

28 novembre / 28 November 2002

**TABLEAUX RÉSUMANT LES « POUR » ET LES « CONTRE »  
DES OPTIONS A, A+ ET B À L'ARTICLE 4(1)**

*soumis par le Bureau Permanent*

\* \* \*

**CHARTS SUMMARISING THE 'PROS AND CONS'  
OF THE OPTIONS A, A+ AND B IN ARTICLE 4(1)**

*submitted by the Permanent Bureau*

*Document préliminaire No 18bis du 28 novembre 2002  
à l'intention de la Session diplomatique sur les titres intermédiés*

*Preliminary Document No 18bis of 28 November 2002  
for the attention of the Diplomatic Session on indirectly held securities*

**TABLEAUX RÉSUMANT LES « POUR » ET LES « CONTRE »  
DES OPTIONS A, A+ ET B À L'ARTICLE 4(1)**

*soumis par le Bureau Permanent*

\* \* \*

**CHARTS SUMMARISING THE 'PROS AND CONS'  
OF THE OPTIONS A, A+ AND B IN ARTICLE 4(1)**

*submitted by the Permanent Bureau*

*Document préliminaire No 18bis du 28 novembre 2002  
à l'intention de la Session diplomatique sur les titres intermédiés*

*Preliminary Document No 18bis of 28 November 2002  
for the attention of the Diplomatic Session on indirectly held securities*

## OPTION B

[SUMMARY OF MAIN ARGUMENTS IN THE COMMENTS RECEIVED BY THE PERMANENT BUREAU]

### PROS

- ?? **Reflects traditional principles of applicable law to ppty issues**  
(D, SF [but see their comments in Cons])
- ?? **Provides objective criterion for determining applicable law**  
(ARG, D, ECB) [disputed by Belgian comments]
- ?? **In theory is most in line with PRIMA**  
(F [but see their comments in Cons])
- ?? **If an irrefutable presumption existed that the parties' agreement satisfies one of the criterion in the white list, it satisfies goal of clarity** (F [but see comments in Cons])

### CONS

- ?? **2 different ways of reading Option B  $\neq$  less ex ante certainty**
  - (1) if acc need not be maintained in State agreed: Convention permits a fiction (P)
  - (2) if acc does need to be maintained in State agreed: part issues of second guessing and diff in localising acc arise
- ?? **Second guessing:** court assess if acc really maintained in State agreed
  - $\neq$  less predictability and certainty
  - $\neq$  greater use of fallback rule because:
    - parties fear 2<sup>nd</sup> guessing: prefer fallback; or
    - fail to satisfy judicial enquiry: fallback rule (AUS, B, , DK, F [but see comments in Pros], N, P, E, CH, UK, USA, ACSDA, AGC, ECB, FBE, ISDA)
- ?? **Risk of intermediary liability when court second-guesses:** where court determines place of maintenance of acc is other than that agreed, acc holder may bring action against intermediary for breach of acc agreement  $\neq$  drastic effects for intermediary
- ?? **Difficult to determine place of acc maintenance** (SF, F, N, P, E, USA, ACSDA, AGC)
  - requires legal fiction
  - geographically dispersed maintenance (multiple offices in different places)
- ?? **Complex Art 11** (B,DK,F,N,CH,USA,ISDA)
- ?? **Side effects under domestic laws:**
  - tax implications (B,DK,N,CH,USA,ACSDA,ISDA)
  - unexpected consequences under local law; &
  - parties' desire *re* tax differs to desire *re* applicable law
  - expropriation
  - designation of place of acc may run counter to acc holders' interests in expropriation proceedings
- ?? **"Magic words" required** (AUS, B, DK, N, CH, USA, ISDA)
- ?? **Not in line with existing industry practice:** costly revision of existing agreements (UK, ACSDA, AGC)
- ?? **Incompatibility with EU Fin'y Directive** (ECB)
- ?? **Intermediaries may have to apply variety of ppty laws to securities it holds:** (*But likely mitigated by reality tests*) (L)
  - $\neq$  different enforcement procedures and provisional safeguard measures
  - $\neq$  disconnections between the applicable law and the competent jurisdiction (*e.g.* attachment orders; privileges)
- ?? **Rel'p of 'maintenance of securities account' submitted to pure choice of law(ECB)**
  - Civil law: credit to acc has direct ppty effect
  - Conflict with national public law regimes

## OPTION A

[SUMMARY OF MAIN ARGUMENTS IN THE COMMENTS RECEIVED BY THE PERMANENT BUREAU]

### PROS

- ?? **Avoids problem of *second guessing***  
(AUS, B, DK, F, N, E, UK, USA, ISDA)  
    ≈ Reduces scope of fallback Art. 5
- ?? **No need to locate place of account**  
(AUS, CAN, SF, F, N, USA)
- ?? **Avoids side effects under domestic laws:**
  - tax implications  
(B, CH, DK, USA, ISDA)
  - expropriation
- ?? **Avoids reference to *internal conflict rules* in Multi-unit State**  
    ≈ simplification of Art. 11  
(B, CH, DK, ISDA, BDB)
- ?? **Greater certainty as based on agreement of parties**  
(May)
- ?? **Clearer and simpler than Option B (C)**
- ?? **Avoids application of law governing contractual aspects to ppty issues where this is not the intention of parties to the agreement**  
(N)
- ?? **No need for magic words because of Art. 4(3)**  
(N)

### CONS

- ?? **"Magic words" required**  
(AUS, B, May, UK, USA, ACSDA, AGC)
- ?? **Not in line with existing industry practice:**  
costly revision of existing agreements  
(UK, ACSDA, AGC)
  - ≈ possibility of 2<sup>nd</sup> guessing may chill desire to put words in post-Convention agreements and lead to greater application of fallback (ACSDA)
- ?? **Requires interpretive rule for pre-existing agreements (Art. 20)**  
(F, AGC)
- ?? **No reference to place where office maintaining acc is located**
  - Insufficient account taken of PRIMA  
(ARG, D)
- ?? **Conflict with EU *Finality Directive***  
(ECB) [disputed by Belgian comments]
- ?? **Intermediaries may have to apply variety of ppty laws to securities it holds: (*But likely mitigated by reality tests*) (L)**
  - ≈ different enforcement procedures and provisional safeguard measures
  - ≈ disconnections between the applicable law and the competent jurisdiction (e.g. attachment orders; privileges)

## OPTION A+

[SUMMARY OF MAIN ARGUMENTS IN THE COMMENTS RECEIVED BY THE PERMANENT BUREAU]

### PROS

- ?? **Avoids problem of *second guessing***
  - ≈ increases certainty and predictability (AUS, B, DK, SF, F, N, E, UK, USA, ACSDA, EMTA, FBE, ISDA)
- ?? **No need to locate place of account**
  - ≈ Reduces scope of fallback Art. 5 (AUS, CAN, SF, F, N, USA, UK)
- ?? **Avoids side effects under domestic laws:**
  - tax implications (and expropriation) (B, DK, N, USA, ISDA)
- ?? **Avoids reference to *internal conflict rules* in Multi-unit State**
  - ≈ simplification of Art. 11 (B, DK, F, N, CH, USA, FBE, ISDA, BDB)
- ?? **Greater *ex ante* certainty**
  - ≈ Gives effect to parties' agreement as far as possible (F, May, UK, USA, EMTA)

### Additional pros over Option A

- ?? **No need for "Magic words"**
  - more legal certainty (AUS, B, CAN, SF, F, E, CH, UK, USA, ACSDA, AGC, EMTA, ISDA)
  - Consistent with industry practice
    - ≈ no need to revise pre-existing agreements
    - ≈ less costs, less tax/regulatory risks (ACSDA, AGC)
- ?? **Reduces scope for fallback rule Art. 5 significantly**
  - (B, P, UK, USA, ISDA)
- ?? **Eliminates need for interpretive rule for pre-existing agreements (Art. 20)**
  - (F, UK, USA, AGC, EMTA)
- ?? **Excludes possibility that parties select different laws for different ppty issues**
  - (AUS)

### CONS

- ?? **Against general PIL principles** (ARG, D)
  - Lex contractus* to govern issues of ppty law
- ?? **Inclusion of side agreements** (ARG, D)
  - Legal uncertainty especially vis-à-vis 3<sup>rd</sup> parties
- ?? **Quid if choice of law clause selecting *lex contractus* not valid** (e.g., account holder is consumer)? Default rule?(E)
- ?? **Parties may not intend *lex contractus* to apply to proprietary issues** (N)
- ?? **Deal with pre-existing agreements in Art. 20:** If option is meant to construct a fallback rule other than Art. 5 (i.e. *lex contractus*), questionable whether this improves predictability (CH); clarify relationship with Art 20(1)(b) (DK)
- ?? **Clarify Relationship with Art. 4(3)** (E, P)
- ?? **Intermediaries may have to apply variety of ppty laws to securities it holds:** (*But likely mitigated by reality tests*) (L)
  - ≈ different enforcement procedures and provisional safeguard measures
  - ≈ disconnections between the applicable law and the competent jurisdiction (e.g. attachment orders; privileges)