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

TITRES INTERMÉDIÉS
INDIRECTLY HELD SECURITIES

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TABLEAU RÉSUMANT LES OBSERVATIONS REÇUES SUR « L'AVANT-PROJET D'AVRIL 2002 D'UNE CONVENTION SUR LA LOI APPLICABLE À CERTAINS DROITS SUR DES TITRES DÉTENUS AUPRÈS D'UN INTERMÉDIAIRE » (Doc. prél. No 10)

Préparé par le Bureau Permanent

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CHART SUMMARISING THE COMMENTS RECEIVED ON THE "APRIL 2002 PRELIMINARY DRAFT CONVENTION ON THE LAW APPLICABLE TO CERTAIN RIGHTS IN RESPECT OF SECURITIES HELD WITH AN INTERMEDIARY" (Prel. Doc. No 10)

Prepared by the Permanent Bureau

Document préliminaire No 14 de mai 2002
à l'intention de la Commission spéciale sur les titres intermédiés

Preliminary Document No 14 of May 2002
for the attention of the Special Commission on indirectly held securities

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Document préliminaire No 14 de mai 2002
à l'intention de la Commission spéciale sur les titres intermédiés

Preliminary Document No 14 of March 2002
for the attention of the Special Commission on indirectly held securities

OBSERVATIONS REÇUES SUR « L'AVANT-PROJET D'AVRIL 2002 » (DOC. PRÉL. NO 10)

COMMENTS RECEIVED ON THE "APRIL 2002 PRELIMINARY DRAFT" (PREL. DOC. NO 10)

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

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

ARTICLE:	OBSERVATIONS / COMMENTS:	AUTEUR / AUTHOR:
General comments	La délégation française félicite le Bureau Permanent pour le travail accompli de manière informelle dans l'esprit des conclusions de la dernière réunion de la Commission I (affaires générales et politiques) de la Dix-neuvième Session diplomatique de la CODIP (La Haye 22-24 avril 2002).	France
	The Federal Ministry of Justice continues to give its strong support to the project of the Hague Conference on Private International Law for drafting a convention on the law applicable to certain rights in respect of securities held with an intermediary. The progress made so far and the Permanent Bureau's efforts in taking this project forward are particularly commendable. The Federal Ministry of Justice therefore would like to congratulate the Hague Conference on the new proposal concerning Article 4 and 4bis.	Germany
	Many thanks for the great efforts to achieve a final proposal of a Draft Convention. We congratulate the Hague Conference on the significant progress made.	Sweden [?]
	We would once again like to express our optimism and hope that we will soon be able to agree on a workable Convention in this area of present uncertainty and unpredictability.	Switzerland
	We welcome the decision of the Commission on General Affairs that a Diplomatic Conference on the Convention should be held this year provided that, in the judgment of the Secretariat, sufficient progress is	USA

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

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	made on the key outstanding issues during the informal process.	
	We continue strongly to endorse the work of the Hague Conference on these important issues for the financial markets, and in particular the proactive role played by the Permanent Bureau and the Drafting Committee in managing and driving forward the informal working process on the project. We are pleased that Commission I on General Affairs and Policy of the XIXth Session of the Hague Conference endorsed the continuation of the informal working process, which we believe has been commendably open, transparent, and productive. It is highly desirable that the text of the draft Convention be finalised as rapidly as possible with a view to its adoption at the Diplomatic Session tentatively scheduled for October 2002.	ISDA
	We would like to congratulate the Hague Conference on the significant progress made and the sophistication achieved in a comparatively short time span. The ECB acknowledges the efforts involved and welcomes very much the general aim of the Convention project to achieve ex ante certainty for (cross-border) securities transactions. From the results, not the least the Eurosystem would benefit considerably. Discussions within the European System of Central Banks have shown that there are diverging views on how to interpret a number of provisions of the draft Convention. As such divergence of interpretations might give rise to concerns as to the achievement of legal certainty, we would like to make a number of comments (see below).	ECB
	The Association supports the Conference's efforts to create greater certainty concerning the law that governs cross-border financial collateral arrangements.	Association of Global Custodians
	We are grateful for the opportunity to comment again on the above preliminary draft Convention. The German private banking industry would welcome it if an international private law convention were actually to make it easier to determine the law applicable to dispositions of securities. It is therefore highly important that special emphasis be placed on this aspect in the further work on the Convention. Some of our member banks have already asked whether the Convention, as it stands at present, would in fact facilitate things in practice and lead to more legal certainty. We welcome it that the Draft Convention has been repeatedly presented for comment to market practitioners in particular under the informal consultation procedure and wish to underline our interest in the further progress made in this project.	Bundesverband deutscher Banken

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1(1): "intermediary"	The Danish government would like to stress that it is important that the drafting group discuss the definition of intermediary in Art 1(1)) further at its meeting (see comments under Art 1(4)).	Denmark
	Article (1) definition of "intermediary": in order to simplify this definition it is suggested to **delete the terms "or both for others and for its own account"** as such terms do not add much to the definition which in our reading anyway covers this scenario even without it being specifically mentioned.	Luxembourg
1(1) "disposition"	We wonder if the use of "transfer of title" clearly enough shows that **"disposition" means the *inter partes* connection and not the relationship with third parties**. If there is an uncertainty in this respect the wording "transfer of title" could be exchanged to **"agreement regarding transfer"** or something similar. Furthermore, it seems that this clearer mark the difference between the terms "disposition" and "perfection".	Sweden [?]
1(4)	After further consideration, we are open to both Options A and B	Belgium
	The Danish government would like to stress that it is important that the drafting group discuss Art 1(4)-1(6) (and the definition of intermediary in Art 1(1)) further at its meeting. The Danish government supports a solution based on the following principles: - **CSD´s and similar entities should be explicitly mentioned as persons which are intermediaries**. - A State should be able to make an **opt-out declaration** with respect to a person organized under the law of that State (or of a state (territorial unit) which is part of the State) with the effect that the listed person is not considered an intermediary, when the person acts as central securities depository or in a similar capacity for the issuer. - Persons that maintains accounts in a **purely administrative capacity** should be excluded from the definition of intermediary. Present Art **1(4)(b)** is satisfactory is this respect.	Denmark
	Concerning Article 1 para. (4) no changes have been made. The Federal Ministry of Justice would like to **reiterate the reservations expressed in our comments of March 2002**. Both options provided for under **Article 1 para. (4) exempt certain persons who record dispositions of securities in registers, books, etc. from the term "intermediary" as defined in the Convention. The**	Germany

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

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	reason for such a differentiation is not apparent. One reason may be due to differences in how the law is understood in different States. It may be necessary to further clarify the underlying situation and to take a closer look at the need for such exemptions. The Federal Ministry of Justice points out in this connection that **the more exemptions are allowed, the more the aim of the Convention, namely simplifying arrangements in practice, will be jeopardised**. In this light, the Federal Ministry of Justice is **not convinced of the need for the exemptions to the term "intermediary"** as such exemptions would mean that it would virtually no longer be possible clearly to determine the applicable law. Allowing exemptions runs counter to the practical needs of the parties to dispositions of securities.	
	As to the specific wording of the two options, we would like to raise the following points: 1) **Sub-point (a)** of Article 1(4) is *not identical* in the two options. Is there any particular reason for that? 2) If Option B is retained, **sub-point (b)** of the black list in Article 4 ter / New Article 4 bis 2 (c) may have to be deleted or redrafted.	Luxembourg
	We favour **Option B**.	Spain
	It is **of utmost importance that Nordic CSD's are covered by the Convention**. The distinguishing between directly and indirectly held systems is not essential. **The definition of "intermediary" covers in our opinion central securities depositaries in general and therefore also the Nordic CSD's.** When Nordic CSD's maintain securities accounts directly for the account holder they should be considered as intermediaries. The inclusion of CSD's as intermediaries, also in the direct holding situation, is strongly supported by all Nordic States and several other States. Only UK has had objections to such an inclusion. **Sweden would not oppose to a solution, which excludes Crest in the direct holding situation from the application of the Convention**. One solution could in our opinion be a possibility for opt-out designed to accommodate the needs of Crest. In the light of these comments we are in **favour of Option A**.	Sweden[?]
	We simply flag our concern, expressed by a number of participants in our consultations, that that provision,	Switzerland

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

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	however drafted, **not lead to exceptions from the general rule adopted in Article 4 for all sorts of jurisdictions, thus taking away with one hand the unified approach that the other gave**.	
	We recommend, as others have proposed, to **restructure Article 1(4) by deleting paragraphs 4, 5, and 6 of Option B, by explicitly including entities that function as CSDs within the definition of intermediary, and by providing a declaration mechanism for a State to exclude its CSD where it deems appropriate**. The purpose of this section has been described as accommodating the desire of the Nordic countries to include their central securities depositories ("CSDs") within the terms of the Convention, while accommodating the needs of CREST to exclude certain of its operations from the scope of the Convention. While we are supportive of this goal, we believe that that description of the issue is drawn too narrowly because the scope of Article 1(4) also has implications for coverage of CSDs as securities intermediaries under the Convention, including whether Federal Reserve Banks are securities intermediaries. We thought it might be useful to briefly **describe the role of Federal Reserve Banks as securities intermediaries to provide the context for our recommendation**. Federal Reserve Banks act as **"fiscal agent"** for several international organizations as issuers including, the World Bank, the Asian Development Bank, the African Development Bank and Inter-American Development Bank. The securities of the international organizations for which the Federal Reserve Banks act as fiscal agent are issued under New York law. In addition, the Federal Reserve Banks act as fiscal agent for the United States Treasury Department ("U.S. Treasury") and a number of government-sponsored enterprises and agencies, including for example, the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, and the Government National Mortgage Corporation. Those governmental organizations have issued Federal regulations including choice of law and substantive law rules that govern their securities. In both cases, the Federal Reserve Banks, are considered "securities intermediaries" under the applicable law. **We think Federal Reserve Banks should be covered by the Convention as "securities intermediaries."** Securities of international organizations, the U.S. Treasury, government agencies, and government sponsored entities are issued through the Federal Reserve Banks in dematerialized form. With very limited exception, there is no agent or registrar that stands between the issuer and the Federal Reserve Banks. Entities that are entitled to have securities accounts at Federal Reserve Banks hold these securities in their securities accounts at the Federal Reserve Banks. **Transfers between Federal Reserve Bank account-holders are effected on the books of the Federal Reserve Banks through instructions issued to the**	USA

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	Federal Reserve Banks, not the issuer. Those entities or individuals who are not entitled to have a securities account with a Federal Reserve Bank hold their interests in securities of these issuers through a bank or broker that directly or indirectly has an account with a Federal Reserve Bank. That bank or broker is a securities intermediary under applicable law. (The U.S. Treasury does operate a direct holding system used primarily by small investors in Treasury securities, which is not at issue here). An examination of Article 1(4) in light of Federal Reserve Bank operations reveals a number of problems and ambiguities. **Option B Article 1(4)(a) excludes a person who operates a system or arrangement for the transfer of securities on records of the issuer from the definition of intermediary. Where securities are issued directly on the books of a depositary as in the case of Federal Reserve Banks, would these books be considered to be records of the issuer under Article 1(4)(A)?** In this situation, there appears to be overlap in the coverage of Option B Article 1(4)(a) and Article 1(5). Option B Article 1(5) provides that a person who maintains the primary record of entitlement to securities must be declared to be a securities intermediary with respect to those securities pursuant to Option B Article 1(6). It could be said that Federal Reserve Banks maintain the primary record of entitlement to all the securities issued on its books. **The declaration process contemplated by Option B Article 1(5) and 1(6) does not appear to apply to a person covered by Article 1(4)(a).** This raises an ambiguity as to the effect of a declaration under Article 1(6) for a person that is covered by both Articles 1(4)(a) and 1(5), which we think, may be the case for Federal Reserve Banks. Moreover, **the declaration process applicable to a person covered by Article 1(5) is very complex. It requires a declaration with respect to particular securities. It also requires a declaration by the Contracting State in which the person maintains the records. Moreover, it requires another State whose laws govern the transfer of the securities on the records of the issuer to also make a declaration**. This factor is especially confusing when applied to the securities of the international organizations that issue securities through Federal Reserve Banks. These factors introduce a new undefined concept "maintains records" and a location factor "the State in which the person maintains the records" that may not be self-evident. The identification of the law governing "the transfer of the securities on the records of the issuer" in Article 1(6) seems to raise the question that the Convention is intended to answer.	
	Differing opinions exist as to the applicability of the draft Convention to Central Securities Depositories (CSDs) and Securities Settlement Systems (SSSs). While it could be argued that every legal or natural person that (also) maintains securities accounts for others is encompassed within the definition of intermediary, **the view could also be held that CSDs and SSSs are under no circumstances to be considered intermediaries in the sense of the Convention**, as they offer no depository services and/or only	ECB

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	perform intermediary functions between the issuer and the investor (and would therefore either not fall under the definition of intermediary of Article 1.1 of the draft Convention or would be covered by the exemption contained in Article 1 (4) of the draft Convention). The latter understanding would have the merit to avoid any inconsistencies between the scope of application of the insolvency provision of Article 5 of the draft Convention (encompassing certain contractual rights against the intermediary, to be governed by the law determined by the parties) and Article 8 of the Settlement Finality Directive (subjecting all rights and obligations in relation to the participation in a system to the law applicable to the system). Moreover, in relation to the same issue, if an entity would perform multiple functions (i.e. being a true intermediary for some types of securities, whilst just standing between the issuer and the investor for others), it is not clear whether such entity would be excluded altogether from the scope of application of the draft Convention or whether it would be covered depending on the types of securities it would deal with. In the latter case, the applicability of the Convention might have to be checked for every single type of securities within a portfolio or held on a securities account. As a more general remark, the opt-in/opt-out regime currently envisaged in Article 1 (4) and (5) of the draft Convention could in practice lead to distortions and be detrimental to the goal of creating a universal rule.	
	No changes have been made to Article 1 (4), so that the **reservations we expressed in our comments of 6 March 2002 continue to apply in full**. Both options exclude persons who perform certain activities in connection with the administration of securities from the definition of "intermediary". The activities referred to have nothing to do with the definition of "intermediary" - as also contained in Article 1 (1). Mentioning these separately in the Convention is therefore more likely to **cause confusion**. **We should like to point out once again that the mere fact that securities are dematerialised cannot, in our view, be allowed to determine that a system which administers these dematerialised securities as book entries is not an intermediary**. Instead, the term "intermediary" should apply regardless of whether securities are held in physical form (be it global certificates) or in dematerialised form. Furthermore, our understanding is that **final custodians (e.g. Central Securities Depositories (CSDs)) are also intermediaries.** The **declaration mechanism provided for under Option B**, which is designed to help the parties determine the applicable law, is **not unproblematic**. For one thing, ensuring that the required declarations from States are furnished as quickly as possible and that the currently valid declarations are publicly available for	Bundesverband deutscher Banken

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	inspection at any time appears difficult. For another thing, a declaration mechanism means that the parties would have to continuously monitor the current status of the declarations. **Generally speaking, the more exemptions that are made, the more difficult it will be to determine the applicable law and the more the purpose of the Convention, i.e. making it easier to determine the applicable law, will be jeopardised.** We therefore urgently request clarification as to whether exemptions are actually needed in the first place. Should they be essential, their number should be kept as small as possible. The comments that have been submitted on the preliminary Draft Convention have also raised a question about how the following is to be understood: Page 12 of the Finnish comments states "... that the Nordic CSDs are in principle intermediaries when they maintain securities accounts "directly" for the account holder ...". We would understand this to mean that Nordic CSDs are also intermediaries if there is a direct link to another CSD or if, for example, a German bank (for itself and its clients) places securities in safe custody directly with the Swedish CSD or via a Swedish subcustodian. This would have to apply irrespective of whether or not the securities are dematerialised.	
2(1)(a) / 2(1)(b)	Article 2(1)(a) speaks to the **legal characterization of the credit but not the legal nature and effects of the credit** (which are addressed in part in 2(1)(b)); these should be covered by the applicable law under the Convention. This omission can be addressed by adding the following language to the beginning of Article 2(1)(a): **"the legal nature and effects against the intermediary and against third parties of the credit of securities to a securities account, including whether the rights resulting from the credit of securities to a securities account are property, contract, or other rights."** A corresponding change to **Article 2(1)(b)** is necessary to make the subsections completely parallel, adding "against the intermediary and " before "against third parties."	USA
2(1)(e)	Article 2(1)(e), change "a person" to "another person" and "a competing" to "an."	USA
2(1)(g)	Article 2(1)(g), add "or transfer of title by way of security" after "security interest in."	USA
2(2)(b)	Article 2(2) (b) should begin with **"Subject to paragraph 1, the contractual…"** The Convention's choice of law rules exclude contractual rights and duties that do not involve the legal nature and effects of crediting and effecting dispositions of securities.	USA

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4(1) (Prel. Doc. 10): – "timing issue"	Delete the brackets.	Belgium
	We thank you for including the time issue in the draft of the article. As we see it there are still some time issues to be solved. When deciding the relevant time **the decisive fact should be the time when the disposition in question was made**. This is also in line with the general interpretation of the *lex rei sitae* rule (the place of the securities when the actual disposition was made). In our opinion it is crucial to clarify explicitly what is the relevant time that determines the applicable law.	Sweden[?]
	We would **delete the parenthetical** because it is **open to multiple interpretations** and we do not find it generally helpful. The parenthetical could be read to modify either "law" or "State of the place of the relevant intermediary." One interpretation is that the applicable law is determined **at the time of the disposition**; another interpretation is that applicable law is determined **at the time of the priority dispute or litigation**, the implication being that the applicable law could change between a disposition and a later priority dispute; a third interpretation is, having determined the law applicable under the Convention, one applies the **substantive law that was in effect at the time of a particular event** even though at the time of examination of that event the law has changed; yet another interpretation is that, having determined the applicable law under the Convention, one applies the **current substantive law of that State**.	USA
	We note that in Preliminary Document No. 13, you have **eliminated** the bracketed language that appeared in Article 4(1) of the April Draft Convention, namely, **"[at the time of the event giving rise to the relevant issue.]"** In case that wording makes a reappearance at some later stage, we wish to note that, while we sympathise with the concern of some commentators that led to its inclusion in the April Draft Convention, **we are not in favour of its retention**. It is generally agreed that a court should not determine the law applicable to an issue specified in Article 2(1) at the time the court is considering the issue, but instead the court should make the relevant determination at the time it would according to its own domestic principles. **It does not seem unreasonable to leave this issue to the court to decide**, as it would normally do in any	ISDA

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

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	case where it is required to apply a choice of law rule. On the other hand, the inclusion of the proposed words **might, in some cases, lead to a result inconsistent** with the result the court would otherwise reach applying its normal rules. There are broadly **two concerns**. One is that under a court's normal rules, the relevant time might be determined according to a **local mandatory policy** that requires the law to be determined as of a time falling before or after the relevant "event". For example, the local policy might require the applicable law be determined as of the opening of an insolvency proceeding or the making of a liquidation order. The other more compelling concern is that the **word "event" in the proposed bracketed language is potentially ambiguous**. The situation giving rise to the question referred to in Article 2(1) may be **composed of a number of events**. A single event may be composed of different stages, occurring at different times (a disposition, for example, being composed of one or more instructions and corresponding debits and credits at different stages in the chain from the transferor to its intermediary to the transferee's account with its own intermediary). For example, in a priority dispute falling within Article 2(1)(d) between two secured parties claiming an interest in the same collateral, the question arises **whether the relevant event in the priority dispute is the creation (or attachment) of the second secured party's security interest or its subsequent perfection**. A court in attempting to interpret the Convention might feel constrained to reach a result inconsistent with its normal rules for determination of the relevant time. This could lead to uncertainty, inconsistent with one of the primary objectives of the proposed Convention. Accordingly, we would recommend that the proposed bracketed language not be included in Article 4(1), but that instead **clear guidance be given in the official Explanatory Memorandum** accompanying the proposed Convention that Article 4(1) is **not intended (a) to displace a court's normal rules for determining the time at which the applicable law is to be determined or (b) to require that the court make that determination as of the time it is considering the issue**.	
	A provision covering the moment in time relevant for the determination of the applicable law was inserted in the version of Article 4 (1) contained in Preliminary Document No. 10. Such a provision is **necessary** and therefore to be welcomed. Its specific **wording could, however, cause misunderstandings as regards which event is meant** in the phrase “at the time of the event giving rise to that issue” and **which part of the sentence this phrase is supposed to refer to**. **We assume that the event referred to is the respective disposition and not any legal dispute that may arise later**, for example. We also assume that, when determining the relevant time in this connection, reference is made to the law applicable to the disposition at a given moment. Clarification to this effect might be helpful.	Bundesverband deutscher Banken

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4(2) (Prel. Doc. 10): **-** **primary connecting factor**	As indicated previously, we are **in favour of Article 4 as it stands** which received a large support during the last meeting of the Special Commission in January 2002 when this issue was discussed for the last time by the plenary Group. In this context, **we do understand neither the rationale nor the usefulness of accumulating the number of alternatives** at this stage of the work process at the eve of the finalisation of a draft that should be then discussed by a diplomatic Conference during the fall of this year. We **welcome of course any tentative to reach a consensus** among the various delegations and we are confident that such alternative proposals have been made in view of various contacts and regional workshops in order to move forward. We do not believe however that variations of the same idea may lead to such result especially in the course of a written procedure with delegations that do not know the positions of the others. We will therefore not comment on the two alternatives of Article 4 attached to the April 2002 Preliminary Draft. **If** however it would appear from the current consultation process that an **alternative is required**, then we would rather **support any proposal that would avoid an Article 4 based on the agreement of the parties counterweighted by objectivity tests themselves mitigated by the combination of complicated "black" and "white" lists**, even though we fully recognize that the issue is delicate and that we must avoid any oversimplification. Bearing this consideration in mind, we believe that any new alternative, if it would appear that we need one, should tend to confirm what will be in our view the most encountered situations, meaning the **stipulation of an agreement, explicitly or implicitly (with some exemplative criteria in this respect), relating to where the securities account in question will be maintained or held**, without reference to any additional conditions, nor to any "lists". The following proposal should be read in conjunction with Article 17 bis relating to the protection of pre-existing custody agreements. **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.~~** See also the proposal under 4(3).	Belgium
	In Prel. Doc. No. 10, the combined effect of 4(2) and the restrictive approach to the white list was, in effect, to revert to "Option Z" in relation to Article 4 in Prel. Doc. No. 7 in December 2001, which required that the	Canada

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	account "in fact" be maintained at the agreed-upon office. **The "Comment" under "Introduction: the purpose of the white list" misstates the background to the "core provision of the Convention, i.e. Article 4(2)".** As the Canadian delegation pointed out in its comments on the February draft, Article 4(2) reflects a compromise. **By using the location of the maintenance of the account as a reality test, Article 4(2) is no longer PRIMA as described in Prelim. Doc. No. 1. It has become the "Place where the Relevant Intermediary Maintains the Account".** Instead of looking through to the underlying securities, Article 4(2) requires market participants to look through to the intermediary's account maintenance practices. **In Prel. Doc. No. 10, the compromise between those jurisdictions who need the reality test and those who need a broad interpretation of account maintenance has been lost.** This is reflected in the comment stating that the purpose of the white list is to "clarify" 4(2) by identifying the core functions relating to the activity of maintaining an account. It says that things like general overhead functions should not be included. **We disagree with that position because it takes us right back to the question we all agreed to avoid: where is an account "really" located?** Our understanding is that the Special Commission had reached a consensus that it was **impossible to answer that question**. In light of that, the Convention should not attempt to construct a white list of what constitutes maintenance of an account, and keep some activities off that list because their relationship to account maintenance is not sufficiently "direct". ******* Dans le Document préliminaire no 10, l'effet conjugué de l'article 4, paragraphe 2 et de l'approche limitative adoptée au sujet de la liste blanche a pour effet de revenir à l'« option Z » de l'article 4 du Document préliminaire no 7 de décembre 2001, qui exigeait que le compte soit « en fait » tenu dans l'établissement convenu. **La section « Introduction : l'objet de la liste blanche » sous « Commentaire » rapporte incorrectement le contexte de la « disposition fondamentale de la Convention, à savoir, l'article 4, paragraphe 2 ».** Comme l'a souligné la délégation canadienne dans ses commentaires sur le projet de février, l'article 4, paragraphe 2 représente un compromis. **Étant donné que le lieu de tenue du compte est utilisé à titre de critère de réalité, l'article 4, paragraphe 2 ne représente plus le PRIMA, tel que décrit dans le Document préliminaire no 1. Il s'agit maintenant du « lieu où l'intermédiaire pertinent tient le compte ».** Plutôt que d'examiner les titres sous-jacents, l'article 4, paragraphe 2 exige des participants du	

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	marché qu'ils examinent les pratiques de tenue de compte de l'intermédiaire. **Dans le Document préliminaire no 10, le compromis entre les États qui exigent le critère de réalité et ceux qui exigent une interprétation plus large de la tenue de compte n'existe plus.** On fait référence à cette situation lorsqu'on mentionne dans le commentaire que l'objet de la liste blanche est d'« expliciter » l'article 4, paragraphe 2 en identifiant les fonctions fondamentales relatives à l'activité de tenue d'un compte. En d'autres termes, ce commentaire stipule que les éléments tels que les fonctions générales ne devraient pas être incluses. **Nous sommes en désaccord avec ce point de vue car il nous ramène directement à la question que nous voulions tous éviter : à quel endroit un compte est-il « réellement » situé?** Notre compréhension étant que les membres de la Commission spéciale se sont entendus pour dire qu'il **était impossible de répondre à cette question**. Par conséquent, la Convention ne devrait pas tenter d'élaborer une liste blanche de ce qui peut être considéré comme étant de la tenue d'un compte et devrait exclure des activités de cette liste puisque leur lien avec la tenue d'un compte n'est pas suffisamment « direct ».	
	There are **questions on the correct interpretation of Article 4 (2) of the draft Convention**. It may be argued from the wording that the provision has to be understood in such a manner that the choice of the parties (i.e. the account holder and its intermediary) as to the place on where the account is deemed to be maintained is valid, irrespective of whether the parties actually have complied with the agreement or not and whether the account is ("actually") maintained at a completely different place. The provision could also be read in a way that, in a case where the account were not to be maintained at the place agreed between parties, such agreement would be considered a "sham" and would not be considered to be valid and enforceable under national law. Given the fact that, generally, the draft Convention is considered as a refinement and evolution of the principle of Article 9 (2) of the Settlement Finality Directive and Article 9 of the draft Collateral Directive, the latter interpretation would be in line with these Community legal acts. Consequently, such interpretation would be favoured by the ECB.	ECB
4(2) (Prel. Doc. 10): – "timing issue"	**The added clause "at the time of the agreement" would preserve the choice of applicable law if, for example, after the parties have selected the law of a State in their agreement, the relevant intermediary closes all of its offices in that State engaged in a business or other regular activity of maintaining securities accounts, and the parties do not amend their agreement.** This protects parties that have appropriately relied on the choice of law in the agreement in perfecting dispositions. On the other hand, where the reference to the location of the account in the agreement has changed, parties will need to determine at the time of a disposition whether the relevant intermediary previously had an office in the	USA

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	previously referenced State which was subsequently closed, in determining whether there are perfected priority dispositions. This presents some burden, but we have no objection to striking the balance in this way.	
4(3)	Proposal for paragraph 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, in particular, but not by way of limitation, by reference to any provisions or factors referring to the place where entries to a securities account by the intermediary are made or managed, or where position monitoring of securities accounts is operated [other criteria may be added if needed]."**	Belgium
4(4)	**(4) If the State of the place of the relevant intermediary cannot be determined under paragraph 2, that State is –** **(a) if the relevant intermediary is incorporated, the State under whose law it is incorporated;** **(b) if the relevant intermediary is an unincorporated body, the State under whose law it is organised; or** **(c) in any other case, 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.** **This is the previous wording of Article 4(4).** This previous text (on which there was unanimous consent) seems preferable because the result of the **merger made in the current 4(4) leads to a legally incorrect provision.** The word "incorporated" refers to the State under whose law the intermediary grants its legal personality. On the other hand, the word "organized" refers to the *lex societatis* which could differ from the law under which a legal person is incorporated. This raises the well known issue of the (voluntary or involuntary) transfer of a company seat, which could lead to very difficult legal issues due to the coexistence of the real-seat theory and of the incorporation theory. For these reasons, regarding the intermediary being incorporated, we are of the opinion that we should refer distinctively to the "State under whose law it is incorporated".	Belgium

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4 bis (Prel Doc 10): - **"white list"** (see also the comments under "New Proposal for Article 4 and 4 bis")	In our view, under the new proposal above (see the Belgian comments under "4(2) (Prel. Doc. 10): primary connecting factor"), the current Articles 4 bis and 4 ter may now be discussed in the Explanatory report. Against this background, we suggest to delete 4 bis. In any event, we are opposed to letter (f), as this criteria may not be applicable everywhere and may also lead to inappropriate results in certain types of securities accounts schemes. Regarding the comments appearing in the Annex to Prel Doc 10 under sub-paragraph b, we do not understand the reference to underlying securities at the end of the second paragraph.	Belgium
	The Luxembourg Ministry of Justice **strongly favours the white list proposed by the Permanent Bureau in Appendix 1**. There seems, however, to be quite a fundamental mismatch between the French and the English version of the proposal. **Whilst the English text refers to an open list ("but not by way of limitation") the French text comprises a closed list**. The Luxembourg Ministry of Justice favours a closed list. The initial and most important goal of the Convention is to provide legal certainty in an area of law where today there is legal uncertainty. Only a closed list can achieve legal certainty. An open list, the aim of which seems to be allow for "flexibility", would in reality reintroduce almost full contractual freedom, which Article 4(2), through its reality test, aims to avoid. It seems to us fundamental that the focus only be on "ex ante legal certainty" and that such goal not be jeopardised or used for other purposes such as a questionably necessary flexibility. As to the details of the text proposed by the Permanent Bureau in Appendix 1 it is suggested **to delete in sub-item (a) the term "or monitored" to simplify the text**. **Sub-item (c) should be deleted** as accountholder support functions are typically carried out through representative offices. Although we are very sympathetic to the idea expressed in **sub-item (d), such item cannot be considered as**	Luxembourg

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	an "activity" as set out in the introductory paragraph. The text may have to be reworded to account for this.	
	As you know we were in our last paper generally opposed to the idea of having a white list. However **we can now support subparagraph (a) and (b) of the white list**.	Sweden[?]
	In regard to the various possible versions of that Article, we **clearly favor the broader list on page 18 of the April 2002 Preliminary Draft**. Even though the list is not exhaustive, we should **avoid creating the impression** that the language "office engaged in a business or other regular activity of maintaining securities accounts" is **meant narrowly**, leaving little room within which the parties may choose the applicable law. Otherwise the introduction of a party agreement on this score will be largely illusory and impose upon the industry the unnecessary cost of changing documents to include a party agreement that has virtually no practical effect.	Switzerland
	Based on our meetings with market participants, there seems to be a consensus that **having the white list as a non-exclusive safe harbor in the text of the Convention is extremely important**. In addition, there seemed to be a consensus that it could be drafted in a comprehensive way with only a few items. **We are generally supportive of the proposal introduced by the Secretariat in Appendix 1 of the April draft with some minor changes**. Some have suggested that the **actual handling or making of entries** to securities accounts is an important function that should be encompassed in **(a)**. It would be helpful for the text or commentary to include that. Those with an understanding of the French language believe that the concept is expressed in the French language version. **We suggest that the word "and" between management and administration in item (b) be changed to "or."** The word "and" suggests that management and administration, to the extent that they are separate and distinguishable, must both occur at the office. This strikes us as an overly technical and specific reading of those terms which reading does not appear warranted in a treaty text. It may be appropriate **to include (c) if (a) and (b) do not already cover the functions described therein**. We think they are covered.	USA

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

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	We have **no preference for item (d)** but do not object to its inclusion because it has the support of several delegations. We prefer that the purpose of the white list not be described as to "clarify the content of the proviso." In our view the proviso does not require clarification. The purpose of the white list is to provide comfort to market participants that certain activities do in fact constitute being engaged in a business or regular activity of maintaining securities accounts, thus achieving a high level of *ex ante* predictability.	
	We understand that the drafting process with regard to the so called "white-list" contained in Article 4bis of the draft Convention has not yet reached its final stages, therefore the comments will be more of a general nature. **The ECB would favour (as a principle) a short and exhaustive list in Article 4bis, as this would limit the possibility of alternative choices, and therefore increase ex-ante certainty considerably.** In particular, it would decrease the necessity for due diligence or legal opinions as to which functions are performed by a given intermediary and at which places. **From that perspective, the efforts undertaken by the Sub-Committee are a step into the right direction although still compromised by the fact that the list is non-exhaustive.**	ECB
4 ter (Prel. Doc. 10): – "black list"	In our view, under the new proposal above (see the Belgian comments under "4(2) (Prel. Doc. 10): primary connecting factor"), the current Articles 4 bis and 4 ter may now be discussed in the Explanatory report. Against this background, we suggest to delete 4 ter.	Belgium
	We are in favour of keeping the black list.	Sweden[?]
	We continue to believe that the **"black list" is also an extremely important part of the Convention text**. It eliminates, once and for all, the "look through" approach or the notion that a securities account can be located by reference to the location at which some particular set of the administrative or clerical functions is carried out. That has always been the point of the so-called "black list" of factors that do not determine the applicable law. This point is **so fundamental to the Convention, and it may be such a sharp break from prior law in some jurisdictions, that we believe it is important to state the point explicitly**.	USA

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

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New Proposal for Articles 4 and 4 bis, including "white list" and "black list" (Prel. Doc 13)	Generally, this new draft Article 4 and 4bis found in Prel. Doc. 13 is **an improvement** in comparison with Prel. Doc. 10. The Canadian Delegation would **strongly support the deletion of the text in square brackets** in the chapeau of Article 4(1). **We strongly agree with the comments made in paragraph 2 of the Explanatory Notes, but note that those comments are not yet reflected in the text of Article 4.** The key elements of those comments are that: The reality test does not ensure that the place agreed is in fact the place where the account will be maintained. The Explanatory Note acknowledges "the difficulties in locating an account at one place with precision", but that is an understatement. It should be **explicitly acknowledged that there are circumstances where it is impossible to locate an account by objective measures**. **The Explanatory Note suggests 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".** That is correct, and it is the essence of PRIMA. As long as the reality test is limited to testing "where the account is maintained", it is not PRIMA. **The most important point is not stated in the Explanatory Note, but follows inevitably from the preceding points-the reality test must accept connections between the relevant intermediary and the State chosen that do not relate to the maintenance of an account.** The real challenge for the Convention's reality test is in dealing with innovative or unconventional intermediaries, such as those who **offer services to customers by telephone or through the Internet**. In Canada, we already have intermediaries who contract out all their back office activities and we anticipate that this practice will increase, especially as we move towards T+1 settlement. Although such intermediaries will certainly have a Canadian office (i.e. a legal and physical presence in Canada) **that office will often act, at most, as a conduit to a 3rd party who will execute orders and do everything normally associated with account maintenance, including the sending of account statements**. **The 3rd party, and all of the 3rd party's operations, may be located in a foreign jurisdiction.** Consider an **example** where such an intermediary is registered in Canada (Alberta). Our registration requirements include a legal address for service in Alberta and a formal attornment to the jurisdiction of Alberta's courts. Assume that the intermediary offers its services through the Internet to Alberta customers	Canada

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	and that all back office services are performed by a 3rd party whose operations are located in the U.S. and who is incorporated in the U.S. Can the intermediary and its Alberta customers validly agree that PRIMA is Alberta? In our view, the Convention must allow this. It is important to recognize some of the practical factors in this example. **First, the actual account maintenance activities and operations are invisible to the customer.** From the customer's perspective, they are simply dealing with an intermediary who is registered and regulated by their local securities regulator. **Second, many customers need their local law to apply because it facilitates them using their account as collateral with local lenders**. If the Convention invalidates the agreement that PRIMA is Alberta, and forces the application of U.S. law, that fact may well put the intermediary out of business in Alberta, because many customers will choose to deal with another intermediary who can offer Alberta law. Part of the rationale expressed in Prel. Doc. No. 10 for a restrictive white list was to ensure that it would not allow arbitrary or abusive allocations by custodians to whatever jurisdiction they choose. **We emphasize that, in the example we have presented, Alberta is not an arbitrary or abusive choice of jurisdiction**. The intermediary has a real connection to Alberta even though, strictly speaking, it does not conduct account maintenance activities there. We suggest that it would be an error for the Convention to, in effect, impose a single view of what is an abusive or arbitrary agreement between intermediaries and customers regarding the law applicable to an account. There are two fundamental problems with this: **1) The single view of what is abusive or arbitrary will inevitably be the wrong view for some jurisdictions**. It is wrong from the Canadian perspective because it will restrict competition among intermediaries who do business in Canada. While we fully respect the rights and views of other jurisdictions who may choose to restrict competition among intermediaries who do business there, Canada should have the right to makes its own decisions in this regard. **2) It is not the function of a choice-of-law Convention to regulate the behavior of intermediaries, or to dictate how they arrange their back office operations or commercial relationships with their customers.** Those are the responsibility of individual jurisdictions. Each jurisdiction should be free to decide whether or how to implement local laws to regulate the choice-of-law agreements made between intermediaries and customers in that jurisdiction. Each jurisdiction's decision should be based on their own assessment of local circumstances, including complex considerations regarding the competitiveness of intermediaries and the protection of local customers. We see no justification for the Convention to override	

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	this local regulatory autonomy. Our interpretation of Article 4 in Prel. Doc. No. 13 suggests that, **in the example** we have presented, the **Convention would invalidate the parties' choice and impose U.S. law**. For the reasons explained above, we suggest that this is the **wrong result**, and that the Convention must be revised to support the choice of the parties in similar situations. **We suggest that the white list recognize having a legal address for service in the jurisdiction as a sufficient connection with the State chosen by agreement.** **Additional question** **Under Article 4 in Prel. Doc. No. 13, would the use of a special account number designating the account as an Alberta account be sufficient when it is clear that the Alberta office of the intermediary does nothing that could be construed as maintaining securities accounts?** **Subparagraph 4(1) e)** The Canadian delegation reiterates its position that the reality test must accept connections between the relevant intermediary and the State chosen that do not relate to the maintenance of an account. Subject to that, the Canadian delegation **strongly supports the retention of the words in brackets in subparagraph 4(1)(e)** found in Prel. Doc. 13 **Fallback rule** The Canadian Delegation is of the view that the second **black list in Article 4bis(2) of Prelim. Doc. 13 should apply to the whole of the Convention and not only to paragraph 4bis(1).** ******* En règle générale, la nouvelle version des articles 4 et 4bis qui se trouve dans le Document préliminaire no 13 constitue **une amélioration** par rapport à celle du Document préliminaire no 10. La délégation canadienne est **fortement en faveur de la suppression du texte entre crochets** dans le chapeau de l'article 4, paragraphe 1. **Nous sommes tout à fait d'accord avec les commentaires faits au paragraphe 2 des notes explicatives, mais nous remarquons que le texte de l'article 4 ne reflète toujours pas ces commentaires**. Voici les éléments clés de ces commentaires : Le critère de réalité ne permet pas de s'assurer que le lieu convenu est effectivement le lieu où le compte sera	

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	tenu. Dans les notes explicatives, on reconnaît « la difficulté de localiser avec précision un compte dans un lieu donné », et c'est le moins qu'on puisse dire. **Il devrait être reconnu explicitement que dans certaines circonstances, il est impossible de localiser un compte à l'aide de mesures objectives.** **Dans les notes explicatives, on suggère que « cette disposition ne se concentre plus sur la notion de lieu de tenue du compte, mais fasse plutôt référence au lien existant entre l'intermédiaire pertinent et l'État choisi ».** Ce commentaire est tout à fait indiqué et il constitue l'essence du PRIMA. Tant que le critère de réalité se limite à évaluer « le lieu où le compte est tenu », le principe PRIMA n'est pas appliqué. **Le point le plus important n'est pas indiqué dans les notes explicatives mais il découle inévitablement des points précédents, à savoir, le critère de réalité doit tenir compte des liens entre l'intermédiaire pertinent et l'État qui ne se rapportent pas à la tenue d'un compte.** Le vrai défi auquel doit faire face le critère de réalité de la Convention sont les intermédiaires innovateurs ou non conventionnels, tels que ceux qui **offrent leurs services aux clients par téléphone ou sur Internet**. Au Canada, nous avons déjà des intermédiaires qui font affaire avec des sous-traitants pour toutes leurs activités postmarché et nous prévoyons que cette pratique prendra de l'importance, particulièrement à mesure que nous nous rapprocherons d'un règlement T+1. **Même si de tels intermédiaires auront certainement un établissement au Canada (c.-à-d., une présence juridique et physique au Canada), cet établissement agira souvent, tout au plus, comme un conduit vers un tiers qui exécutera les ordres et toutes les tâches qui sont normalement liées à la tenue d'un compte, notamment l'envoi des états de compte. Ce tiers, et toutes ses opérations, peuvent se trouver dans un État étranger.** Prenons **l'exemple** d'un intermédiaire dont le principal établissement est situé au Canada (Alberta). Nos exigences d'enregistrement comprennent une élection de domicile aux fins de signification en Alberta et une attribution formelle de la compétence aux tribunaux de l'Alberta. Imaginez maintenant que cet intermédiaire offre ses services sur Internet à des clients de l'Alberta et que tous les services postmarché sont rendus par un tiers dont les opérations sont effectuées aux États-Unis et qui est incorporé aux É.-U. L'intermédiaire et ses clients de l'Alberta peuvent-ils convenir de façon valable que le PRIMA est l'Alberta? À notre avis, la Convention doit permettre ce raisonnement. Il est important de reconnaître quelques-uns des facteurs pratiques de cet exemple. Tout d'abord, **les activités et les opérations réelles liées au compte sont inconnues du client**. Du point de vue du client, il fait simplement affaire avec un intermédiaire qui est inscrit auprès de, et réglementé par son organisme de réglementation du commerce des valeurs mobilières local. **De plus, pour bon nombre de clients,**	

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	l'application des lois locales est nécessaire pour leur permettre d'utiliser leur compte comme une garantie auprès de leurs prêteurs locaux. Si la Convention invalide le consensus selon lequel le PRIMA est l'Alberta et force l'application des lois américaines, cela pourrait fort bien forcer l'intermédiaire à se retirer des affaires en Alberta, étant donné que bon nombre de clients choisiront de faire affaire avec un autre intermédiaire auquel les lois de l'Alberta s'appliquent. Une partie de la justification exprimée dans le Document préliminaire no 10 pour l'application d'une liste blanche limitative était de s'assurer que les conservateurs n'affectent pas de manière arbitraire et abusive les comptes de titres à tout État de leur choix. Dans l'exemple que nous avons présenté, **nous insistons sur le fait que l'Alberta n'est pas un choix arbitraire ou abusif**. L'intermédiaire a un lien réel avec l'Alberta même si, à vrai dire, les activités de tenue de compte n'y sont pas effectuées. Nous croyons que la Convention ne devrait pas imposer une seule façon d'évaluer les ententes abusives et arbitraires entre les intermédiaires et les clients en ce qui concerne les lois qui s'appliquent à un compte. Cette façon de faire comporte deux problèmes de fond : **1) Une seule détermination de ce qui est abusif ou arbitraire sera inévitablement insatisfaisante pour certains États.** Elle le serait du point de vue du Canada parce qu'elle aurait comme conséquence de limiter la compétition entre les intermédiaires qui sont en affaires au Canada. Bien que nous respections entièrement les droits et les opinions des autres États qui choisissent de limiter la compétition entre les intermédiaires qui y font affaire, le Canada devrait pouvoir prendre ses propres décisions à ce sujet. **2) Une convention visant à déterminer la loi applicable n'a pas pour objet de réglementer le comportement des intermédiaires ou de dicter de quelle façon ils doivent organiser leurs opérations postmarché ou leurs relations commerciales avec leurs clients.** Cette responsabilité revient à chacun des États. Chaque État devrait être libre de décider si des lois locales doivent être adoptées pour réglementer les ententes de loi applicable conclues entre des intermédiaires et des clients dans cet État ou la façon d'adopter de telles lois. La décision de chaque État devrait reposer sur sa propre évaluation des circonstances locales, notamment des considérations complexes relatives à la compétitivité des intermédiaires et la protection des clients locaux. Nous sommes d'avis que rien ne justifie la suppression de cette autonomie de réglementation locale par la Convention. Selon notre interprétation de l'article 4 du Document préliminaire No 13, **la Convention invaliderait le choix des parties et imposerait les lois américaines dans le cas de l'exemple donné précédemment**. Pour les raisons exposées plus tôt, nous considérons que **ce résultat n'est pas approprié** et que la Convention	

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	doit être révisée pour soutenir le choix des parties dans des situations similaires. **Nous suggérons qu'une élection de domicile aux fins de signification dans l'État puisse être reconnue par la liste blanche comme un lien suffisant avec l'État choisi par entente.** **<u>Question supplémentaire</u>** **Aux termes de l'article 4 du Document préliminaire no 13, l'utilisation d'un numéro de compte spécial l'identifiant comme un compte de l'Alberta serait-elle suffisante lorsqu'il est clair que l'établissement Albertain de l'intermédiaire n'est responsable d'aucune activité qui peut être interprétée comme une activité de tenue de comptes de titres?** **<u>Article 4, paragraphe 1, alinéa e)</u>** La délégation canadienne réitère sa position, à savoir que le critère de réalité doit prendre en compte les liens entre l'intermédiaire pertinent et l'État choisi qui ne correspondent pas à la tenue d'un compte. Sous réserve de ce qui précède, **la délégation canadienne est vigoureusement en faveur de conserver le texte entre crochets de l'article 4, paragraphe 1, alinéa (e)** qui se trouve dans le Document préliminaire no 13. **<u>Rattachement subsidiaire</u>** La délégation canadienne estime que la seconde liste noire de l'article 4bis, paragraphe 2 du Document préliminaire no 13 devrait **s'appliquer à l'ensemble de la Convention** et non seulement à l'article 4bis, paragraphe 1.	
	The Danish Government **supports the principles in the proposal for a new Art 4**, which were suggested by the Bureau in Prel. Doc. No. 13. **With respect to the text in brackets in Art 4(1) of the proposal, the Danish Government supports a deletion of those words for the reasons stated in Prel. Doc. No. 11**. The Danish Government supports of having the **white list included in Art 4** instead of in a separate Article, **provided there is a strong support by other States to have a white list at all**. However, with respect to the reality test factors listed in the suggested white list, **Denmark has not yet decided whether to support the current wording or whether changes would be preferable**. With regard to the **"second" black list in new Art 4bis, para. 2, the Danish government finds that reference should be made to all the rules of the Convention and not just Art 4bis, para. 1**, as it is important that the black list also excludes taking into account the listed factors when deciding the applicable law under Art 4(1).	Denmark

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	We shall concentrate here to the new proposals for Articles 4 and 4bis in Preliminary Document No 13. The previous language for those Articles in Preliminary Document No 10 is referred to as the "original". As we have previously stated, we understand symbolic importance of emphasizing the PRIMA in the original Article 4, paragraph 1. The substantial provisions are, however, in the following paragraphs. Therefore, we **support the Permanent Bureau's suggestion for deleting the original paragraph 1**. Concerning the material contents of the new paragraph 1, we **support** the Permanent Bureau's suggestion. We support also **deleting the bracketed language** in the chapeau of paragraph 1. The connection between the intermediary and the "reality test" is now **direct and simple** ("an office in that State"). We support also the idea of reforming the reality test with elements of the "white list". As such, we **prefer the abridged language in Appendix of Preliminary Document 10** to the language of Article 4 in the Preliminary Document itself. So, we support the language in the new Article 4, paragraph 1, **except subparagraph b** which is unclear and **subparagraph d** which we prefer to be **deleted**. We would like to have an explanation of what is meant by expression **"corporate events"** in subparagraph b. As we said in the Special Commission in January 2002, we see a **reference to a account code or bank number in subparagraph d arbitrary**. The code does not prove in any way that the intermediary is regularly engaged in a business or other regular activity of maintaining securities accounts in a particular office of even a particular State. We support so the comments presented by the Permanent Bureau in the Appendix of Preliminary Document 10. It is, however, **problematic to leave the crucial requirement of *business-nature and regularity* of the intermediary's activity only to a reference in subparagraph e of paragraph 1**. Also the activities referred to in **subparagraphs *a–d* must be business-connected/ regular by nature**. The reference to regular engagement in a business or other regular activity of maintaining securities accounts should be in *the chapeau* of paragraph 1, as it is in paragraph 2, so that it covers also subparagraphs a–d. Concerning the bracketed language in **subparagraph e**, we prefer **deleting the bracketed language**. The office in question must be engaged in a business of maintaining securities accounts, as defined in subparagraphs a–e. We **strongly support the idea of separating the <u>"first black list"</u> in the new Article 4, paragraph 2 from the "second black list" in the fallback rule in the new Article 4bis, paragraph 2**. The first black list strengthens the relevance of the reality test. **Its exact contents must be, however, carefully considered**.	Finland

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	What are, e.g. the **filing rooms in subparagraph c**? Does the expression refer to vaults where immaterialised securities are held by a CSD? According to Preliminary Document 9, it seems to be a general opinion that CSDs and ICSDs must be included to the Convention, and in many legal systems they keep the paper-form securities in their vaults. It must be made clear that the intent of this subparagraph is not to leave them outside the scope of the Convention. The **"second black" list of paragraph 2** lists elements which have nothing to do with the law of the intermediary. The new Article 4 determines the freedom on contract between the account holder and the intermediary and sets limits, connected to the offices of the intermediary, to that freedom. Paragraph 1 of the new Article 4bis determines the applicable law if the account holder and the intermediary have failed making a contract satisfying the requirements of **Article 4. Paragraph 2 of Article 4bis lists facts that have no relevance for determining the applicable law, either according to Article 4 or Article 4bis**. **So, we prefer deleting the whole paragraph**. It is not necessary to give an example list of factors that are totally irrelevant for a *judge* determining applicable law. On the other hand, nothing prevents taking those factors into account when the intermediary and the account holder agree on applicable law in accordance with Article 4, of course on the condition that the requirements set out in Article 4 paragraph 1 are fulfilled.	
	La structure actuelle de la règle de conflit de lois proposée par la version remaniée de l'article 4 est la suivante : Autonomie de la volonté sous réserve que le choix se porte sur la loi d'un Etat dans lequel l'intermédiaire a un établissement qui se livre à certaines activités (a) ou (b) ou (c) ou (e) ou qu'un numéro de compte ou un code bancaire puisse rattacher le compte à l'établissement. **La délégation française se félicite que le rôle imparti à la volonté des parties soit ainsi rehaussé à sa juste mesure**. A première vue, la **fiction de localisation du lieu de tenue de compte**, qui subsiste entre crochets dans le chapeau du paragraphe 1, **perd une grande partie de sa raison d'être, alourdit la lecture du texte et fait double emploi avec les critères qui limitent désormais le choix des parties**. Cependant, il convient de s'attacher au sens de ce passage entre crochets. **La raison d'être de cette fiction de localisation est très certainement de limiter le choix des parties à la loi de l'Etat où le compte est *réellement* tenu**. Il serait peut-être possible de proposer la suppression du passage entre crochets mais en modifiant la version remaniée de l'article 4 § 1 comme suit : **« La loi applicable à toute question mentionnée à l'article 2, paragraphe premier, est la loi de l'Etat où est réellement tenu le compte de titres. Cette loi est la loi de l'Etat convenu**	France

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	entre le titulaire de compte et l'intermédiaire pertinent, à condition que l'intermédiaire pertinent ait, au moment de la conclusion de la convention un établissement dans cet Etat, et que, soit,… » Dans sa note explicative, le Bureau Permanent propose que la règle PRIMA figure dorénavant dans le **Préambule** de l'avant-projet. A ce stade des travaux, **il apparaît opportun de maintenir une référence à la règle PRIMA**. Pour les Etats membres de l'Union européenne, il faut rappeler que la Directive « contrat de garantie financière » fixe, pour les opérations qu'elle vise, le principe PRIMA sans toutefois en donner les critères opérationnels et fait à cet égard référence aux travaux en cours au sein de la CODIP. L'absence de référence à PRIMA dans l'avant-projet de Convention pourrait ainsi conduire à des crispations lors de l'élaboration du mandat de la Commission. L'ancienne **liste blanche** qui figurait dans une disposition distincte (article 4 bis original) fait maintenant corps avec la règle de conflit de lois principale ce qui rend **beaucoup plus claire la lecture du texte**. On peut toutefois s'interroger sur la pertinence de l'activité énumérée au **sous-paragraphe c)**, cette disposition figurant par ailleurs entre crochets. Dans l'hypothèse où les services d'assistance (notion qu'il est extrêmement difficile de définir) seraient fournis à distance par voie téléphonique, n'y aurait-il pas une certaine incompatibilité avec le sous-paragraphe b) du paragraphe 2 ? La nouveau réside dans le **sous-paragraphe e)**. Cette disposition admet que l'exercice par l'établissement d'autres activités que celles énumérées aux sous-paragraphes précédents permet de qualifier le choix des parties au titre de l'article 4 § 1. Certaines activités qui ne sont pas encore identifiées comme relevant de la tenue de compte pourront donc être prises en compte afin de compléter l'article 4 § 1. Un éclaircissement quant au type d'activité d'ores et déjà envisageable comme activité de tenue de compte devra être demandé au Secrétariat. **Il faut en effet éviter que le 4 § 1 (e) fasse double emploi avec les dispositions précédentes de l'article 4 § 1, en particulier le sous-paragraphe (a).** Il apparaît également **indispensable de compléter la liste noire de l'article 4 § 2**. Certaines activités identifiées préalablement comme ne constituant en aucun cas des activités de tenue de compte à titre professionnel doivent figurer dans cette liste noire. Tel est en particulier le cas de la **conclusion du contrat de tenue de compte** et le **fait de pouvoir obtenir des informations auprès d'un établissement**. Ces critères sont en effet beaucoup trop aléatoires pour attester du lieu de l'exercice de la tenue de compte. **La division de la liste noire en deux ensembles paraît plus cohérente.** Il semble donc que le futur article 5 § 2 ne doive **pas renvoyer à toute la Convention, mais simplement au paragraphe premier**.	

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	At the moment we do not prefer the deleting phrase in brackets in the first sentence [as the State in which the securities account is maintained] in Article 4 para. (1). In the event of deletion, there might be no connection between the „virtual“ place of the specified securities account and the following criteria of Article 4 para. 1 subpara. a to e. In order to determine the maintenance of the security account, it is necessary for the wording [as the State in which the securities account is maintained] to be mentioned in the chapeau of Ar-ticle 4 para. 1. As far as Article 4 para. 1 **subpara. a** is concerned, the wording (making and updating of entries) could lead to some misunderstanding because the words „making and updating“ are not usual in business. We would recommend the following wording: **„(a) the crediting and debiting of securities to securities accounts are managed or monitored at such office;“** Concerning Article 4 para. 1 **subpara. c,** this criterion seems to be **too vague**. The term „account holder support functions“ covers so many activities that we should for the sake of clarity and legal certainty **delete subparagraph c**. Regarding Article 4 para. 1 **subpara. d**, we prefer a **new wording** which reads as follows: **„...a single account number, bank code or other specific means of identification solely or together clearly identify the securities accounts as being maintained at such office;“** Last but not least, deletion of the phrase in brackets [, whether alone or together with other offices of the relevant intermediary or with other persons acting for the relevant in that or another State] in **subparagraph e** is up for discussion. We **still prefer deleting this phrase**, because it opens the door to a lot of interpretation problems. For the sake of legal certainty the Federal Ministry of Justice recommends the following wording concerning **paragraph two of Article 4**: **„The criterion e defined in paragraph 1 is not fulfilled merely because the office referred to is a place where...“.** Discussions have shown that the wording in the preliminary document could either refer to all criteria or only to criterion e of paragraph one. Furthermore the Federal Ministry of Justice would like to suggest **adding the following sub-paragraph (d)**	Germany

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	to Article 4 para. (2): **„(d) other services of a purely technical, mechanical or otherwise subordinate nature".** The **„black list" in Article 4bis** of the Convention seems to be very helpful, as it makes clear which elements are not taken into account when determining the applicable law in the fallback situation. Therefore the Federal Ministry of Justice **prefers the phrase „pursuant to paragraph 1".**	
	The Italian Delegation **welcomes the philosophy behind this proposal** of providing for a simplification of the text of Art. 4 **in so far as it does not change the substance of the compromise** which was reached in January 2002. Moreover, the proposed text is **more in line with traditional conflict of laws principles and construction**. However, the proposed version seems **much in favour of the position of those delegations which do not fully share the opinion that the place of the account is the correct criterion for the determination of the applicable law**. This is probably the reason why the "white list" is shorter in the sense that it limits the activities of the intermediary which can be considered and it excludes any mandate on the part of the intermediary to its auxiliaries. The Italian Delegation wishes also to draw the attention on the fact that the newly proposed version is **completely different from the Finality Settlement Directive and the proposed Collateral Directive**, which both refer to the place of the account. The reciprocal effect of the European and the future Hague rules is still largely unknown and has to be considered thoroughly at European level. Nevertheless, following the **same spirit of fruitful cooperation and compromise** which has been accompanying the project since its very start, the Italian Delegation makes the following further observations. The Italian Delegation **supports the merging of paragraphs 1 and 2 of Art. 4** and it considers also that it might be **wise to move the reference to the PRIMA principle to the preamble** (and explained in the Official Report, of course) because the PRIMA principle as incorporated in Art. 4 is only one of the possible PRIMA rules: in fact, it has been adopted in some States with different contents or even without any specification, and consequently the mere reference to the fact that the (future) Hague Convention applies the PRIMA rule might be sufficient.	Italy

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	As to the content of new paragraph 1, the Italian Delegation agrees on the fact that the January compromise was based on the reality test, which was supposed to be guaranteed by the white list of Art. 4bis, paragraph 1. In this respect **the newly proposed version, which discards the reference to the (often unknown and hardly provable) place of maintenance of the account and incorporates some of the relevant factors of the white list of Art. 4bis paragraph 1, would have the merit to impose a more proper reality check on the activity of the relevant intermediary.** To this extent **we would favour the new paragraph 2 of Art. 4**, in so far as it excludes reference to some activities which we already criticised, together with some other Delegations, in the comments on the January 2002 Draft. Nevertheless, the list should be more precise in order to make clear to the courts of all Contracting States which activities may be taken into account and which may not. At first sight we would be **neutral in respect to litt. c),** while we would **prefer the words into brackets in litt. e) to be discarded.** The last concern the Italian Delegation wishes to express concerns the fact that **the proposal might allow a different choice of law for each act of disposition**, while the previous version was more rigid as it provided for the choice of the State where the securities account was to be maintained. A point which is still unclear is the **time of the choice** and the underlying option as to the rigidity vs. the flexibility of such choice. Finally, the change in the text of Art. 4 **requires redrafting of Art. 9.** As far as the **fall-back rule is concerned, the fact of moving it to a new article is positive** if it is intended to clarify the fact that it is actually only a fall-back rule. However, if paragraph 2 of the new Art. 4bis will apply to all the rules of the Convention, we suggest that it becomes a new Article (Art. 4ter or eventually Art. 6). To this end, as we pointed out in our comments on the January 2002 Draft, **we consider the black list necessary in so far as it applies to the whole text**, that is if it prevents the court to take such factors into consideration also when evaluating the terms of the contract under Art. 4.3. Therefore, we would support the words "[pursuant to paragraph 1]" to be deleted and the words "under the rules of this Convention" to be kept out of brackets.	
	The idea of **streamlining** a text that had become rather complex following proposals that were made during the last days of the January Special Commission **seems attractive**, but could open the door to a complete reopening of a debate that we thought had been closed in January and is therefore to be **handled with caution**.	Luxembourg

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	Due to the very short time period between the receipt of Preliminary Document 13 and the deadline for comments a **thorough review and consultations were not possible**. The Ministry is therefore limiting, at this stage, its comments to a number of preliminary thoughts: **the reference to the "securities account" seems to be designed to disappear.** There is a concern that this **may create problems both under EC law** (finality directive) and under our own **national law**; first paragraph of Article 4(1) does not say to which agreement reference is made, especially if the square bracketed language were to be deleted; we assume that the drafters had the **custody agreement** in mind; the comments made above apply *mutatis mutandis* here (i.e. **closed list**, **deletion of certain terms and paragraphs**); the **relationship between Article 4 bis (1) and (2)** may have to be clarified. The Luxembourg Ministry of Justice reserves the right to further comment on the text proposed by the Permanent Bureau and possibly to submit alternative wording that accounts for its concerns.	
	We share the Secretariat's comments on the draft of Article 4 reproduced in Prel. Doc. 10. **The reference to the location of the securities account is just a way to express the agreement to the law of one State, and we could perfectly delete it**. In that version, the parties are allowed to choose the law of the State "A" as long as the intermediary has an office there (an office engaged in a business…); nevertheless, they are not allowed to do that directly, but indirectly, by placing the account in that State. If we are not wrong, **the main advantage of the new version is that it overcomes this periphrasis**: it allows the parties to choose the law of the State "A", and therefore they are not obliged to make an "artificial location" of the account. Secondly, we all agree on the necessity of the Convention, and we will support any reasonable solution. If the general opinion is in favor of the new version we will joint it without any doubts. Nevertheless, we would like to express two concerns: The first one is related to the "approach" to the problem. So far, we have followed an approach based on the account, and to be more precise, on the location of the account. This approach has led us to an "artificial" and "peripheral" solution (the parties can choose the law of one State but through locating the account there). But even if this is not true, that solution had some advantages: (i) it was in line with the solution followed by the European legislation (Art. 9.2 of the FD, f.i.); (ii) it was easier to assimilate for those States that look for	Spain

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	the solution of this kind of problems in the *lex rei sitae rule* (they argue as follow: "as long as we are dealing with proprietary aspects and the account is the res, we have to look for the location of the account"); and (iii), it was easier to assimilate for public authorities (supervisors, regulatory bodies,…); they commonly operate with the concepts of "account" and "location of accounts". It is true that the Convention only covers private law aspects, but is also true that these aspects may have some repercussion in public law dimension. The second concern is related to the compatibility of the new draft with European law; in particular with the Finality Directive and with the Collateral Directive. Those European rules are based on the "location of the account" approach, and the new version of Art. 4 changes that approach. We should be aware of this point. **But we want to make it clear: as we have said, we can accept the new draft**. The considerations that we have made are only "hesitations". If the general opinion is in favor of the new version, we will support it as well. If we finally follow this way (the new Art. 4), we would like to add some comments: (i) To be coherent within the new approach **we would prefer to delete any reference to the account in Art. 4(1)**, which means to delete the bracketed text. (ii) The wording of the Article should **express clearer that letters a, b, c, d, and e are alternatives** (as a matter of fact, some Spanish experts have read them as cumulative). (iii) We consider that **letter b should be rewritten to reflect correctly the working of indirect holding systems**. The text now says: "… and other items relating to securities held with the intermediary…". As we all know, the securities are not held with the intermediary. The securities as such are held in other place, what is held with the intermediary is the securities account. The text of letter b should reflect this idea. (iv) **We have several problems to admit letter c**; the expression "support functions" is very broad and can be understood in a wrong way. (v) In paragraph 4.3 the reference should be to paragraph 1, and not to paragraph 2. (vi) **We do not consider necessary the text included in Art. 4bis(2)**. Regarding the determination of the applicable law, the Convention is based on clear-cut rules and this black list does not add anything. From a lawmaking perspective, it seems to us rather unusual. Nevertheless, if the majority prefers to keep it, we **suggest to place it in a new Article** and to delete the reference to paragraph 1 (leaving the general reference "under the rules of this convention).	

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	(v) Finally, if we finally follow this new Art. 4, we have to be aware that other articles of the convention have to be reconsidered (for instance, **Art. 17bis**).	
	We prefer the new text in Prel Doc 13 to the one in Prel Doc 10. The new text is in our opinion **clearer and more coherent**. Nevertheless we would like to point out that in our opinion the new text is **clearly not in line with the current EU legislation, i.e. article 9.2 of the Settlement Finality Directive**.	Sweden[?]
	We consider the proposed Redraft by the Permanent Bureau a welcome addition to our discussions. It represents, in our view, a **clearer** regulation and thus one that will be **easier to apply in practice** than the one contained in the April 2002 Draft and thus **should replace the latter**. We are, however, of the opinion that the **specific content of the white and black lists may need to be discussed further**. For example, we **do not believe that the operation of call centers should be in the black list**. On the contrary, this is an activity that is **part of the servicing of securities accounts**, which should rightfully be included **in the white list**. In fact, even under this proposal, we believe that the **approach on page 18 of the April 2002 Draft may be preferable**. Moreover, we **strongly support eliminating the "place where the securities account is maintained" language**. As we have seen in our discussions so far, identifying that place would be **difficult, if not impossible, in practice and thus add unnecessary uncertainty**.	Switzerland
	We are **supportive of the redraft of Article 4 circulated by the Secretariat**. The purpose of the first clause of Article 4(2) is to select the applicable law by agreement. The bracketed language regarding the office where the securities account is maintained is surplus verbiage without independent meaning and retains the concept that it is possible and necessary to determine where the specific securities account is maintained. **The bracketed language should be deleted**. We see the advantage, as you suggest, of **continuing to include a clause about the multiple offices in 4(1)(e)**. It is important to acknowledge the dispersion of securities account maintenance activities. We think that **new 4bis(1) should be part of Article 4**. The Article 4bis(2) black list really applies across the board to the choice of law under the Convention and thus, could either be part of Article 4 or could be set forth in a separate Article.	USA

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

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	From our perspective, the deletion of the bracketed language in Article 4 would **eliminate the need for Article 17bis**. The reference in Article 4(3) should be to paragraph 1, not paragraph 2. See also the US comments under Article 9, which suggest amendments to the new Article 4 with a view to simplify Article 9.	
	Subject to the comments below, we **support the proposed redrafting of Articles 4 and 4bis** suggested in Preliminary Document No. 13. Our comments on that redrafting are: (1) We have not had time to consult sufficiently widely among ISDA's members on the **wording in square brackets** in the new Article 4(1), so we are **not able to say that a consensus exists** among our members for the deletion of those words. However, **informal soundings** among members of the ISDA Working Group on the proposed Hague Convention suggest support for the **deletion of those words**, essentially for the reasons set out in the Explanatory Notes to Preliminary Document No. 13. (2) We propose that **sub-clauses (b) and (c)** of new Article 4(1) be replaced by the following: **"(b) the management or administration of securities accounts or securities held with the intermediary is performed at such office;** **(c) services are provided to account holders by the intermediary at such office;"** Some members of our Working Group felt that sub-clause (b) of Article 4bis as set out in Appendix 1 to Preliminary Document No. 10 was more specific than it needed to be, and that the **more general wording we have suggested above is clearer and simpler**. Informal soundings of members of the Working Group also **support the inclusion of sub-paragraph (e), without the bracketed language** (in keeping with the proposed deletion of the bracketed language from the introductory wording of Article 4(1). We note that the old **"black list"** has been reorganised as part of the redrafting suggested in Preliminary Document No. 13. We have **no additional items to add to Article 4(2)**, but would **suggest the deletion of the bracketed language in sub-clause (b)**, which does not appear to be necessary.	ISDA
	The Association supports the version of Article 4 (including Article 4bis) that appears in Preliminary Document No. 13. As discussed in our prior letters, the Association believes that the standards by which the	Association of Global

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	applicable law is determined should be consistent with the practices of custodian banks and should provide as much certainty as possible. Further, the intermediary and the account holder should have reasonable latitude to select applicable law, based on where the key account-related activities of the intermediary occur. While, as our prior letters demonstrate, there are various ways in which those goals could be accomplished, we believe that the Preliminary Document No. 13 version of Article 4 is consistent with these objectives. The drafts on which we have previously commented have sought to identify "the place of the relevant intermediary" or the "place where the account is maintained." As noted above, **we agree** with the determination to eliminate these concepts and **to focus** instead **on the nexus between the intermediary's activities and the State whose law is selected**. The Association has the following specific comments on Article 4 as set forth in Preliminary Draft No. 13 – 1. **We recommend deletion of the bracketed phrase ("as the State in which the securities account is maintained")** in the introductory clause of Article 4(1). **In modern, multi-jurisdictional custody practice, the concept of the place where the account is maintained has no generally understood meaning.** We agree therefore that the more straight-forward approach is to identify those States that have a sufficient nexus to the intermediary's activities such that it is permissible for the parties to select the law of one of those States. 2. **In Article 4(1)(b), the word "and" should be changed to "or" so that the first phrase refers to "the management or administration" of the specified events.** We believe that it may be difficult to reach consensus on the exact demarcation between "management" and "administration" of securities held by an intermediary. If these two words are joined by "and," Article 4(1)(b) may seem to require that both activities occur in the same office in order for that office to fall within the scope of Article 4(1)(b). Such an interpretation would be unduly restrictive. 3. **The Association is neutral on whether it would be preferable to delete Article 4(1)(c)**, which appears in brackets in Preliminary Document No. 13. While retention of Article 4(1)(c) would be acceptable to us, we understand that this provision may create confusion regarding the treatment of representative offices. 4. **We believe that the bracketed phrase in Article 4(1)(e) (", 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") should be retained.** The maintenance of securities accounts by custodian banks operating in multiple jurisdictions often involves coordinated activities that occur in several different offices of the intermediary and at the offices of agents and other service providers retained by the intermediary.	Custodians

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	The bracketed phrase recognizes that reality. 5. **While we do not disagree with the substance of the "black list" in Article 4(2), the Association believes it would be preferable to delete this provision from the text of Article 4 and to instead include these concepts in the commentary.** We do not believe that Article 4(1) could be fairly read to include any office that is "merely" engaged in any of the activities described in Article 4(2). Accordingly, Article 4(2) is not a limitation on Article 4(1), it is simply an explanation of the application of Article 4(1) to specific activities. As such, we believe that the substance of Article 4(2) is more properly commentary, rather than Convention text. As noted above, the Association has kept abreast of the work of the U.S. delegation. We understand our position regarding Article 4 to be consistent with that of the U.S. delegation.	
	Several proposals have been submitted for Article 4 ff. We should like to concentrate in our comments on the final proposal. **We welcome the new structure of Article 4**. In particular, it **makes sense to merge the PRIMA principle and the criteria for determining involvement in the activity of maintaining securities accounts into a single provision**. Given the type of "reality test" selected in Article 4 (1), the list of such criteria **("white list") is absolutely essential** to allow determination of the applicable law. **<u>Article 4 (1), sentence 1</u>** In Article 4 (1), sentence 1, **deletion** of the phrase in brackets [... as the State in which ...] is put up for discussion. **This could, however, mean that there would then not be any link to the criteria.** It is **no longer clear what the criteria are geared to**, namely some kind of involvement in the activity of maintaining securities accounts. Besides, **the phrase in question could be useful for contract practice**. **Otherwise the "real" choice-of-law clause within the meaning of Article 4 (1) would have to be distinguished from the already customary "contractual" choice-of-law clause**, which could lead to misunderstandings in practice. It would also have to be remembered in this connection that the "real" choice-of-law clause is not agreed between the parties to the disposition but between the account holder and the intermediary and thus paves the way for determination of the law applicable to the subsequent disposition. We are therefore **in favour of retaining the phrase in question**. **<u>Article 4 (1) (a)</u>** **We generally endorse the wording adopted here.** In particular, the phrase "... or processed through ..."	Bundesverband deutscher Banken

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	(longer version in the Appendix to Preliminary Document No. 10) should not be included, as it also covers the mere transfer of data and would be at odds with the exemption criterion in Article 4(2)(a) (Preliminary Document No. 13) and Article 4 ter (e) (Preliminary Document No. 10). **Article 4 (1) (b)** The activity is also important for the maintenance of securities accounts. **For clarification purposes, the term "corporate events" could be replaced by "corporate actions".** **Further specification of the "other items"** referred to would also be advisable. A possible wording could be: **"... the management and administration of dividend, interest and redemption payments, corporate ~~events~~actions and ~~other items relating to securities held with the intermediary are performed at such office~~ other substantive administrative services relating to securities accounts are provided at such office;"** Inclusion of purely mechanical activities (clerical activities), such as the mechanical exe-cution of instructions issued by other parties, in account holder administrative services should, in particular, be ruled out, **as only administrative activities which involve a certain decision-making power are associated with the maintenance of securities accounts**. The further specification proposed here is unnecessary if, as proposed below, a sub-paragraph (d) is added to Article 4(2). **Article 4 (1) (c)** Subparagraph (c) should be **deleted**, as the term "account holder support functions" does not appear clear enough and opens the door for a number of activities that are not directly connected with the maintenance of securities accounts. **Article 4 (1) (d)** We **welcome** the criterion according to which a securities account is to be identified by means of an account number, possibly together with a bank code. A slight change to the wording might be advisable for clarification purposes, however, and the other means of identification should be specific: **"... a single account number, bank code or other specific means of identification exists that solely or in combination thereof clearly identifies ~~such office as maintaining~~ the securities accounts as being maintained at such office; or"**	

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	Article 4 (1) (e) It is in principle to be **welcomed** that the nature of the list is kept open through this sub-paragraph and other activities that constitute involvement in the maintenance of securities accounts can be considered. Such a provision appears necessary particularly with future developments in mind. It should also be made clear at his point that the wording "otherwise engaged in a business or other regular activity of maintaining securities accounts" only covers activities that are as substantial for the maintenance of securities accounts as the aforementioned activities. The words " ... which are comparably substantial for the maintenance of securities accounts" could be added here. **Article 4 (2)** The limitation of the other activities that allow reference to the agreed jurisdiction is **greatly welcomed**, while the exemption criteria are also appropriate in our view. Now that the wording **"... engaged in a business or other regular activity of maintaining securities accounts ..." is no longer contained in the new Article 4 (1) (chapeau), the limitation in paragraph 2 unfortunately does not seem to cover the whole of paragraph 1.** It would, however, be advisable to subject all the criteria contained in paragraph 1 to this clarifying limitation. A possible wording could be : **"(2) The criteria defined in paragraph 1 are not fulfilled merely because the office referred to is a place where - ..."** As regards the comment in **brackets in subparagraph (b), we would appreciate clarification** since we do not quite understand it. Such an insert is unnecessary if it is assumed that communication with parties other than the account holders (or their authorised representatives) is *per se* certainly not part of the activity of maintaining securities accounts. We also feel that the **following wording should be added as subparagraph (d)**, particularly where the limitation in paragraph 2 refers to all the criteria specified in paragraph 1: **"... other services of a purely technical, mechanical or otherwise subordinate nature."** **Article 4 bis(2)** The "black list" in Article 4 bis (2) of the Convention appears **helpful**, as it makes clear which factors are not taken into account when determining the applicable law. The deletion made in the first sentence compared	

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	with the February draft is welcomed as providing clarification. In addition, **the phrase "... under the rules of this Convention" should be adopted and the reference to paragraph 1 dropped**. Otherwise it might be wrongly assumed that the list of exemptions only applies in connection with the fallback rule.	
Transfers involving several intermediaries **("page 37 problem"; Prel. Doc. 12)**	The Canadian Delegation **agrees** with the following conclusions reached by the Permanent Bureau in its analysis of the PRIMA principle within the framework of this draft Convention and transfers involving several intermediaries: (a) that the "relevant intermediary" should be assessed separately but according to a common standard (i.e. PRIMA) for each portion of the overall transfer and that the problem of "double interests" does not seem to generate insurmountable difficulties in the context of indirectly held securities; and (b) that possible differences among legal systems on the question whether a defect in the contractual validity of a transfer impairs its effectiveness as a transfer or property do not appear to generate any new problems which are specific to the context of indirectly held securities. *** La délégation canadienne **est d'accord avec les conclusions du Bureau Permanent** après avoir analysé le principe PRIMA dans le cadre de ce projet de convention et des transferts impliquant plusieurs intermédiaires : (a) Que « l'intermédiaire pertinent » doit être évalué séparément mais selon une norme commune (c'est-à-dire, PRIMA) pour chaque partie du transfert global, et que le problème des « droits doubles » ne semble pas donner lieu à des difficultés insurmontables dans le contexte de titres intermédiés ; et (b) Que les divergences possibles entre systèmes de droit sur la question de savoir si un vice de validité d'une convention impliquant un transfert de propriété nuit à son efficacité pour réaliser une mutation de propriété ne semble pas donner lieu à aucun nouveau problème spécifique au domaine des titres intermédiés.	Canada
	We do not think that the example used in the document illustrates the problem at stake. If A sells some securities to B and others to C, the only problem seems to be whether each contract is binding (under applicable contract law). We think however, this whole discussion illustrates another point: **That the convention should not focus on whether someone has (acquired) an interest, but rather whether an interest (acquired under contract law) is protected against a third party (a non-contracting part)**. In short PRIMA should not address interests, but conflicts between third parties relating to securities (held with	Denmark

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	an intermediary). If this approach is followed the problem of several intermediaries only occurs if the third party conflict is between someone (purchaser no. 1) who acquired his interest (under contract law) while the securities were held with X, and a person (purchaser no. 2) who acquired an interest in the same securities (under contract law) after the securties were moved to intermediary Y (or at the least with the result that the securities are moved to intermediary Y e.g. in case the second disposition is a title transfer to purchaser no. 2). Solving that problem in my oppinion requires a unitary solution (not in the sense the word is used in the document of course). In short should the conflict between purchaser no. 1 and purchaser no. 2 be solved under X law (the law of the first int.) or Y law (the law of the second int.). Traditional conflict of laws principles would suggest X law, but for pragmatic reasons we maybe should prefer Y law. We do not believe that the separate assessment-approach solves the problem. Imagine e.g. that both intermediaries are insolvent and the securities are under the control of a court e.g. in Belgium where the ICSD is. If both investors (under X law and Y law respectively) are held to have a validly perfected interest in the securities, to whom should the court then order the securities to be delivered to? It is not an answer to this question to say that it is a matter for the relevant insolvency laws to decide. The insolvency law of X may say that X is entitled to the securities (because A has a perfected interest under X law), whereas the insolvency law of Y for similar reasons may say that Y is entitled. The point is that the court in control of the securities need to know which PRIMA is the relevant one in order to decide whether A or B is entitled to the securities	
	We **agree with the conclusions of the Permanent Bureau** in Preliminary Document 12, page 10. *Problem of "multiple" intermediaries* We do not see an insurmountable problem here. From a logical viewpoint, there cannot be several intermediaries involved because each legal problem would be solved according to the law of the relevant intermediary. We agree with the analysis in Preliminary Document 12, para. 4. As we have stated earlier, we are opposed to any ideas of a "Super-PRIMA". It has to be noted that the application of one **Super-PRIMA would affect the substantive law as well not only the choice of law rules**. If a single PRIMA would govern a securities transfer, then the issues to which the PRIMA would be applied in accordance with Article 2 (1) of the future Convention would also be governed by that one law. These issues include, for example, the legal nature of the securities held with an intermediary. **The application of a Super-PRIMA might have the effect that all of a sudden, all**	Finland

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	intermediaries involved in a transfer would have to apply the chosen Super-PRIMA to their own securities accounts and systems. Taking the example given in the Permanent Bureau's excellent document: If, let us say, the Super-PRIMA is chosen to be the French law, then both the Bank in London and the European ICSD would have to apply the Super-PRIMA to the legal nature of the securities being transferred. This could mean that the European ICSD (which otherwise applies the Belgian Royal Decree no. 62 of 1967 to its operations) would be forced to apply the French rules in respect of securities being transferred through the ICSD. As accurately suggested by the Permanent Bureau, the European ICSD might not be aware of such change in the status of the securities. The Convention should honour the fact that in Europe, the CSDs and the ICSDs are in any case entitled to apply the law applicable to their systems in accordance with the Settlement Finality Directive. *Problem of "real transfers"* The Finnish law does not recognize "real agreements" so the problem is unfamiliar to us. However, based on the information and examples given in Preliminary Document 12, we do we do not see an additional problem here and do not see a reason for specific regulation addressing the subject. That would mean a step toward substantial law which is not the intention of this Convention.	
	We **share the analysis and the views expressed in Prel. Doc. 12 and agree with the conclusion** that in all the cases considered the application of PRIMA will contribute to international certainty, while the so-called SUPER-PRIMA would not. All the problems touched in the analysis are frequent in case of rights upon movables and negotiable instruments and PRIMA will contribute in clarifying the possible solutions.	Italy
	See the comments in **Preliminary Document No 14 A** submitted by the Japanese delegation.	Japan
	As members of our delegation have expressed informally on a number of occasions, one of the most perplexing problems for us so far has been the exact operation of the PRIMA approach in transfers involving multiple intermediaries from different jurisdictions. From page 37 of Preliminary Document No. 1 it seemed clear that the question whether the seller or pledgor's legal interest in the sold or pledged securities were validly extinguished would be determined by the law of a different State than the question whether the buyer or pledgee had acquired a valid interest in those securities and thus possibly to inconsistent answers to these two intertwined questions regarding the same interest in a particular pool of securities. This result would be problematic in a legal system, such as ours, where the individual customer is deemed to hold (and thus to sell and acquire) an interest not in the pool of securities of his intermediary, but in the pool of actual securities at	Switzerland

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	the CSD, providing two possibly conflicting answers to an issue that, under our legal system, is essentially one and the same — whether the interests of a particular pool of securities at the CSD has been validly transferred from seller/pledgor to buyer/pledgee. **Preliminary Document No. 12 does two things to mitigate our concerns** and to make us realize that what that Document calls the Super-PRIMA approach — the application of the law identified by the place of the buyer's/pledgee's relevant to the entire transaction — is not necessarily a better approach: First, it states under bullet point No. 4 on page 5 a true, if convoluted, conflicts rule, thus resolving, in an important part of cases, the difficulty of having to apply two different and possibly inconsistent legal orders to one and the same transaction: **If the buyer/pledgee has validly acquired the agreed interest in a particular pool of securities under the law identified by the place of his relevant intermediary, the question whether any defects in the transfer under the law identified by the place of the seller's/pledgor's intermediary would nevertheless impair the transaction is to be determined by the PRIMA of the buyer/pledgee**. This leaves as an area of concern for us only the (practically less relevant) **cases in which the reverse is true** — the interest of the seller/pledgor has been validly extinguished under the seller/pledgor's PRIMA, but has not been validly acquired under the buyer's/pledgee's. We also believe, however, that the **bracketed language in Article 4(1) regarding the relevant time would** further help in defusing the issue. Second is the implication from footnote 2 that there are legal systems where, in fact, such a transfer involves multiple transactions, depending on the number of intermediaries involved. In those systems, applying what the Document calls a **Super-PRIMA approach would indeed lead to enormous difficulties**. Our **remaining concerns** with the page-37 problem arise from the simple fact that, at least for us, the **resolution of the problem as presented in Preliminary Document 12 does not arise from a reading of the current text of the proposed Convention**. Thus we need to ensure that (1) the views expressed in Preliminary Document 12 are **really the views of the respective delegations** and (2) that those who read the Convention for purposes of applying it in the future can easily find out about those views. Perhaps we can include them in the **final report**. In that case, we suggest **elaborating a bit further on the two points mentioned above** to make things clear for readers of the Convention from legal systems such as ours.	
	We agree with the conclusions of the Secretariat. We are not in favor of a Super-Prima rule. While in a theoretical analysis a single law that would apply throughout the chain appears attractive, it cannot be achieved without introducing additional unwarranted risks and complexities for the intermediary system.	USA

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	Legal certainty about the applicable law at each level of intermediary is the major objective we can and should achieve under the Convention. A number of delegations expressed considerable concern about importing a Super-Prima rule, which could not work properly under the structure of the Convention.	
	We **welcome the guidance** in Preliminary Document No. 12 on the issues raised by transfers involving intermediaries in different jurisdictions (the so-called "page 37" issue). We have **not had time to consider in detail or to consult widely** on Preliminary Document No. 12, and so, in particular, we cannot comment on the specific examples given to support the arguments set out in that Preliminary Document. But we **support the pragmatic approach** of the Preliminary Document. We agree that the suggested unitary solution (the so-called "Super-PRIMA" approach) is unworkable in practice, as we commented in our letter to the Permanent Bureau of 2nd October, 2001. It would be helpful if these issues are dealt with in the Explanatory Memorandum.	ISDA
	We continue to advocate reference to the (respective) relevant intermediary (PRIMA), as this would make it easier in many cases to determine the law applicable to a cross-border disposition of securities. The Explanatory Note, which deals, inter alia, with the question of conflicting rights in respect of the securities and explains the treatment of any defects in a disposition of securities at an earlier stage of safe custody, is helpful. We would appreciate it if it could be **checked whether the ideas contained in the Explanatory Note and the mechanism set out there may be incorporated into the provisions of the Convention**. We should also like to discuss specific aspects of the draft that still raise questions at a **regional discussion workshop**.	Bundesverband deutscher Banken
5	As we have stated before the wording of Article 5 leaves some **uncertainties** as to the impact. **We would prefer just ascertaining that the interest/right created and perfected under the law designated by PRIMA is recognized as valid even in the case of insolvency**. All other effects of insolvency proceedings should, in our opinion, be left outside the Convention. Thus, we would be in favour of only giving examples of those insolvency rules that remain in force. One possibility of doing this is to state in Article 5(2): **"Nothing in this Convention affects the application of [especially] – …".**	Sweden[?]

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

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	We propose some editorial changes to provide comfort to insolvency practitioners. We **suggest the order of paragraphs 1 and 2 be reversed and that the text of paragraph 1, which will become paragraph 2, be preceded by the words: "Subject to paragraph 1." Add the words "substantive or procedural" before "insolvency law" in what is now paragraph 1.** The difference in the two paragraphs invites question. Delete the words "to property." The definition of property differs from jurisdiction to jurisdiction. It could be defined with reference to insolvency law, the PRIMA law, by reference to the aggregation of rights covered under Article 2(1) of the Convention, or some other way. The words are not necessary and their deletion avoids problems.	USA
	No change has been made to Article 5. However, we feel that it is **necessary to synchronise the provisions here with current European insolvency law**, particularly where this was developed specifically for clearing and settlement systems. We thus refer in this connection to our comments of 6 March 2002. **The fact that the wording of Article 5 (1) (b) could also mean that a disposition which has not been perfected is not protected in insolvency proceedings is problematic**. Under Article 3 of the European Settlement Finality Directive (98/26/EC), claims and payments (deliveries) resulting from transfer agreements that have been entered into a system at the time insolvency proceedings are opened may be set off if set-off takes place no later than the day on which insolvency proceedings are opened. The positions of participants in clearing systems are protected in this way. A wording that takes account of this situation could read: **1…** **(b) a disposition of securities held with that intermediary that has been perfected <u>or irrevocably and irreversibly initiated</u> in accordance with the law determined under Art. 4 of this Convention. (...)"**	Bundesverband deutscher Banken
8	We understand that **both paragraphs (1) and (2) are intended to be subject to paragraph (3)**. For consistency between paragraphs (1) and (2), we **suggest the addition of the words "Subject to paragraph 3," at the beginning of paragraph (1)**.	ISDA
9	The Canadian Delegation **supports the new draft of Article 9** suggested in paragraph 17 of the Preliminary Document 11. We would suggest that, given the length and complexity of this Article, a **very clear and precise**	Canada

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	explanation is needed in the Explanatory Report. Perhaps concrete examples, such as those included in the Preliminary Document 11, would be helpful. Additionally, the language of this Article will need to be aligned with the language of other provisions, for example, **Articles 4(2) and 4(4)**. *** La délégation canadienne **soutient la nouvelle version de l'article 9** présentée au paragraphe 17 du Document préliminaire n° 11. À notre avis, étant donné la longueur et la complexité de cet article, **une explication très claire et précise devrait être donnée dans le rapport explicatif**. Des exemples concrets comme ceux donnés dans le Document préliminaire no 11 pourraient être utiles. De plus, le texte de cet article devra être uniformisé avec celui des autres dispositions, par exemple, les **articles 4, paragraphe 2 et 4, paragraphe 4**.	
	According to the examples given in Preliminary Document 11, it seems that the suggestion of the Permanent Bureau works.	Finland
	The Federal Ministry of Justice like to reserve the right to make comments on Article 9 during the course of further deliberations on this matter.	Germany
	If the bracketed language is in Article 4(1) is deleted, the proposed revision of Article 4 also facilitates a dramatic simplification of Article 9. With minor changes, the proposed Article 4 can be revised to make clear that an agreement may select the law of a territorial unit of a multi-unit State. Then, all that is needed in Article 9 is a permissive declaration rule. Specifically, Article 4(1) would be revised as follows: **The law applicable to any issue specified in Article 2(1) is the law ~~of~~ in force in the State or territorial unit of a Multi-unit 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 anywhere in that State, and…**	USA

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	Then, Article 9 can be dramatically simplified, as follows: **If the applicable law under Article 4 of this Convention is that of a Multi-Unit State, the State may make a declaration either as to subparagraph (1) or (2) below:** **(1) that identifies the internal choice of law rules applicable within the State which apply to the matters covered by this Convention, and if such declaration is made, those rules determine which of the laws of the State or territorial unit apply, or,** **(2) that the law of a particular territorial unit applies only if the relevant intermediary has an office within that territorial unit engaged in a business or other regular activity of maintaining securities accounts.** Sub-paragraph 2 is included to accommodate the desires expressed by at least one other delegation. In our view, it is not necessary because we think that a declaration under sub-paragraph 1 could address this matter.	
	As in our letter of 13th March, 2002, we note that **Article 9 continues to attract significant attention**. The provision is clearly one that will affect all ISDA members, but it is not one on which ISDA members have a single formulated view. Accordingly, we have no specific comments on Article 9 in the April Draft Convention or on Preliminary Document No. 11. The overriding concern shared by all ISDA members is that the **final rule should meet the objective of providing ex ante certainty**, avoiding surprising results that would defeat the presumed intention of the parties. We are pleased to see that this attention is getting careful attention, and it appears as though the issues raised by Article 9 are **on the way to being satisfactorily resolved**.	ISDA
	As a side remark, **the inclusion of the European Union into the scope of Article 9 of the draft Convention could in our eyes merit some further thought**, as this approach would allow to reduce the risk of discrepancies between existing Community (and national) legislation and the draft Convention.	ECB
	Article 9 has been thoroughly revised and provided with explanatory notes and examples. **Unfortunately, the underlying problem persists. Multi-unit States are given a number of alternatives for determining the applicable law. This makes determining the applicable law more complicated and at last costly and leads to less security as to whether the law determined is really the applicable law.** The examples kindly	Bundesverband deutscher Banken

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	compiled by the Permanent Bureau show that Article 9 may produce unsatisfactory results in practice. The declaration mechanisms in Article 9 (1) (b) (ii) and paragraph 3 meet the reservations we have already expressed with regard to paragraphs 4 and 5 of Article 1. **We also have reservations insofar as scope is provided for deviation from the PRIMA principle when determining the applicable law.** This is a **consequence that cannot be welcomed,** given the desired aim of making the PRIMA approach a globally valid concept in the future. With all due respect for the established legal regimes of multi-unit States, **this raises the question of whether subscribing to a convention makes sense if different rules apply internally. It does not seem convincing to apply PRIMA in dealings with other States but to follow other rules internally.** For non-multi-unit States, the question may be whether subscribing to a convention that does not apply to a large number of States which are of major importance for dispositions of securities makes sense if it introduces an additional element of legal uncertainty. As simple a solution as possible for multi-unit States would therefore be desirable. **Reference could, for example, be made directly to the substantive rules of law of the respective territorial unit.** A similar result would be achieved if internal choice-of-law rules were based on PRIMA. Against this background, it should be examined whether it is possible for multi-unit States to only subscribe to the Convention once their internal choice-of-law rules are in line with the PRIMA approach. It should be remembered that each exception jeopardises the purpose of the Convention in general, namely easy ex ante determination of the applicable law.	
11	We would delete the brackets.	USA
12	Reference to "these States" in the bracketed language of paragraph (1) should be "Contracting States;" delete "proposed" from paragraph 2. The Special Commission's approval power should not be limited to the amendments as proposed.	USA
17	We fully support the first comment made under Art 17 in Prel Doc 10, according to which the Convention should be based on the general principle of **non-retroactivity**. We do not, however, support the second comment relating to the question of priority between a pre-Convention disposition and a post-Convention disposition (Option A). On the contrary, we think **Option A may be regarded as inconsistent with the non-retroactivity principle** since the pre-convention disposition should not be overruled by the post-convention disposition. In addition, how do we apply option a in a cross-border context? **We propose to drop**	Belgium

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	Option A. We are of the opinion that the principle of non-retroactivity leads to the **solution previously provided** and reproduced hereafter: "(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. *(= principle of non-retroactivity)* (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." *(= solution which is implicitly derived from the principle of non-retroactivity).* With such a proposal, we don't need Option B which appears too complex.	
	The Federal Ministry of Justice **welcomes the fact that Option A of Article 17 is based on the general principle of non-retroactivity**. For that reason as the Federal Ministry of Justice has already indicated in its comments of March 2002, it does not support Option B which would give the Convention a certain retroactive effect.	Germany
	We support the non-retroactivity option	Luxembourg
	We **prefer Option A and are strongly against the retroactive effect proposed under Option B**. A solution like the one in option B would be very difficult for us to implement. Such retroactivity would probably run counter to our legal system. With option B the possibility that third parties rights in some	Sweden[?]

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

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	situations would be affected in a negative way cannot be ruled out.	
	In our opinion, Option A provides less than optimal legal certainty for dispositions that occur after the effective date of the Convention. Its advantage is that parties will at least be able to investigate whether the PRIMA law will preserve the perfection and priorities of pre-Convention dispositions. However, under Option A, parties will not be able to determine with certainty whether there are other interests that have been perfected under a law other than PRIMA which have priority. Option B's advantage is that it provides a mechanism for cutting off potential prior interests after a date certain; this never occurs under Option A. Thus, the rejection of Option B results in less certainty for dispositions that occur after the effective date of the Convention. Certainty in the application of the Convention is a significant interest for the United States shared by other States. **Notwithstanding our continued preference for Option B, in the spirit of compromise, we are prepared to support Option A, provided that other significant open issues under the Convention are satisfactorily resolved.**	USA
	There appears to be **general support for the inclusion of Option A and the deletion of Option B**. In the text of Option A, we suggest that the words "**and/or perfected" be added after the words "disposition made"**.	ISDA
	Concerning the question of retroactivity, **the ECB is of the opinion that any provision that could potentially invalidate pre-existing agreements would have severe implications, not the least of a constitutional nature, and might potentially lead to financial instability and systemic risk.** Therefore, it is very much welcomed that the new draft tries to emulate the principle of non-retroactivity. In this connection, we understand that the new version of Article 17 is merely intended to establish that the law applicable under the Convention determines the priority between a disposition made before or after the entry into force of the Convention in a given contracting State.	ECB
	We welcome it that, as things stand at the moment, the Convention is based in general on the principle of non-retroactivity. With this in mind, we **favour Option A.** Under this option, the question of priority when a disposition is made before the entry into force of the Convention and a disposition is made after the entry into force is settled by the PRIMA law. Further specification of what exactly is meant by "a disposition made" would be required. This could read as follows: **"In a Contracting State, the law applicable under this Convention determines the priority between a disposition made and perfected before the Convention entered into force for that State and a disposition made or perfected after the entry into force."**	Bundesverband deutscher Banken

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	The proposed Option B would give the Convention a certain retroactive effect again. **We have already indicated in our comments of 6 March 2002 that we are against any retroactive effect and therefore refer to these comments.** Firstly, it gives cause for concern from the angle of constitutional law that the holder of a real security interest is to be allowed to be deprived of this interest by the entry into force of a Convention. There are also practical reservations. The requirements under paragraph 2, subparagraphs (a) and (a) (i) and subparagraph (b) mean that the parties face considerable problems furnishing proof in the event of a legal dispute. The provision of paragraph 2, subparagraph (a) (ii) raises the question of what "appropriate action" is. Also, such a possible retroactive effect would mean that every single collateral agreement would have to be checked to determine whether, after the entry into force of the Convention, "appropriate action" has to be taken. Ultimately, this action would have to be enforced. This approach is likely to involve considerable costs. Moreover, it is questionable whether, given the existing legal and actual possibilities, more security can be created by way of such a provision. We are therefore against any retroactive effect for the Convention.	
17 bis	Simplification of the drafting to read in conjunction with our proposal of article 4: ~~**(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**~~ **An agreement governing a securities account made before the Convention entered into force pursuant to Article 15(1) of which a provision 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.**	Belgium
	The need for this provision has to be **reconsidered**.	Luxembourg
	The version of Article 17bis proposed in Preliminary Document 10 **introduces legal uncertainty** for	USA

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	existing agreements that did not exist in the prior version. There are two ways that one can consider revising the draft to increase legal certainty. One is to revise Article 17bis(1)(b) to closely follow the carefully drafted and negotiated Article 4(3). Under that option, Article 17bis(1)(b) would read as follows: **(b) does not contain an express agreement, or, if not express, an agreement implied from the terms of the contract considered as a whole, as to where the securities account is maintained.** The second option is to delete the word implied from (1)(b). We prefer **deleting the word "implied."**	
	We support the inclusion of Article 17bis in the proposed Convention and believe that the version of this article in the April Draft Convention is an improvement over the version in the January 2002 preliminary draft. We are concerned, however, that **it still might not be broad enough** to cover the situation under a pre-Convention agreement in which an account holder and an intermediary **have not expressly agreed on the location of the securities account** but where the location would have been considered reasonably clearly established by the circumstances. For example, we understand that when a German intermediary enters into a custody agreement with a German account holder, the agreement does not normally deal expressly with the question of the location of the account. It is simply taken for granted that the account will be located in Germany. There may be many other markets where, at least in a domestic context, it has not traditionally been considered necessary for the intermediary-account holder agreement to deal expressly with this issue. **It may be that the words "or implied" in paragraph (1)(b) are broad enough to cover this situation, however it would be helpful if the Explanatory Memorandum made this clear.** If the word "implied" in this context is meant to be construed consistently with Article 4(3), that is, "implied from the terms of the contract", then it might not be broad enough to cover the situation described above. If so, the Drafting Committee may wish to consider the following alternative approach: **(1) delete the words "or implied" from paragraph 1(b); and** **(2) add an additional paragraph (3) that reads as follows:** **"If it is reasonably evident that, at the time when the agreement between the account holder and the relevant intermediary was made, it was the (explicit or implied) understanding of those parties that the account was to be maintained in a specific jurisdiction, this shall be treated for the purposes of Article 4(2) as an agreement that the securities account will be**	ISDA

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	maintained within that State." The Drafting Committee will recall that this wording was originally proposed by the *Bundesverband deutscher Banken*, in its comment letter on the January 2002 preliminary draft, although we do not know if the BdB supports the specific proposal above. **The drafting of paragraph (2) has also caused some confusion and could perhaps be improved or clarified in the Explanatory Memorandum**. The concern centers on the words **"under the law governing that agreement" and what they are intended to signify in this context**. Some appear to read this to mean that the governing law of the Agreement should be treated ipso facto as the **PRIMA law**, which would, apparently, be consistent with the approach taken in the United States under §8-110(e)(1) of the Uniform Commercial Code. Others read this to mean that one looks **first to the law governing the agreement between account holder and intermediary and then, under the governing law's choice of law rules, one determines the substantive law applicable to any of the issues specified in Article 2(1)**. This would, of course, encompass the US example mentioned above, where the governing law is, under local law, also the PRIMA law. While the latter broader approach might seem to be the more likely intention of paragraph 2, there appears, in that case, to be a **possible conflict with Article 7**, which requires that the term "law" be construed without reference to choice of law rules. It may be that paragraph 2 could be clarified simply by deleting the words "under the law governing that agreement", which are implicit. This would also appear to have the advantage of avoiding or minimising the potential conflict with Article 7. Perhaps these issues could be clarified in the Explanatory Memorandum.	
	Editing the article has made the provision **much clearer. Yet, there is still the fear that this provision will be unable to provide any help in a large number of jurisdictions**. This provision is based on the assumption that a choice with regard to the law applicable to dispositions of securities (e.g. collateral agreement) is provided for in the custody agreement. Where a custody agreement contains a choice-of-law clause, this – traditionally at any rate – covers the custodial relationship and thus a contractual relationship which is excluded under Article 2 (2) (b) from the scope of the Convention, but not dispositions of the securities held in custody. It is, however, vital that parties to dispositions of securities are not forced to review all custody agreements	Bundesverband deutscher Banken

ARTICLE:	OBSERVATIONS / COMMENTS:	AUTEUR / AUTHOR:
	already concluded with CSDs or other intermediaries. For this reason, as broad a rule as possible, based on current contract practice, is required. May we there-fore resubmit in this connection the wording we proposed in our comments of 6 March 2002: **"If it is reasonably evident that, at the time when the agreement between the account holder and the relevant intermediary was made, it was the (explicit or implied) understanding of those parties that the account was to be maintained in a specific jurisdiction, this shall be treated for the purposes of Article 4 (2) (now Article 4 (1)) as an agreement that the securities account will be maintained within that State."**	
18	Some ISDA members have **requested guidance on the interpretation of the denunciation clause and its intended effect on priority as between dispositions occurring before and after a denunciation**. It would be useful if this could also be dealt with in the Explanatory Memorandum. This issue affects the volume of on-going monitoring work that will have to be performed by a collateral taker in order to protect its legal position in relation to cross-border dispositions of collateral.	ISDA
Final clauses	We request that either the Drafting Group or the Secretariat **draft a general article on declarations, including a provision that they be written and capable of being made or changed at any time**. Each declaration called for under the Convention will then need to be reviewed to determine the appropriate date of effectiveness and whether a transition provision is necessary. Withdrawal and cessation of effectiveness must also be addressed.	USA