

Décembre/December 2001

**PROPOSITION DE DISPOSITIONS-CLÉS POUR UNE FUTURE CONVENTION  
SUR LA LOI APPLICABLE A CERTAINS DROITS  
SUR DES TITRES DÉTENUS AUPRÈS D'UN INTERMÉDIAIRE**

Propositions de nouvel amendement au texte contenu dans  
le Document préliminaire No 6 de juillet 2001 (« projet de novembre 2001 »)

*soumis par le Bureau Permanent*

**(à désigner « projet de décembre 2001 »)**

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**TENTATIVE TEXT ON KEY PROVISIONS FOR A FUTURE CONVENTION  
ON THE LAW APPLICABLE TO CERTAIN RIGHTS  
IN RESPECT OF SECURITIES HELD WITH AN INTERMEDIARY**

Suggestions for further amendment of the text contained in  
Preliminary Document No 6 of November 2001 ("November 2001 draft")

*submitted by the Permanent Bureau*

**(to be referred to as the "December 2001 draft")**

*Document préliminaire No 7 de décembre 2001  
à l'intention de la Commission spéciale de janvier 2002*

*Preliminary Document No 7 of December 2001  
for the attention of the Special Commission of January 2002*

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**Article 1        Definitions and interpretation****(1) In this Convention –**

**“securities” means any shares, bonds or other financial assets or instruments, or any interest therein;**

**“intermediary” means a person that in the course of business maintains securities accounts either for others or for its own account and is acting in that capacity;**

**“relevant intermediary” means the intermediary with whom the account holder maintains the securities account;**

**“securities account” means an account with an intermediary to which securities are credited;**

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

**“account holder” means a person in whose name an intermediary maintains a securities account;**

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

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

**“insolvency administrator” means a person, including one appointed on an interim basis, authorised in an insolvency proceeding to administer the reorganization or liquidation of the debtor’s assets or affairs;**

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

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

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

**[(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.]**

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**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 or 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.

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**Article 3      Internationality (territorial scope of application of the Convention)**

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

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**Article 4      Determination of the applicable law**

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

**Option X**

- (2) The place of the relevant intermediary is the place of the office or branch that the account holder and the relevant intermediary have agreed will maintain the securities account.**

**Option Y**

- (2) The place of the relevant intermediary is the place of the office or branch that the account holder and the relevant intermediary have agreed will maintain the securities account, provided that an account number, bank code or other means of identification identifies the securities account as being held at that office or branch.**

**Option Z**

- (2) The place of the relevant intermediary is the place of the office or branch that the account holder and the relevant intermediary have agreed will maintain the securities account, provided that the securities account is in fact held by that office or branch.**

**If Option Z is retained, the following “black list” should be added:**

- (3) In applying the provisions of the preceding paragraph, 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.]**
- (3) If the place of the relevant intermediary cannot be determined under paragraph 2, that place is the place where the relevant intermediary is incorporated or, in the absence of incorporation, the place under whose law it was organised.**

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## **Article 5      Insolvency**

- (1) The opening of an insolvency proceeding under a law other than the law of the place of the relevant intermediary does not affect a disposition of securities held with an intermediary that has been made and perfected in accordance with the law of the place of the relevant 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 insolvency procedure relating to the enforcement of rights to property which is under the control or supervision of an insolvency administrator.**

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**Article 6      General applicability**

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

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**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.**

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**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.**

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

**Option A    (reflecting the results of the conference call on Federal clauses, as reviewed by the extended drafting group at its Brussels meeting in December 2001)**

- (1) Where, under Article 4, the place of the relevant intermediary is located in a State within which one or more of its territorial units, or both the State and one or more of its territorial units, have their own rules of law in respect of any matter dealt with in this Convention, any reference in this Convention to the place of the**

relevant intermediary shall be construed as referring to the place in a territorial unit.

- (2) The conflict of laws rules in force in that territorial unit determine whether the substantive rules of law of that territorial unit, of another territorial unit, or of the State apply.

**Options previously considered:**

**Option B (see Preliminary Document No 4: Memorandum on federal clauses)**

Where, under Article 4, the place of the relevant intermediary is located in a State which comprises two or more territorial units each of which has its own system of law or set of rules of law in respect of matters covered by this Convention, the following rules apply –

- (a) if there are rules in force in such a State identifying which law or set of rules of law is applicable, that law or set of rules of law applies;
- (b) in the absence of such rules, any reference in this Convention to the place of the relevant intermediary's office or branch which maintains the securities account shall be construed as referring to the place in a territorial unit.

**Option C (see the Annex to Preliminary Document No 4)**

The following rules apply if the place of the relevant intermediary, determined under Article 4, is located in a State within which the State and one or more of its territorial or other units have their own substantive rules of law or conflict of laws rules in respect of any matter dealt with in this Convention ("Multi-unit State") –

- (1) If a court in another State must decide a conflict of laws issue within a Multi-unit State, it shall do so under the following rules –
  - (a) if the Multi-unit State has made a declaration identifying the conflict of laws rules applicable within the Multi-unit State, the other State shall apply those rules;
  - (b) if the Multi-unit State has not made such a declaration, the other State shall apply this Convention to conflict of laws issues within that Multi-unit State.
- (2) This Convention does not displace the conflict of laws rules applicable within a Multi-unit State to conflict of laws issues within that Multi-unit State.



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**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.**

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**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].**

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**Article 12      Amendments to the Convention**

To be completed.

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**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.**

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**[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" or "State Party" or "States Parties" in this Convention applies equally to a Regional Economic Integration Organisation where the context so requires.]**

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**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 14.**
- (2) Thereafter the Convention shall enter into force 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.**

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**Article 16      Federal State extension clause**

- (1) If a State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.**

- (2) Any such declaration shall be notified to the depositary and shall state expressly the territorial units to which the Convention applies.**
- (3) If a State makes no declaration under this Article, this Convention is to extend to all territorial units of that State.**

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**[Article 17 Transitional rules]**

- (1) This Convention applies in a Contracting State to all dispositions of securities held with an intermediary concluded after its entry into force for that State, and, subject to the following provision, to all dispositions concluded before its entry into force for that State.**

- (2) Where a court of a Contracting State has to determine –**

- (a) whether at a time before this Convention entered into force for that State a disposition of securities held with an intermediary has been [validly] made or perfected; or**

- (b) any issue of priority among competing dispositions of securities held with an intermediary made and perfected before this Convention entered into force for that State,**

**the court shall apply the law determined by the conflict of laws rules of that State in force before this Convention entered into force for that State.**

**Option A**

- [(3) In determining the place of the relevant intermediary for the purposes of Article 4 of this Convention, the courts of a Contracting State shall treat a provision in an account agreement entered into before this Convention enters into force for that State designating the law governing the account agreement as an agreement that the securities account is maintained at an office or branch in the jurisdiction whose law is designated.]]**

## **Option B** \*

**[(3) Where a court of a Contracting State has to determine the place of the relevant intermediary in relation to a disposition made or perfected after this Convention entered into force for that Contracting State but under a custody agreement concluded before this Convention entered into force for that Contracting State, the place of the relevant intermediary for the purposes of Article 4 is the place where the relevant intermediary is incorporated or, in the absence of incorporation, the place under whose law it was organised.]]**

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## **Article 18 Denunciation**

- (1) A State party to this Convention may denounce it 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 [six] [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.**

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## **Article 19 Notifications by the Depositary**

To be completed.

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## **[Other final clauses]**

To be completed.

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\* Taking into account the concerns expressed by some experts of civil law countries about the use of the governing law as the appropriate connecting factor and after consulting with various financial institutions, the Permanent Bureau suggests to use the fall-back test embodied in Article 4 as the test for existing agreements. We would appreciate your thoughts on this suggestion.