

THE ASSOCIATION OF GLOBAL CUSTODIANS

THE BANK OF NEW YORK
BROWN BROTHERS HARRIMAN
CITIBANK, N.A.
DEUTSCHE BANK AG
INVESTORS BANK & TRUST COMPANY
JPMORGAN CHASE BANK
MELLON TRUST/BOSTON SAFE DEPOSIT
& TRUST COMPANY
THE NORTHERN TRUST COMPANY
STATE STREET BANK AND TRUST COMPANY

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May 15, 2002

VIA FACSIMILE AND AIR COURIER

Permanent Bureau
Hague Conference on Private International Law
Scheveningseweg 6
2517 KT The Hague
Netherlands

Attn: Christophe Bernasconi, First Secretary

Re: Proposed Convention on the Law Applicable to Proprietary Rights in Indirectly Held Securities ("Proposed Convention") – Article 4 of Preliminary Document No. 13 (May 2002)

Ladies and Gentlemen:

The Association of Global Custodians ("Association"), an informal group of nine U.S. banks that are major providers of global custody services to U.S. institutional investors, has followed closely the development of the Proposed Convention and particularly of those provisions that would determine the law applicable to rights in securities held by an intermediary.¹ In that connection, the Association submits this comment on Article 4 ("Determination of the applicable law – Primary rule") as set forth in Preliminary Document No. 13 (May 2002).

¹ The Association previously submitted comment letters on this issue on October 31, 2001, and on March 15, 2002. In addition, several members have been active participants in the deliberations of the U.S. delegation. The members of the Association would be directly affected, both in their capacity as custodians and in their capacity as holders of security interests, by the provisions of the Proposed Convention.

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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 applicable law² 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 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.

² 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 in comment #1 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.

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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. 13.³ 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. 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.

The Association appreciates the opportunity to comment on Preliminary Document No. 13 and supports the Conference’s efforts to create greater certainty concerning the law that governs cross-border financial collateral arrangements. If you have any questions concerning these comments, or if there are specific issues

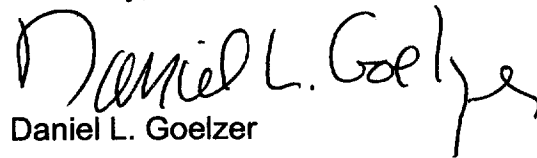
³ Bracketed Article 4(1)(c) states: “account holder support functions of the intermediary relating to securities accounts occur at such office.”

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concerning the activities and practices of global custodians that would be of interest,
please contact the undersigned at 202/452-7013.

Sincerely,


Daniel L. Goelzer

cc: Joyce Hansen
Federal Reserve Bank of New York