THE ASSOCIATION OF GLOBAL CUSTODIANS

THE BANK OF NEW YORK
BROWN BROTHERS HARRIMAN
CITIBANK, N.A.
DEUTSCHE BANK TRUST COMPANY AMERICAS
INVESTORS BANK & TRUST COMPANY
JPMORGAN CHASE BANK
MELLON FINANCIAL
THE NORTHERN TRUST COMPANY
RBC GLOBAL SERVICES
STATE STREET BANK AND TRUST COMPANY

COUNSEL TO THE ASSOCIATION:
BAKER & MCKENZIE
815 CONNECTICUT AVENUE, N.W.
WASHINGTON, D.C. 20006

TELEPHONE: 202/452-7013
FACSIMILE: 202/452-7074

October 23, 2002

VIA E-MAIL 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") – Comments on Article 4 as Set Forth in Preliminary Document No. 16 (September 2002)

Ladies and Gentlemen:

The Association of Global Custodians ("Association"), an informal group of ten North American banks that are major providers of global custody services to institutional investors,[1] has followed closely the development of the Proposed Convention and particularly those provisions that would determine the law applicable to rights in securities held through an intermediary in a multi-tiered holding system.[2] In that connection, the Association submits this comment on Article 4 ("Determination of the

---

[1] The RBC Global Services, the global custody business of Royal Bank of Canada, became a member of the Association on September 1, 2002.

[2] The Association previously submitted comment letters on this issue on October 31, 2001, March 15, 2002 and May 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.

applicable law – Primary rule") as set forth in Preliminary Document No. 16 (September 2002) ("Option A+") and Preliminary Document No. 15 (June 2002).

General Approach to Determining Governing Law

As proposed in Preliminary Document No. 16, Option A+ would provide:

> The law applicable to all the issues in Article 2(1) is the law in force in the State agreed by the account holder and the relevant intermediary as governing the account agreement or, if they have agreed that another law is applicable to all such issues, that other law.[3]

The Association supports this formulation of Article 4. As discussed in our prior letters, the Association believes that the standards by which the applicable law is determined should be consistent with the practices of custodian banks and should provide as much certainty as possible. In addition and as also noted in our earlier letters, there should be reasonable latitude in the selection of the applicable law, based on where the key account-related activities of the intermediary occur. Option A+ achieves all of these results.

Preliminary Document No. 15 (June 2002) contained two alternative versions of Article 4(1) -- Option A and Option B. Option A provided that the law applicable to the issues specified in Article 2(1) of the Proposed Convention is "the law of the State agreed by the account holder and the relevant intermediary as the State whose law governs those issues." Option B provided that the governing law is that "of the State

---

[3] Consistent with this redraft, Preliminary Document No. 16 also states that a definition of the term "account agreement" will be added to the definitions in Article 1. This new definition would provide:

> "account agreement" means the agreement between the account holder and the relevant intermediary governing the securities account;

The Explanatory Report would state the "account agreement" need not be contained in a single document, but may consist of more than one document, including side agreements. This statement is intended to clarify that a side agreement may be executed specifying the governing law without otherwise amending a pre-existing custody agreement.

agreed by the account holder and the relevant intermediary as the State in which the securities account is maintained." We believe that Option A+ as set forth in Preliminary Document No. 16 is superior to either Option A or Option B.

Option B is especially unsatisfactory because, as emphasized in our earlier letters to the Bureau, in modern, multi-jurisdictional custody practice, the concept of the place where an account is maintained has no generally understood meaning. Therefore, the use of a test, like Option B, that is dependent on that concept would necessarily result in uncertainty and the risk of post hoc judicial review that could upset the expectations of the parties. The possibility of courts second-guessing the determinations of the intermediary and the account holder concerning whether the account is maintained in a particular jurisdiction would undermine a key goal of the Convention -- certainty and reliability with respect to the creation and perfection of rights in indirectly held securities.

While preferable to Option B, Option A would require costly revision of existing custody contracts -- which typically lack provisions identifying the law governing the issues addressed in the Convention. Alternatively, Option A would require the inclusion of a provision, such as Article 20, addressing the construction of existing contracts; agreement on the scope and application of such a provision may, however, be difficult to achieve. Option A+ in Preliminary Document No. 16 avoids both of these problems.

For these reasons, we strongly favor Option A+. However, in the event that Option A+ is not adopted, we would recommend Option A as set forth in Preliminary Document No. 15, rather than Option B.

Article 4(1)(d)

The Association also urges that the Convention retain the bracketed phrase in Article 4(1)(d) ("[, 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]"). We believe that this language is important to the workability of Article 4.

Article 4(1)(d) provides that there is a sufficient nexus between a State and the intermediary if the intermediary is, in that State, "otherwise 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]." Both Preliminary Document No. 15 and No. 16

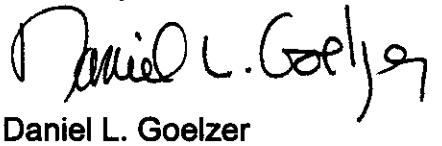
enclosed the final clause of Article 4(1)(d) in brackets, apparently to reflect the possibility that these words would be deleted from the final text of Article 4.

We urge the Convention to retain the bracketed language. 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. Its deletion could create an unfortunate and unhelpful negative implication that, in order for the nexus test to be satisfied, all of the intermediary's activities must occur within the State and at a single office. Any such interpretation would be highly impractical and inconsistent with modern custody practice.

* * *

The Association appreciates the opportunity to comment on Preliminary Document No. 16 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 require information concerning the activities and practices of global custodians, please contact the undersigned at 202/452-7013.

Sincerely,



Daniel L. Goelzer

cc: Joyce Hansen
Federal Reserve Bank of New York