this Convention in relation to securities which are credited to securities accounts which it maintains in the capacity of a central securities depository or which are otherwise transferable by book entry across securities accounts which it maintains.
- (5) In relation to securities which are credited to securities accounts maintained by a person in the capacity of operator of a system for the holding and transfer of such securities on records of the issuer or other records which constitute the primary record of entitlement to them as against the issuer, the Contracting State under whose law those securities are constituted may, at any time, make a declaration that the person which operates that system shall not be an intermediary for the purposes of this Convention.

Article 2

Scope of the Convention and of the applicable law

- (1) This Convention determines the law applicable to the following issues in respect of securities held with an intermediary –
- a) the legal nature and effects against the intermediary and third parties of the rights resulting from a credit of securities to a securities account;
 - b) the legal nature and effects against the intermediary and third parties of a disposition of securities held with an intermediary;
 - c) the requirements, if any, for perfection of a disposition of securities held with an intermediary;
 - d) whether a person’s interest in securities held with an intermediary extinguishes or has priority over another person’s interest;

- e) the duties, if any, of an intermediary to a person other than the account holder who asserts in competition with the account holder or another person an interest in securities held with that intermediary;
 - f) the requirements, if any, for the realisation of an interest in securities held with an intermediary;
 - g) whether a disposition of securities held with an intermediary extends to entitlements to dividends, income, or other distributions, or to redemption, sale or other proceeds.
- (2) This Convention determines the law applicable to the issues specified in paragraph (1) in relation to a disposition of or an interest in securities held with an intermediary even if the rights resulting from the credit of those securities to a securities account are determined in accordance with paragraph (1)(a) to be contractual in nature.
- (3) Subject to paragraph (2), this Convention does not determine the law applicable to –
- a) the rights and duties arising from the credit of securities to a securities account to the extent that such rights or duties are purely contractual or otherwise purely personal;
 - b) the contractual or other personal rights and duties of parties to a disposition of securities held with an intermediary; or
 - c) the rights and duties of an issuer of securities or of an issuer's registrar or transfer agent, whether in relation to the holder of the securities or any other person.

Article 3 Internationality

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

CHAPTER II – APPLICABLE LAW

Article 4 Primary rule

- (1) The law applicable to all the issues specified in Article 2(1) is the law in force in the State expressly agreed in the account agreement as the State whose law governs the account agreement or, if the account agreement expressly provides that another law is applicable to all such issues, that other law. The law designated in accordance with this provision applies only if the relevant intermediary has, at the time of the agreement, an office in that State, which –
- a) alone or together with other offices of the relevant intermediary or with other persons acting for the relevant intermediary in that or another State –
 - i) effects or monitors entries to securities accounts;
 - ii) administers payments or corporate actions relating to securities held with the intermediary; or
 - iii) is otherwise engaged in a business or other regular activity of maintaining securities accounts; or
 - b) is identified by an account number, bank code, or other specific means of identification as maintaining securities accounts in that State.
- (2) For the purposes of paragraph (1) a), an office is not engaged in a business or other regular activity of maintaining securities accounts –
- a) merely because it is a place where the technology supporting the bookkeeping or data processing for securities accounts is located;
 - b) merely because it is a place where call centres for communication with account holders are located or operated;
 - c) merely because it is a place where the mailing relating to securities accounts is organised or files or archives are located; or
 - d) if it engages solely in representational functions or administrative functions, other than those related to the opening or maintenance of securities accounts, and does not have authority to make any binding decision to enter into any account agreement.
- (3) In relation to a disposition by an account holder of securities held with a particular intermediary in favour of that intermediary, whether or not that intermediary maintains a securities account on its own records for which it is the account holder, for the purposes of this Convention –

- a) that intermediary is the relevant intermediary;
- b) the account agreement between the account holder and that intermediary is the relevant account agreement;
- c) the securities account for the purposes of Article 5(2) and (3) is the securities account to which the securities are credited immediately before the disposition.

Article 5 Fall-back rules

- (1) If the applicable law is not determined under Article 4, but it is expressly and unambiguously stated in a written account agreement that the relevant intermediary entered into the account agreement through a particular office, the law applicable to all the issues specified in Article 2(1) is the law in force in the State, or the territorial unit of a Multi-unit State, in which that office was then located, provided that such office then satisfied the condition specified in the second sentence of Article 4(1). In determining whether an account agreement expressly and unambiguously states that the relevant intermediary entered into the account agreement through a particular office, none of the following shall be considered –
 - a) a provision that notices or other documents shall or may be served on the relevant intermediary at that office;
 - b) a provision that legal proceedings shall or may be instituted against the relevant intermediary in a particular State or in a particular territorial unit of a Multi-unit State;
 - c) a provision that any statement or other document shall or may be provided by the relevant intermediary from that office;
 - d) a provision that any service shall or may be provided by the relevant intermediary from that office;
 - e) a provision that any operation or function shall or may be carried on or performed by the relevant intermediary at that office.
- (2) If the applicable law is not determined under paragraph (1), that law is the law in force in the State, or the territorial unit of a Multi-unit State, under whose law the relevant intermediary is incorporated or otherwise organised at the time the written account agreement is entered into or, if there is no such agreement, at the time the securities account was opened; if, however, the relevant intermediary is incorporated or otherwise organised under the law of a Multi-unit State and not that of one of its territorial units, the applicable law is the law in force in the territorial unit of that Multi-unit State in which the relevant intermediary has its place of business, or, if the relevant intermediary has more than one place of business, its principal place of business, at the time the written account agreement is entered into or, if there is no such agreement, at the time the securities account was opened.
- (3) If the applicable law is not determined under either paragraph (1) or paragraph (2), that law is the law in force in the State, or the territorial unit of a Multi-unit State, in which the relevant intermediary has its place of business, or, if the relevant intermediary has more than one place of business, its principal place of business, at the time the written account agreement is entered into or, if there is no such agreement, at the time the securities account was opened.

Article 6 Factors to be disregarded

In determining the applicable law in accordance with this Convention, no account shall be taken of the following factors –

- a) the place where the issuer of the securities is incorporated or otherwise organised or has its statutory seat or registered office, central administration or place or principal place of business;
- 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; or
- d) the place where any intermediary other than the relevant intermediary is located.

Article 7
Protection of rights on change of the applicable law

- (1) This Article applies if an account agreement is amended so as to change the applicable law under this Convention.
- (2) In this Article –
 - a) “the new law” means the law applicable under this Convention after the change;
 - b) “the old law” means the law applicable under this Convention before the change.
- (3) Subject to paragraph (4), the new law governs all the issues specified in Article 2(1).
- (4) Except with respect to a person who has consented to a change of law, the old law continues to govern –
 - a) the existence of an interest in securities held with an intermediary arising before the change of law and the perfection of a disposition of those securities made before the change of law;
 - b) with respect to an interest in securities held with an intermediary arising before the change of law –
 - i) the legal nature and effects of such an interest against the relevant intermediary and any party to a disposition of those securities made before the change of law;
 - ii) the legal nature and effects of such an interest against a person who after the change of law attaches the securities;
 - iii) the determination of all the issues specified in Article 2(1) with respect to an insolvency administrator in an insolvency proceeding opened after the change of law;
 - c) priority as between parties whose interests arose before the change of law.
- (5) Paragraph (4) c) does not preclude the application of the new law to the priority of an interest that arose under the old law but is perfected under the new law.

Article 8
Insolvency

- (1) Notwithstanding the opening of an insolvency proceeding, the law applicable under this Convention governs all the issues specified in Article 2(1) with respect to any event that has occurred before the opening of that insolvency proceeding.
- (2) Nothing in this Convention affects the application of any substantive or procedural insolvency rules, including any rules relating to –
 - a) the ranking of categories of claim or the avoidance of a disposition as a preference or a transfer in fraud of creditors; or
 - b) the enforcement of rights after the opening of an insolvency proceeding.

CHAPTER III – GENERAL PROVISIONS

Article 9
General applicability of the Convention

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

Article 10
Exclusion of choice of law rules (*renvoi*)

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

Article 11
Public policy and internationally mandatory rules

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

Article 12
Determination of the applicable law for Multi-unit States

- (1) If the account holder and the relevant intermediary have agreed on the law of a specified territorial unit of a Multi-unit State –
 - a) the references to “State” in the first sentence of Article 4(1) are to that territorial unit;
 - b) the references to “that State” in the second sentence of Article 4(1) are to the Multi-unit State itself.
- (2) In applying this Convention –
 - a) the law in force in a territorial unit of a Multi-unit State includes both the law of that unit and, to the extent applicable in that unit, the law of the Multi-unit State itself;
 - b) if the law in force in a territorial unit of a Multi-unit State designates the law of another territorial unit of that State to govern perfection by public filing, recording or registration, the law of that other territorial unit governs that issue.
- (3) A Multi-unit State may, at the time of signature, ratification, acceptance, approval or accession, make a declaration that if, under Article 5, the applicable law is that of the Multi-unit State or one of its territorial units, the internal choice of law rules in force in that Multi-unit State shall determine whether the substantive rules of law of that Multi-unit State or of a particular territorial unit of that Multi-unit State shall apply. A Multi-unit State that makes such a declaration shall communicate information concerning the content of those internal choice of law rules to the Permanent Bureau of the Hague Conference on Private International Law.
- (4) A Multi-unit State may, at any time, make a declaration that if, under Article 4, the applicable law is that of one of its territorial units, the law of that territorial unit applies only if the relevant intermediary has an office within that territorial unit which satisfies the condition specified in the second sentence of Article 4(1). Such a declaration shall have no effect on dispositions made before that declaration becomes effective.

Article 13
Uniform interpretation

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

Article 14
Review of practical operation of the Convention

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

CHAPTER IV – TRANSITION PROVISIONS

Article 15

Priority between pre-Convention and post-Convention interests

In a Contracting State, the law applicable under this Convention determines whether a person's interest in securities held with an intermediary acquired after this Convention entered into force for that State extinguishes or has priority over another person's interest acquired before this Convention entered into force for that State.

Article 16

Pre-Convention account agreements and securities accounts

- (1) References in this Convention to an account agreement include an account agreement entered into before this Convention entered into force in accordance with Article 19(1). References in this Convention to a securities account include a securities account opened before this Convention entered into force in accordance with Article 19(1).
- (2) Unless an account agreement contains an express reference to this Convention, the courts of a Contracting State shall apply paragraphs (3) and (4) in applying Article 4(1) with respect to account agreements entered into before the entry into force of this Convention for that State in accordance with Article 19. A Contracting State may, at the time of signature, ratification, acceptance, approval or accession, make a declaration that its courts shall not apply those paragraphs with respect to account agreements entered into after the entry into force of this Convention in accordance with Article 19(1) but before the entry into force of this Convention for that State in accordance with Article 19(2). If the Contracting State is a Multi-unit State, it may make such a declaration with respect to any of its territorial units.
- (3) Any express terms of an account agreement which would have the effect, under the rules of the State whose law governs that agreement, that the law in force in a particular State, or a territorial unit of a particular Multi-unit State, applies to any of the issues specified in Article 2(1), shall have the effect that such law governs all the issues specified in Article 2(1), provided that the relevant intermediary had, at the time the agreement was entered into, an office in that State which satisfied the condition specified in the second sentence of Article 4(1). A Contracting State may, at the time of signature, ratification, acceptance, approval or accession, make a declaration that its courts shall not apply this paragraph with respect to an account agreement described in this paragraph in which the parties have expressly agreed that the securities account is maintained in a different State. If the Contracting State is a Multi-unit State, it may make such a declaration with respect to any of its territorial units.
- (4) If the parties to an account agreement, other than an agreement to which paragraph (3) applies, have agreed that the securities account is maintained in a particular State, or a territorial unit of a particular Multi-unit State, the law in force in that State or territorial unit is the law applicable to all the issues specified in Article 2(1), provided that the relevant intermediary had, at the time the agreement was entered into, an office in that State which satisfied the condition specified in the second sentence of Article 4(1). Such an agreement may be express or implied from the terms of the contract considered as a whole or from the surrounding circumstances.

CHAPTER V – FINAL CLAUSES

Article 17

Signature, ratification, acceptance, approval or accession

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

Article 18
Regional Economic Integration Organisations

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

Article 19
Entry into force

- (1) This Convention shall enter into force on the first day of the month following the expiration of three months after the deposit of the third instrument of ratification, acceptance, approval or accession referred to in Article 17.
- (2) Thereafter this Convention shall enter into force –
 - a) for each State or Regional Economic Integration Organisation referred to in Article 18 subsequently ratifying, accepting, approving or acceding to it, on the first day of the month following the expiration of three months after the deposit of its instrument of ratification, acceptance, approval or accession;
 - b) for a territorial unit to which this Convention has been extended in accordance with Article 20(1), on the first day of the month following the expiration of three months after the notification of the declaration referred to in that Article.

Article 20
Multi-unit States

- (1) A Multi-unit State may, at the time of signature, ratification, acceptance, approval or accession, make a declaration that this Convention shall extend to all its territorial units or only to one or more of them.
- (2) Any such declaration shall state expressly the territorial units to which this Convention applies.
- (3) If a State makes no declaration under paragraph (1), this Convention extends to all territorial units of that State.

Article 21
Reservations

No reservation to this Convention shall be permitted.

Article 22
Declarations

For the purposes of Articles 1(5), 12(3) and (4), 16(2) and (3) and 20 –

- a) any declaration shall be notified in writing to the Depositary;
- b) any Contracting State may modify a declaration by submitting a new declaration at any time;
- c) any Contracting State may withdraw a declaration at any time;
- d) any declaration made at the time of signature, ratification, acceptance, approval or accession shall take effect simultaneously with the entry into force of this Convention for the State concerned; any declaration made at a subsequent time and any new declaration shall take effect on the first day of the month following the expiration of three months after the date on which the Depositary made the notification in accordance with Article 24;
- e) a withdrawal of a declaration shall take effect on the first day of the month following the expiration of six months after the date on which the Depositary made the notification in accordance with Article 24.

Article 23 Denunciation

- (1) A Contracting State may denounce this Convention by a notification in writing to the Depositary. The denunciation may be limited to certain territorial units of a Multi-unit State to which this Convention applies.
- (2) The denunciation shall take effect on the first day of the month following the expiration of twelve months after the date on which the notification is received by the Depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the date on which the notification is received by the Depositary.

Article 24 Notifications by the Depositary

The Depositary shall notify the Members of the Hague Conference on Private International Law, and other States and Regional Economic Integration Organisations which have signed, ratified, accepted, approved or acceded in accordance with Articles 17 and 18, of the following –

- a) the signatures and ratifications, acceptances, approvals and accessions referred to in Articles 17 and 18;
- b) the date on which this Convention enters into force in accordance with Article 19;
- c) the declarations and withdrawals of declarations referred to in Article 22;
- d) the notifications referred to in Article 18(2);
- e) the denunciations referred to in Article 23.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at The Hague, on the 5th day of July, 2006, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the Member States of the Hague Conference on Private International Law as of the date of its Nineteenth Session and to each State which participated in that Session.