Doc. prél. No 10
Prel. Doc. No 10

avril / April 2002

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

Propositions d'amendement à la version provisoire
adoptée par la Commission spéciale le 17 janvier 2002

soumis par le Bureau Permanent
à la suite de la réunion du Comité de rédaction à Francfort en mars 2002

(à désigner « avant-projet d'avril 2002 »)

* * *

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

Suggestions for amendment of the provisional version
adopted by the Special Commission on 17 January 2002

submitted by the Permanent Bureau
following the meeting of the Drafting Committee in Frankfurt in March 2002

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

Document préliminaire No 10 d'avril 2002
à l'intention de la Commission spéciale sur les titres intermédiés

Preliminary Document No 10 of April 2002
for the attention of the Special Commission on indirectly held securities

Bureau Permanent de la Conférence ?Scheveningseweg 6 ?2517 KT La Haye ?Pays-Bas
Permanent Bureau of the Conference ?Scheveningseweg 6 ?2517 KT The Hague ?Netherlands

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

Propositions d'amendement à la version provisoire
adoptée par la Commission spéciale le 17 janvier 2002

soumis par le Bureau Permanent
à la suite de la réunion du Comité de rédaction à Francfort en mars 2002

(à désigner « avant-projet d'avril 2002 »)

*** * ***

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

Suggestions for amendment of the provisional version
adopted by the Special Commission on 17 January 2002

submitted by the Permanent Bureau
following the meeting of the Drafting Committee in Frankfurt in March 2002

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

Document préliminaire No 10 d'avril 2002
à l'intention de la Commission spéciale sur les titres intermédiés

Preliminary Document No 10 of April 2002
for the attention of the Special Commission on indirectly held securities

Article 1 Definitions and interpretation

(1) In this Convention –

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

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

"relevant intermediary" means the intermediary that maintains the securities account for the account holder;

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

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

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

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

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

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

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

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

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

<u>Option A (December 2001 Draft)</u>

[(4) A person shall not be considered an intermediary for the purposes of this Convention merely because –

(a) it acts as [registrar or] transfer agent for an issuer of securities; or

(b) it records in its own books details of securities credited to securities accounts maintained by an intermediary in the names of other persons for whom it acts as manager or agent or otherwise in a purely administrative capacity.]

<u>Option B (text developed at the Special Commission)</u>

[(4) Subject to paragraph 5, a person shall not be considered an intermediary in relation to securities for the purposes of this Convention merely because –

(a) it acts as [registrar or] transfer agent for the issuer of the securities or operates a system or arrangement for transfer of those securities on records of the issuer; or

(b) it records in its own books details of securities credited to securities accounts maintained by an intermediary in the names of other persons for whom it acts as manager or agent or otherwise in a purely administrative capacity.

(5) The Contracting State or States referred to in paragraph 6 shall declare whether a person who maintains records of particular securities which constitute the primary record of entitlement to them is to be treated as an intermediary in relation to those securities, and may modify such a declaration by submitting another declaration at any time.

(6) For the purposes of the preceding paragraph, the Contracting State or States are –

(a) the State in which the person concerned maintains the records; and

(b) where the law of another State governs the transfer of the securities on the records of the issuer and that law requires [or permits] such securities to be transferred through the system operated by that person, that other State.]

Article 2 Scope of the Convention and of the applicable law

(1) This Convention determines the law applicable to the following issues in respect of securities held with an intermediary –

(a) whether the rights resulting from the credit of securities to a securities account are property, contract, or other rights;

(b) the legal nature and effects against third parties of a disposition of securities held with an intermediary;

(c) the requirements, if any, for perfection of a disposition of securities held with an intermediary;

(d) whether a person's interest in securities held with an intermediary extinguishes or has priority over a competing interest;

(e) the duties, if any, of an intermediary to a person who asserts a competing interest in securities held with that intermediary;

(f) the requirements, if any, for the realisation of an interest in securities held with an intermediary; and

(g) whether a security interest in securities held with an intermediary extends to entitlements to dividends, income, other distributions or redemption, sale or other proceeds.

(2) This Convention does not determine the law applicable to –

(a) the contractual rights and duties of parties to a transaction in securities;

(b) the contractual rights and duties arising from relations between an intermediary and an account holder; or

(c) the rights and duties of an issuer of securities or of an issuer's registrar or transfer agent, whether in relation to the holder of the securities or any other person.

Article 3 Internationality

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

Article 4 Determination of the applicable law

(1) The law applicable to 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 4[bis] Factors indicative of maintenance of accounts [1]

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

(a) contracts regarding securities accounts are executed at such office or received by such office;

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

(c) legal, regulatory, auditing, position monitoring, or account-holder-support functions of the intermediary relating to securities accounts occur at such office;

(d) account statements bear an address of that office or are prepared at that office;

(e) entries to a securities account by the intermediary are made, stored, or managed at that office, such as the booking, recording, transferring, or pledging of securities;

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

(g) …]

[1] *Note*: The text of Art. 4 bis reproduced here is almost identical to that already appearing in Art. 4 bis, paragragh 1, of Prel. Doc. No 8 (provisional version of the preliminary draft Convention adopted by the Special Commission in January 2002), the main difference being that sub-paragraph (f) of the version appearing in Prel. Doc. No 8 has been deleted. One may recall, however, that due to lack of time Art. 4 bis had not been discussed extensively by the Plenary in January 2002 and was merely inserted so as to provide the basis for further consideration. Against this background, the Special Commission mandated the Drafting Committee to assess this preliminary version of Art. 4 bis and, if needed, to submit new suggestions. At its Frankfurt meeting in March 2002, the Drafting Committee established a sub-working group to consider this issue in detail and to propose a revised list of factors indicative of maintaining securities accounts (also referred to as the "white list"). The work of this sub-working group formed the basis for a new proposal of the "white list" made by the Permanent Bureau and which appears in Appendix 1 to this document.

[Article 4[ter] Factors excluded for determination of the State of the place of the relevant intermediary

(1) In determining the State of the place of the relevant intermediary no account shall be taken of the following factors –

(a) the places where certificates representing or evidencing securities are located;

(b) the places where any register of holders of securities maintained by or on behalf of the issuer of the securities is located;

(c) the place where the issuer of the securities is organised or incorporated or has its statutory seat, central administration, principal place of business or its registered office;

(d) the place where any intermediary other than the relevant intermediary is located; or

(e) the places where the technology supporting the bookkeeping or data processing for the securities account is located.]

Article 5 Insolvency

(1) The opening of an insolvency proceeding under a law other than the law of the State of the place of the relevant intermediary does not affect –

(a) the determination of issues specified in Article 2(1) in respect of securities that have been credited to a securities account; or

(b) a disposition of securities held with that intermediary that has been perfected in accordance with the law of the State of the place of that intermediary.

(2) Nothing in this Convention affects the application of –

(a) any rules of insolvency law relating to the ranking of categories of claim or to the avoidance of a disposition as a preference or a transfer in fraud of creditors; or

(b) any rules of substantive or procedural insolvency law relating to the enforcement of rights to property after the opening of an insolvency proceeding.

Article 6 General applicability

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

Article 7 Exclusion of choice of law rules (*renvoi*)

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

Article 8 Public policy and internationally mandatory rules

(1) The application of the law determined by this Convention may be refused only if the effects of its application would be manifestly contrary to the public policy of the forum.

(2) Subject to paragraph 3, this Convention does not prevent the application of those provisions of the law of the forum which, irrespective of rules of conflict of laws, must be applied even to international situations.

(3) This Article does not permit application of provisions of the law of the forum imposing requirements with respect to perfection or relating to priorities between competing interests, unless the law of the forum is the law determined by Article 4.

Article 9 Determination of applicable law for Multi-unit States[2]

(1) In relation to a Multi-unit State, Article 4(2) applies as follows –

(a) If the account holder and the relevant intermediary have agreed that the securities account is maintained within a specified territorial unit of that Multi-unit State, or at a specified place which is situated within a territorial unit of that Multi-unit State, then -

[2] The applicability of this provision to Regional Economic Integration Organisations will need to be considered.

(i) the reference to the agreed State in Article 4(2) is to that territorial unit;

(ii) the reference to "that State" in the proviso to Article 4(2) is to the Multi-unit State itself, unless the Multi-unit State has declared that such reference, in its application to that Multi-Unit State, is to a particular territorial unit.

(b) If the account holder and the relevant intermediary have agreed that the securities account is maintained within the Multi-unit State (without specifying a particular place or a particular territorial unit), the references to that State in Article 4(2) are to the Multi-unit State and the applicable law shall be determined –

(i) if the Multi-unit State has made a declaration under paragraph (3), in accordance with the internal choice of law rules referred to in the declaration; and

(ii) otherwise, in accordance with Article 4(4).

(2) In relation to a Multi-unit State, Article 4(4) applies as follows -

(a) the references to the State under whose law the relevant intermediary is incorporated or organised or in which it has its place of business or principal place of business are references to the territorial unit under whose law the relevant intermediary is incorporated or organised or in which it has its place of business or principal place of business;

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

(3) A Multi-unit State may declare that,

(a) if the account holder and the relevant intermediary have agreed that the securities account is maintained within the Multi-unit State, without specifying a particular place or a particular territorial unit, the internal choice of law rules in force in the Multi-unit State shall determine whether the substantive rules of law of the Multi-unit State or of a particular territorial unit shall apply;

(b) if, as a result either of Article 4(2) or Article 4(4), the applicable law would be the law of one of its territorial units, but under the internal choice of law rules in force in that territorial unit the applicable law would be that of another territorial unit or the Multi-unit State itself, then the substantive rules of law of that other territorial unit or (as the case may be) of the Multi-unit State itself shall apply.

[(4) Any declaration according to paragraph 3 [may] [shall] be accompanied by information concerning the content of the choice of law rules of that Multi-unit State and of its territorial units. The Permanent Bureau shall then make that information available to interested parties by appropriate means.]

(5) Any declaration under paragraph 1(a)(ii) or paragraph 3 shall have no effect on dispositions made before that declaration becomes effective.

Article 10 Uniform interpretation

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

Article 11 Review of practical operation of the Convention

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

[Article 12 Amendments to the Convention

(1) A Contracting State may submit proposals for amendments to this Convention to the Secretary General of the Hague Conference on Private International Law, who shall then consult the Contracting States, and [if a majority of two thirds of these States approves the proposal] shall convene a Special Commission to consider the proposed amendments.

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

Article 13 Signature, ratification, acceptance, approval or accession

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

(2) This Convention is subject to ratification, acceptance, approval or accession by the signatory States.

(3) The instruments of ratification, acceptance, approval or accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, Depositary of the Convention.

Article 14 Regional organisations

(1) A Regional Economic Integration Organisation which is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, accept, approve or accede to this Convention. The Regional Economic Integration Organisation shall in that case have the rights and obligations of a Contracting State, to the extent that that Organisation has competence over matters governed by this Convention. Where the number of Contracting States is relevant in this Convention, the Regional Economic Integration Organisation shall not count as a Contracting State in addition to its Member States which are Contracting States.

(2) The Regional Economic Integration Organisation shall, at the time of signature, acceptance, approval or accession, make a declaration to the depositary specifying the matters governed by this Convention in respect of which competence has been transferred to that Organisation by its Member States. The Regional Economic Integration Organisation shall promptly notify the depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration under this paragraph.

(3) Any reference to a "Contracting State" or "Contracting States" in this Convention applies equally to a Regional Economic Integration Organisation where the context so requires.

Article 15 Entry into force

(1) The Convention shall enter into force on the first day of the month following the expiration of [three] [six] months after the deposit of the third instrument of ratification, acceptance, approval or accession referred to in Article 13.

(2) Thereafter the Convention shall enter into force –

(a) for each State subsequently ratifying, accepting, approving or acceding to it, on the first day of the month following the expiration of [three] [six] months after the deposit of its instrument of ratification, acceptance, approval or accession;

(b) for a territorial unit to which this Convention has been extended by a declaration under Article 16(1), on the first day of the month following the expiration of [three] [six] months after that declaration.

Article 16 Multi-Unit States

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

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

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

[Article 17 Treatment of pre-existing rights

In light of the comments received and the discussion at the meeting in Frankfurt, the Drafting Committee suggests to delete the old Article 17

Option A and to refer to the general principle of non-retroactivity. It did not, however, consider it necessary to include a provision stating that principle. On the other hand, for the question of priority between a pre-Convention disposition and a post-Convention disposition, the following Option A has been considered necessary.

<u>Option A</u>

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

<u>Option B</u>

The Drafting Committee has also included the following provision with a view to permit consideration of the minority view under which the Convention should be given retroactive effect.

(1) This Convention applies in a State to all dispositions of securities held with an intermediary 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 entry into force of this Convention for that State.

Article 17bis Interpretation of pre-Convention agreements

(1) The following provision applies only with respect to an agreement governing a securities account which -

(a) was made before the Convention entered into force pursuant to Article 15(1); and

(b) does not contain an express or implied agreement as to where the securities account is maintained.

(2) A provision in that agreement which would have the effect, under the law governing that agreement, that the laws of a particular State apply to 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 agreement that the securities account is maintained within that State.

Article 18 Denunciation

(1) A Contracting State may denounce the Convention by a notification in writing addressed to the Depositary.

(2) The denunciation takes effect on the first day of the month following the expiration of twelve months after the notification is received by the Depositary. Where a longer period for the denunciation to take effect is specified in the notification, the

denunciation takes effect upon the expiration of such longer period after the notification is received by the Depositary.

Article 19 Notifications by the Depositary

To be completed.

[Other final clauses]

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

SUGGESTION FOR A REVISED ARTICLE 4 BIS ("WHITE LIST")

Submitted by the Permanent Bureau,
based on the results of the work conducted by the
sub-working group established by the Drafting Committee
and on the comments received from the Drafting Committee members
(see footnote to Article 4 bis in the main document)

Article 4bis

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 exits that identifies such office as maintaining securities accounts at such office.

Comments

Introduction: the purpose of the white list

Article 4 bis needs to be assessed against the background of the core provision of the Convention, *i.e.* Article 4(2). According to this latter provision, the account holder and the relevant intermediary can agree on the location of the relevant intermediary by selecting a State "in which the securities account is maintained, provided that […] the relevant intermediary has an office within that State engaged in a business or other regular activity of maintaining securities accounts". The purpose of the "white list" suggested above is to *clarify the content of the proviso* to Article 4(2) by identifying the *core functions relating to the activity of maintaining an account.* In other words, the principle behind the white list is that functions that can reasonably be regarded as *directly* related to the maintenance of securities accounts should be included, but functions which are general overhead functions covering all or a substantial part of the intermediary's activities, including activities that have nothing to do with the

maintenance of securities accounts, should not be included. This is because their inclusion will tend to dilute the efficacy of the reality test and indeed may tend to exacerbate a concern that the white list will enable multi-national custodians arbitrarily to allocate securities account to whatever jurisdiction they choose and in particular to the head office of the custodian where general overhead functions are carried out. The white list reproduced above is based on the view expressed by the majority of the sub-working group.

Should the suggested list be broadened?

On the other hand, with a view to ensure the full transparency of the informal working process, the Permanent Bureau would like to highlight that some of the experts involved in the discussion regarding the white list were of the opinion that the list suggested above is too narrow and restrictive and that a number of items, which these experts also regard to be part of the core functions relating to the activity of maintaining an account, should be added. These experts recommended that the white list should include the following items (the chapeau would be the same as in the text suggested above):

> ***(a) entries to securities accounts are managed, monitored or processed through such office;***
>
> ***(b) one or more functions are performed at such office relating to the servicing, operation or monitoring of securities accounts or the servicing of assets in securities accounts;***
>
> ***(c) account holder administrative services relating to securities accounts are provided at such office;***
>
> ***(d) legal, regulatory, auditing, position monitoring, or account-holder-support functions of the intermediary relating to securities accounts occur at such office; or***
>
> ***(e) a single account number, bank code, or other means of identification exits that identifies such office as maintaining securities accounts at such office.***

While the foregoing activities are conclusive for the purposes of this Convention, they are not exclusive and other activities of the relevant intermediary may demonstrate compliance with this Convention.

The following comments intend to explain the objectives underlying the text suggested by the Permanent Bureau. By the same token, an attempt will be made to justify why some of the items contained in the wider list have not been retained.

Sub-paragraph (a)

This subparagraph is directed at the traditional debits and credits in securities accounts and the monitoring of such book-entries. In its version suggested by the Permanent Bureau, the list merely refers to the *making*, *managing* and *monitoring* of entries in securities accounts and their updating.

The broader version, on the other hand, contains a reference to the *processing* of entries in securities accounts as an additional possible item. The Permanent Bureau preferred not to retain that criterion, as it might open the door to mere IT functions which sceptics might not accept as sufficiently important or satisfactorily closely related to the maintenance of securities accounts and which historically have been on the black list. Consequently, the Permanent Bureau has not included them in the white list.

Sub-paragraph (b)

This subparagraph focuses on those services which are ancillary to the debiting and crediting of securities accounts but which still appear to be specific enough to serve as a credible reality check.

The widened list refers to the "servicing, operation or monitoring of securities accounts or the servicing of assets in securities accounts". First, the relationship of this language with subparagraph (a) is not entirely clear and may create some overlaps or lead to undesirable results. For example, if 'monitoring' refers to an internal audit function then this may well be an overhead function handled by head offices in centralised organisations and therefore should not be regarded as an appropriate substantiation of the realty test. Secondly, the reference to "securities in securities accounts" implies a reversion to a look-through approach, which seems undesirable and in conflict with the black list. Thirdly, this reference would also encourage people to look at functions relating to the underlying securities, or interests in securities, held with a higher tier intermediary, which might have no direct connection with securities accounts maintained at particular branches. For example, if a bank with branches in London and Paris held underlying securities in Euroclear, this would bring Brussels into the equation even if accounts maintained for London and Paris customers had no other connection with Brussels.

Sub-paragraph (c) [sub-paragraph (d) of the broader version of the list]

This sub-paragraph appears in brackets as the precise content of the expression "account holder support functions" does not seem to be clear enough. In particular, one might not exclude that this opens the door to representative offices being included, which all experts have agreed should not be the case.

Sub-paragraph (d) of the broader version also refers to "legal", "regulatory" and "audit" functions. These functions have not been retained in the proposal submitted by the Permanent Bureau as in centralised organisations they are potentially overhead functions. In addition, this broader version also refers to position monitoring. This function also has not been retained in the Permanent Bureau's proposal for two reasons. First, if what is referred to is the monitoring of debits and credits to the securities account, then it would fall under sub-paragraph (a). If, on the other hand, the proposal is intended to extend to oversight of positions by the institution's credit department, then this would be a centralised function, usually carried out at the head office rather than at the place where the securities accounts are managed.

Sub-paragraph (d)

The final sub-paragraph is in the same form as in Prel Doc 8. However, the Permanent Bureau would encourage Member States and observers to comment specifically on this subparagraph, since it offers scope for a somewhat arbitrary approach by the intermediary whose account numbering or code system may designate an office that is in reality not engaged in the actual activity of maintaining securities accounts.

Additional elements contained in the broader version of the list: "administrative services" and "safe harbour rule".

Two additional suggestions appearing in the broader list have not been adopted in the white list submitted by the Permanent Bureau.

The first is that the white list should include a sub-paragraph referring to "account holder administrative services relating to securities accounts" (sub-paragraph (c) of the broader version). This language appears to be far too broad and vague to serve as an appropriate substantiation of the reality check.

The second relates to the inclusion of a "safe harbour rule" (see last paragraph of the broader version). The Permanent Bureau is not convinced that such a provision is necessary or indeed appropriate in a Hague Convention. First, if the suggested language is intended to keep the white list open, this is already taken care of by the words "but not by way of limitation" appearing in the chapeau of the first paragraph. Secondly, if the suggested language is also intended to bind the judge, additional clarifying language would probably be needed but in any case, such a rule appears to be problematic for various reasons. Most importantly, it appears to intrude into the procedural law of States becoming a party to the Convention and would dictate to judges what shall and shall not be conclusive. Overall, such a provision has the potential to completely neutralise the reality check and enable parties to choose any place where the intermediary has an office because no judge would be in a position to question an assertion that one of the subparagraphs of the white list has been satisfied.