

**Permanent Editorial Board for the Uniform Commercial Code**

**PEB COMMENTARY NO. \_\_\_\_**

**Hague Securities Convention's Effect on Determining  
the Applicable Law for Indirectly Held Securities**

**Draft for Public Comment**

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***Comments on this draft must be submitted by no later than June 30, 2013.***

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**PEB COMMENTARY NO. \_\_\_\_**  
**HAGUE SECURITIES CONVENTION'S EFFECT ON DETERMINING**  
**THE APPLICABLE LAW FOR INDIRECTLY HELD SECURITIES**

**Issue:** How does the Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary, concluded on July 5, 2006 (the “Hague Securities Convention” or “Convention”) affect UCC Articles 8 and 9’s determination of the applicable law for investment securities in the indirect holding system?

**Background and General Assessment:** The Hague Securities Convention meshes very well with UCC Articles 8 and 9, and in most instances will not lead to different results. The Convention carries certain complexities in determining the applicable law, and in some instances it may designate the law of a jurisdiction different from that designated by UCC Articles 8 and 9 alone, but difficulties of this nature are inevitable in any instrument affecting intermediated securities and designed to apply across multiple national systems. In the case of the Hague Securities Convention, these instances are generally manageable by sound transactional planning.

The resolution of commercial law questions often depends as much on the applicable choice of law rules as it does on the substantive law of the jurisdiction that those choice of law rules designate. For questions concerning indirectly held securities the United States choice of law rules are provided primarily by UCC sections 8-110 and 9-305, which depending on the circumstances may designate either a jurisdiction that has enacted the substantive law of UCC Articles 8 and 9 or another jurisdiction. Other nations’ choice of law rules differ, of course, and this diversity of choice of law rules with its corresponding diversity of possibly applicable substantive law may cause substantial difficulties in planning transactions and resolving disputes. To help ameliorate these problems, the Hague Securities Convention provides uniform choice of law rules among nations adhering to the Convention (“Contracting States”). The Convention has effect as a matter of United States law beginning on the first day of the month following the expiration of three months after the United States deposits its instrument of ratification with the Convention’s Depositary (the “Effective Date”).<sup>1</sup>

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<sup>1</sup> See Convention art. 19(1), (2)(a). All article and paragraph references are to the Convention unless otherwise indicated, and all section and subsection references are to the [2012] Official Text of the UCC.

It is expected that the United States will implement the Convention on a “self-executing” basis, so that after ratification, the Convention itself will be controlling law within the United States with respect to cases or transactions to which it applies. See S. Treaty Doc. No. 112-6, at VII (2012) (President’s message transmitting the Convention to the Senate and enclosing a State Department overview).

This Commentary explains the Convention's primary interactions with the UCC.<sup>2</sup> Where the Convention applies, it prevails to that extent over a contrary UCC rule because of the Supremacy Clause of the Constitution; but otherwise the applicable UCC provisions continue in full force and effect. The Convention's text, from the Web site of the Hague Conference on Private International Law, <http://hcch.e-vision.nl>, is attached as Appendix A.

## **I. Overview of the Convention**

The Convention applies to a broad range of issues affecting securities held with an intermediary, in any case or transaction involving a choice between the law of different nations. The Convention may apply to transactions that are not obviously or initially international in character. It applies even to transactions completed before the Effective Date, but it takes care to preserve the intended effect of pre-Effective Date account agreements.

Under the Convention's primary rule the applicable law is determined by either of two provisions appearing in the account agreement between a securities intermediary and its entitlement holder, namely a general governing law clause or a specialized clause that focuses directly on the group of commercial law issues in question. The Convention's primary rule is thus very similar to UCC subsections 8-110(b), (e)(1) and (2), and 9-305(a)(3). However this primary rule unlike the UCC rules operates only if the intermediary has, at the time of the agreement, an office in the applicable jurisdiction that is engaged in a regular activity of maintaining securities accounts (usually called a "Qualifying Office"). If the account agreement contains neither of the two above provisions, or if the Qualifying Office requirement is not met, the Convention provides a series of fall-back rules somewhat different from those of the UCC. For perfection of security interests by filing, the Convention accommodates UCC Article 9's choice of law rule designating the substantive law of the location of the debtor, with certain exceptions.

Though overall the Convention meshes very well with UCC Articles 8 and 9, in some instances it may designate the law of a different jurisdiction (whether a different nation or a different U.S. state). In addition to differences arising from the Qualifying Office requirement (see Part II for further discussion), differences could notably arise regarding the jurisdiction in which to perfect a security interest by filing when the account agreement designates the law of a non-U.S. jurisdiction, or when the debtor is located in a non-U.S. jurisdiction (see Part III), and regarding the continued perfection of a security interest following an amendment to the account agreement's designation of governing

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<sup>2</sup> Useful further sources on the Convention include Christophe Bernasconi and Harry C. Sigman, *The Hague Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary* (Hague Securities Convention), 2005 Uniform L. Rev. 117; James S. Rogers, *Conflict of Laws for Transactions in Securities Held Through Intermediaries*, 39 Cornell Int'l L.J. 285 (2007); and Carl S. Bjerre and Sandra M. Rocks, *A Transactional Approach to the Hague Securities Convention*, 3 Capital Markets L. J. 109 (2008). An official and exhaustive resource is Roy Goode, Hideki Kanda, and Karl Kreuzer, with the assistance of Christophe Bernasconi (Permanent Bureau), *Explanatory Report on the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary* (2005) [hereinafter "Explanatory Report"].

law (see Part IV). As indicated above, such instances are generally manageable by sound transactional planning.

## II. The Convention's Scope and Primary Rule

The Convention applies to “securities held with an intermediary,”<sup>3</sup> a scope generally comparable in UCC terms to security entitlements created by a securities intermediary’s book-entry credit of a security under section 8-501(b)(1).<sup>4</sup> The Convention applies broadly to all instances “involving a choice between the laws of different States,”<sup>5</sup> and can accordingly apply by reason of any of many elements, including without limitation a non-U.S. location of a party involved in the transaction, a non-U.S. party asserting an adverse claim, non-U.S. securities being credited to the securities account, or non-U.S. law being specified by the account agreement or other transaction document. Indeed one may wish to plan all indirect holding system transactions with the Convention as well as UCC Article 8 in mind, because even in transactions that appear wholly domestic, international factors may in fact be present (for example, if the securities intermediary holds securities for the entitlement holder through a non-U.S. intermediary) or may later become present (for example, if a non-U.S. party acquires an interest in or asserts an adverse claim to assets credited to the account).

The Convention applies regardless of whether the law that it designates is that of a Contracting State, though of course the Convention itself is the law only of Contracting States.<sup>6</sup> The Convention law applies to events that have occurred before an insolvency proceeding, notwithstanding the opening of the proceeding.<sup>7</sup> As is standard in

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<sup>3</sup> Convention arts. 2(1), 1(1)(f).

<sup>4</sup> At a more detailed level certain technicalities may complicate the comparison. First, under UCC Article 8 a security entitlement can in unusual circumstances be created even in the absence of a credit to a securities account (see subsections 8-501(b)(2) and (3)), and the Convention does not govern such cases.

Second, the definition of security may differ as between UCC Article 8 and the Convention. Compare section 8-102(a)(15) with Convention art. 1(1)(a) (defining security as “any shares, bonds, or other financial instruments or financial assets (other than cash), or any interest therein.” However there is no doubt that the Convention, like UCC Article 8, applies to multiple tier holding arrangements, such as where the account holder holds through a broker which in turn holds through a clearing corporation. See Explanatory Report ¶ 1-4 (“in light of the intermediated holding system, which may involve a chain of intermediaries between the account holder and the issuer, [the phrase ‘or any interest therein’ in article 1(1)(a)’s definition of securities] also refers to the interest which the account holder’s intermediary (or any other intermediary in the chain) has in securities held with its intermediary”).

Third, UCC Article 8 provides for security entitlements not only to securities (defined relatively narrowly in section 8-102(a)(15)) but also to a broad range of other financial assets, including “any property . . . held . . . in a securities account if the securities intermediary has expressly agreed . . . that the property is to be treated as a financial asset . . .” Section 8-102(a)(9)(iii). The Convention’s above-noted definition of security expressly includes financial assets and to that extent may be somewhat more expansive than UCC Article 8’s definition of security, but it is important to note that the Convention neither defines financial assets nor permits the parties’ agreement alone to be determinative.

<sup>5</sup> Convention art. 3. The Convention refers to “cases” rather than “instances,” but the Convention’s term should not be misunderstood as suggesting that the Convention applies only in litigation.

<sup>6</sup> Convention art. 9.

<sup>7</sup> Convention art. 8. On the other hand the Convention is not otherwise an insolvency choice of law convention. Except for the issues referred to in article 2(1), the Convention does not determine which jurisdiction’s law applies to insolvency issues such as the ranking of claims or the avoidability of transfers.

international instruments, the Convention is to be interpreted in light of the need to promote uniformity in its application.<sup>8</sup> Contracting States may refuse the Convention's choice of law rules only in very rare cases.<sup>9</sup>

For securities held with an intermediary the Convention determines the choice of law for a broad range of issues specified in article 2(1). These include all of the issues specified by sections 8-110(b), 9-305(a)(3) and the applicable portions of 9-305(c), relating to acquisition or disposition of interests, perfection and priority of security interests, and taking free of adverse claims. The following table shows the correlations between the two sets of issues.<sup>10</sup>

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<sup>8</sup> Convention art. 13. This may mean avoiding purely United States canons of interpretation and taking into account decisions of courts of other Contracting States. Cf. section 1-103(a)(3) (UCC to be applied to promote underlying purpose and policy of "mak[ing] uniform the law among the various jurisdictions").

<sup>9</sup> Convention art. 11(1) ("manifestly contrary to the public policy of the forum"), 11(2) (substantive provisions of the forum which, "irrespective of rules of conflict of laws, must be applied even to international situations"). Even these narrow exceptions are further limited by article 11(3).

<sup>10</sup> In certain respects the article 2(1) issues reach beyond the section 8-110 and 9-305 issues. Besides the article 2(1)(f) and (g) points noted in the table, article 2(1)(c)'s "requirements, if any, for the perfection of a disposition" extends beyond the usual UCC understanding of perfection, because article 1(h) defines disposition as including not only security interests but also other transfers of limited interests plus outright transfers.

<i>UCC provision</i>	<i>Convention provision(s)</i>
subsection 8-110(b)(1): acquisition of a security entitlement from the securities intermediary	article 2(1)(a): legal nature and effects against the intermediary and third parties of the rights resulting from a credit of securities to a securities account
subsection 8-110(b)(2): rights and duties of the securities intermediary and entitlement holder arising out of a security entitlement	article 2(1)(a): legal nature and effects <i>against the intermediary</i> and third parties of the rights resulting from a credit of securities to a securities account (emphasis added)
subsection 8-110(b)(3): whether the securities intermediary owes any duties to an adverse claimant to a security entitlement	article 2(1)(e): duties, if any, of an intermediary to a person other than the account holder who asserts in competition with the account holder or another person an interest in securities held with that intermediary
subsection 8-110(b)(4): whether an adverse claim can be asserted against a person who acquires a security entitlement from the securities intermediary or a person who purchases a security entitlement or interest therein from an entitlement holder	article 2(1)(a): legal nature and effects <i>against the intermediary and third parties</i> of the rights resulting from a credit of securities to a securities account (emphasis added) article 2(1)(d): whether a person's interest in securities held with an intermediary extinguishes or has priority over another person's interest
subsection 9-305(a)(3): perfection, the effect of perfection or nonperfection, and the priority of a security interest in a security entitlement or securities account	article 2(1)(b): legal nature and effects against the intermediary and <i>third parties</i> of a <i>disposition</i> of securities held with an intermediary (emphasis added) article 2(1)(c): requirements, if any, for perfection of a disposition of securities held with an intermediary article 2(1)(d): whether a person's interest in securities held with an intermediary extinguishes or has priority over another person's interest
subsection 9-305(c)(1): perfection of a security interest in investment property by filing	article 2(1)(c): requirements, if any, for perfection of a disposition of securities held with an intermediary
subsection 9-305(c)(2): automatic perfection of a security interest in investment property created by a broker or securities intermediary	article 2(1)(c): requirements, if any, for perfection of a disposition of securities held with an intermediary
subsection 1-301(a): foreclosure requirements for security interests and the like	article 2(1)(f): requirements, if any, for the realisation of an interest in securities held with an intermediary
subsection 1-301(a): transferee's rights to proceeds and the like as against transferor	article 2(1)(g): whether a disposition of securities held with an intermediary extends to entitlements to dividends, income, or other distributions, or to redemption, sale or other proceeds

The Convention does not cover issues under UCC Article 8's direct holding system, does not cover rights or duties of the issuer even in the indirect holding system, and does not cover issues affecting commodity contracts or commodity accounts.<sup>11</sup> The Convention also does not cover purely contractual matters between the securities intermediary and its entitlement holder, such as the enforceability of an arbitration clause in the account agreement.<sup>12</sup>

<sup>11</sup> Convention art. 2(3)(c).

<sup>12</sup> Convention art. 2(3)(a).

The Convention's primary choice of law rule for the issues above is highly parallel to that of the UCC, because under both bodies of law the rule depends directly on either of two provisions of the account agreement.<sup>13</sup> Under article 4(1), just as under sections 8-110(e)(2) and 9-305(a)(3), if the agreement contains an express governing law clause, then the law specified by that clause is also the law designated by the Convention.<sup>14</sup> Alternatively, under article 4(1) similarly to sections 8-110(e)(1) and 9-305(a)(3), if the agreement contains a specialized clause expressly designating a certain jurisdiction's law for the group of commercial law issues in question, then that jurisdiction's law will control, even if the jurisdiction is different from the one specified in the governing law clause.<sup>15</sup> Both bodies of law accommodate agreement provisions designating the law of either a nation (called a "State" in the Convention) or a U.S. state, Canadian province or

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<sup>13</sup> The account agreement in question is the one between the account holder and the intermediary with which the account holder has its account, rather than another intermediary at a higher tier. See Convention article 1(1)(e) (agreement with "relevant intermediary") and (g) (defining relevant intermediary as "the intermediary that maintains the securities account for the account holder"); subsections 8-110(e)(1) and (2) (agreement between the entitlement holder and "its" intermediary); cf. subsection 8-112(c) (directing creditor process to "the securities intermediary with whom the debtor's securities account is maintained" as a matter of substantive law). If an original account agreement is later amended, for example by a control agreement providing that the account is now governed by a law different from that originally designated, then the term "account agreement" refers to the original agreement as amended. See Explanatory Report ¶ 1-15 ("The definition [of account agreement] does not require that the account agreement fulfil any formal requirements. . . . [I]f in writing [it] may consist of one or more documents."). Amendments to an account agreement changing the governing law are further discussed in Part IV below.

<sup>14</sup> Convention art. 4(1), first sentence ("The law applicable to all the issues specified in Article 2(1) is the law in force in the State expressly agreed in the account agreement as the State whose law governs the account agreement . . .").

<sup>15</sup> Convention art. 4(1), first sentence (" . . . or, if the account agreement expressly provides that another law is applicable to all such issues, that other law.") Because of the Convention's reference to "all such issues" a clause is ineffective if it singles out only certain issues for treatment under this choice of law rule.

In U.S. account agreements these specialized clauses will presumably be the exception rather than the rule, with parties usually using only the governing law clause just discussed. However when the account agreement uses the specialized clause to designate a jurisdiction different from that of the governing law clause (or for some reason uses the specialized clause without a governing law clause at all), drafters should note that a clause simply tracking the language of section 8-110(e)(1) might not satisfy the present provision of article 4(1), or vice versa. Under section 8-110(e)(1) the specialized clause should provide that a particular jurisdiction is the securities intermediary's jurisdiction, while under article 4(1) the specialized clause should provide that the particular jurisdiction's law is applicable to all issues specified in article 2(1). A clause satisfying both the UCC and Convention provisions might read, for example, "The parties hereto agree that the State of New York is the securities intermediary's jurisdiction for purposes of UCC Article 8 and that the law in force therein is applicable to all the issues specified in Article 2(1) of the Hague Securities Convention."

Nevertheless for account agreements entered into before the Effective Date a clause tracking the language of section 8-110(e)(1) does suffice under article 4(1), as discussed in Part IV below.

the like (called a “territorial unit of a Multi-unit State” in the Convention).<sup>16</sup> Both bodies of law also generally eliminate renvoi, meaning that only the jurisdiction’s substantive law applies, not its conflicts of law rules.<sup>17</sup>

The only notable exception to this parallelism between the Convention and the UCC is that the Convention’s primary rule applies only if the intermediary has, at the time of the agreement, a Qualifying Office in the applicable jurisdiction engaged in a regular activity of maintaining securities accounts.<sup>18</sup> The Convention clarifies this requirement by specifying safe-harbor activities that satisfy the requirement<sup>19</sup> and by also specifying certain mechanical functions that do not in and of themselves satisfy it.<sup>20</sup> Of importance to agreements designating the law of a U.S. state, the Qualifying Office requirement is applied broadly to Multi-unit States, so that the office may be located in any territorial unit of the same Multi-unit State, rather than necessarily in the particular territorial unit designated by the agreement.<sup>21</sup> Thus an account agreement expressly governed by the law of New York and specifying no other jurisdiction as governing the Convention’s article 2(1) issues effectively designates New York law under the Convention even if the intermediary has a Qualifying Office only in New Jersey.

If the account agreement contains neither of the express clauses contemplated by the primary rule, or if the Qualifying Office test is not satisfied with respect to such a clause,

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<sup>16</sup> Convention arts. 1(1)(m) (defining Multi-unit State as “a State within which two or more territorial units of that State, or both the State and one or more of its territorial units, have their own rules of law in respect of any of the issues specified in Article 2(1)”), 12(1)(a) (“If the account holder and the relevant intermediary have agreed on the law of a specified territorial unit of a Multi-unit State . . . the references to “State” in the first sentence of Article 4(1) are to that territorial unit”); section 8-110(e)(1), (2) (“the law of a particular jurisdiction”).

To the extent that United States federal law applies to the article 2(1) issues, the Convention recognizes that an account agreement designating the law of a particular U.S. state also incorporates that federal law. See Convention arts. 12(2)(a) (applying “the law of the Multi-unit State itself”), 4(1), first sentence (designating “the law in force in” the jurisdiction rather than the law “of” the jurisdiction). For example, the TRADES Regulations governing book-entry interests in Treasury securities, 31 C.F.R. 357, contain substantive provisions addressing the perfection and super-priority of security interests in favor of the United States in security entitlements of Federal Reserve Bank participants. Such provisions are included within article 12(2)(a), as are the parallel provisions contained in regulations governing securities issued by various government-sponsored entities (“GSEs”). The TRADES and GSE regulations also contain choice of law provisions tracking UCC section 8-110(e) and do not explicitly refer to the Convention. It may not be clear whether these choice of law provisions, or those in the Convention, will apply to future commercial transactions. Accordingly, parties should structure their transactions to achieve the desired outcome under both frameworks.

<sup>17</sup> Convention art. 10 (“‘law’ means the law in force in a State other than its choice of law rules”); sections 8-110(b), 9-305(a)(3) and 9-305(c)(3) (“local law”). For perfection of security interests by filing, the Convention provides a rule on choice of law among the states of the United States that in most instances accommodates UCC Article 9’s usual location-of-the-debtor filing rule. See Part III below.

<sup>18</sup> Convention art. 4(1), second sentence.

<sup>19</sup> The Qualifying Office requirement is conclusively met if the office either “effects or monitors entries to securities accounts” or “administers payments or corporate actions relating to securities held with the intermediary”. *Id.* The securities accounts maintained by the office need not necessarily include the particular securities accounts to which the account agreement in question relates.

<sup>20</sup> Convention art. 4(2) (mere location of technology supporting bookkeeping or data processing; mere operation of call centers for communication with account holders, etc.).

<sup>21</sup> Convention art. 12(1)(b).



the Convention provides certain fallback rules that differ in their details from the fallback rules of section 8-110(e).<sup>22</sup>

### III. Preservation of UCC Article 9's Location-of-Debtor Rule for Perfection of Security Interests by Filing

Though the Convention generally eliminates renvoi, it generally preserves UCC Article 9's own choice of law rule for perfection of a security interest in indirectly held securities by the filing of a financing statement. This UCC Article 9 rule designates the law of the location of the debtor,<sup>23</sup> which keeps the jurisdiction for filing for this type of collateral the same as that for virtually all other types of personal property.<sup>24</sup> Convention article 12(2)(b)'s preservation of the UCC Article 9 rule may be explained by example:

Debtor is using the Japanese securities credited to its securities account with Intermediary as collateral for a loan from Lender; Debtor is a corporation organized solely under the law of Texas; and the account agreement between Debtor and Intermediary provides that the agreement is governed by the law of New York. If Lender wished to perfect by, for example, obtaining control by agreement under sections 8-106(d)(2) and 9-106, then the Convention's primary rule would designate the applicable law as New York; but if Lender wishes to perfect by filing a financing statement (perhaps because the value of other personal property collateral in the transaction makes the securities account of secondary importance), then Convention article 12(2)(b) accommodates the UCC Article 9 location-of-debtor rule designating the applicable law for filing as

<sup>22</sup> The two sets of fallback rules are as follows:

	UCC § 8-110(e)	Convention
First fallback	subsection (e)(3): jurisdiction of an office at which the securities account is maintained, as expressly provided in the account agreement.	article 5(1): State of a particular office through which the intermediary entered into the account agreement, as expressly and unambiguously stated in the account agreement, if Qualifying Office requirement is met with respect to that office.
Second fallback	subsection (e)(4): jurisdiction in which the office serving the entitlement holder's account is located, as identified in an account statement.	article 5(2): State in which the intermediary is organized.
Third fallback	subsection (e)(5): jurisdiction of the chief executive office of the intermediary.	article 5(3): State in which the intermediary has its principal place of business.

Seeking an abundance of clarity the Convention also enumerates criteria that do not determine the applicable law, just as UCC Article 8 does. See Convention art. 6; cf. section 8-110(f).

<sup>23</sup> Section 9-305(c)(1).

<sup>24</sup> See generally section 9-301(1). The location of the debtor is determined under section 9-307.

Texas.<sup>25</sup> Accordingly Lender should file in Texas, in the office designated by section 9-501(a) as enacted in Texas, and should follow the substantive rules for financing statements set forth in part 5 of Article 9 as enacted in Texas.

It is important to note, however, that the Convention provision also narrows the UCC Article 9 rule somewhat. Specifically, the Convention provision does not apply to cases in which the account agreement designates the law of, or the debtor is located for UCC Article 9 purposes in, a jurisdiction other than a territorial unit of the United States.<sup>26</sup>

It was noted above that the Qualifying Office rule applies broadly to Multi-unit States, and this same breadth applies when article 4(1) is applied with the overlay of article 12(2)(b). On the facts of the example above, the Convention designates Texas as the applicable law for filing even if Intermediary's only Qualifying Office is in New Jersey and not in Texas or New York.<sup>27</sup>

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<sup>25</sup> Convention article 12(2)(b) provides: "In applying this Convention [i.e. in following the account agreement's and article 4(1)'s designation of New York law] . . . if the law in force in a territorial unit of a Multi-unit State [i.e. New York's section 9-305(c)(1)] designates the law of another territorial unit of that State [i.e. Texas as the location of the debtor under section 9-307(e)] to govern perfection by public filing, recording or registration, the law of that other territorial unit [i.e. Texas's filing-office and substantive filing law] governs that issue."

<sup>26</sup> This is illustrated by two variations on the main example above. First, suppose that the account agreement designates the law of England rather than New York, with Debtor being located in Texas as in the main example. On these facts, UCC Article 9 standing alone formerly called for filing in Texas, but under the Convention English law applies, including any filing provisions thereunder. UCC section 9-305(c)(1)'s provision for filing in Texas is irrelevant because the Convention's primary rule does not in the first instance designate the law of any UCC jurisdiction and hence article 12(2)(b) is not triggered. The Convention's place-of-filing provision is limited by Convention articles 4 and 5 and UCC Article 9's place-of-filing provision is not similarly limited by sections 8-110 or 9-305(a)(3).

Second, suppose that the account agreement designates the law of New York as in the main example, but that Debtor is a non-U.S. corporation with its chief executive office in Ontario, Canada, and that the law of Ontario generally requires filing, recordation or the like as specified in UCC section 9-307(c). For Article 9 purposes Debtor is thus located in Ontario under section 9-307(b). On these facts, UCC Article 9 standing alone formerly caused Ontario law (including Ontario's substantive filing provisions) to apply; but under the Convention New York law (including New York's substantive filing provisions) apply. The key to this result is that Convention article 12(2)(b) does not apply, because Ontario is not "another territorial unit of [the same] State [agreed upon in the account agreement]," and as a result the transaction is governed by the substantive law designated by Convention article 4(1) alone.

Many otherwise non-U.S. debtors are located in the District of Columbia under sections 9-307(c)'s exception to section 9-307(b), and such cases are fully accommodated by Convention article 12(2)(b) so that the District of Columbia is the jurisdiction for perfection by filing (not unlike the main Texas example in the text above). But section 9-307(c) has no bearing on the Ontario example just discussed, because it applies only "[i]f subsection (b) does not apply," which is not the case here. That is, the fact that filing in Ontario is not effective as a matter of U.S. law results from the limitations of Convention article 12(2)(b) itself, rather than from any aspect of Ontario law addressed by section 9-307(c).

Separately from its limitations on section 9-305(c)(1), the Convention also does not preserve section 9-305(c)(2)'s choice of law rule for automatic perfection of a security interest in investment property created by a broker or securities intermediary, but this is of little practical importance because the rule is uniform across U.S. jurisdictions and by its nature requires no location-directed action such as filing.

<sup>27</sup> Convention art. 12(1)(b).

#### IV. Pre-Convention Account Agreements and Other Change of Law Matters

The Convention generally applies as described above to all account agreements even if they were entered into before the Effective Date.<sup>28</sup> However, most pre-Convention transactions do not need to be amended or renegotiated in order to retain their intended effects. To illustrate, suppose that an account agreement, entered into before the Effective Date, provides “This agreement shall be governed by the law of New York.” Until the Effective Date, New York was the applicable law under the UCC alone because of the agreement’s governing law clause under subsection 8-110(e)(2). From the Effective Date forward (provided only that the Convention’s usual Qualifying Office requirement is satisfied), New York continues to be the applicable law for Convention purposes under articles 16(1) and 4(1).

A slightly more complex variation is dealt with by Convention article 16(3). Suppose that the pre-Effective Date account agreement provides “This agreement shall be governed by the law of New York, except that California is the securities intermediary’s jurisdiction for purposes of the Uniform Commercial Code.” In this case, until the Effective Date, California was the applicable law under the UCC alone because of the agreement’s securities intermediary clause under subsection 8-110(e)(1). From the Effective Date forward (provided only that the Convention’s usual Qualifying Office requirement is satisfied), California continues to be the applicable law for Convention purposes under article 16(3).<sup>29</sup> Note that California would not be the applicable law for Convention purposes under articles 16(1) and 4(1) alone.<sup>30</sup>

Convention article 15 addresses conflicts between a party that acquires rights before the Effective Date under the law that applies at that time, and another party that acquires rights after the Effective Date under the law designated by the Convention. Convention

<sup>28</sup> Convention art. 16(1) (“References in this Convention to an account agreement include an account agreement entered into before this Convention entered into force in accordance with Article 19(1)”). The rules described are inapplicable to account agreements that expressly refer to the Convention. Convention art. 16(2).

<sup>29</sup> Convention article 16(3) provides in pertinent part: “Any express terms of an account agreement which would have the effect, under the rules of the State whose law governs that agreement, that the law in force in a particular State, or a territorial unit of a particular Multi-unit State, applies to any of the issues specified in Article 2(1), shall have the effect that such law governs all the issues specified in Article 2(1), provided that the relevant intermediary had, at the time the agreement was entered into, an office in that State which satisfied the condition specified in the second sentence of Article 4(1).” As applied to the example in the text, under New York law alone, the quoted clause would have the effect that California law governs the section 8-110(b) issues that are also included in article 2(1), and as a result (again subject to the Qualifying Office requirement) the clause is bootstrapped so as to govern all of the other issues in article 2(1) as well.

This rule does not apply to pre-Convention account agreements that contain an express reference to the Convention, and its scope may be further limited by declaration. See arts. 16(2) and (3). The United States is not expected to make any such declaration, though of course on this point as elsewhere in the Convention, account should be taken of declarations made by a non-U.S. Contracting State to the extent enforcement in that Contracting State is foreseeable.

<sup>30</sup> After all, the reference to California satisfies neither of article 4(1)’s alternatives: it is not a governing law clause, and it does not “expressly provide that another law is applicable to all [the] issues [specified in article 2(1)]”.

article 15 provides that such a conflict is to be resolved under the law designated by the Convention. This rule should rarely be disruptive to the first party, particularly in light of article 16 as just discussed. The rule promotes a quite substantial interest in the clarity of results that arises from the Convention's prompt and broad application.

Change of law matters can also arise after the Effective Date when an amendment to the account agreement designates a new applicable law. For example, if a securities account initially governed by English law is used as collateral for a U.S. lender that wishes to perfect the security interest using a control agreement under New York law, then the lender might build into the control agreement an amendment to the account agreement changing its governing law clause, with the debtor's and intermediary's consent to that amendment of course being necessary. Assuming such an amendment satisfies Convention article 4(1), including the Qualifying Office requirement applied at the time of the amendment, then article 7(3) provides for the law designated by the amendment to govern most of the Convention's article 2(1) issues. However, to protect pre-amendment interests of third parties, article 7(4) provides for the pre-amendment law to continue governing a handful of issues,<sup>31</sup> without limitation as to time. UCC Article 9 is broadly similar, with the law designated by the amendment generally governing,<sup>32</sup> and protections for pre-amendment interests being a subject for the new jurisdiction's substantive law.<sup>33</sup>

## **V. Amendment to Official Comments**

Amendments to some of the Official Comments to the UCC sections affected by the Convention are appropriate in order to make better known the interactions discussed above. The Official Comments to section 8-110, 9-305, 9-301 and 1-301 are hereby amended as shown in Appendix B, effective on the Effective Date.

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<sup>31</sup> The pre-amendment law notably continues to govern perfection of pre-amendment interests, and most issues of their priority as against competing pre-amendment interests. However these protections do not apply to a party that has consented to the amendment. Convention art. 7(4), (5).

<sup>32</sup> See section 9-305(a)(3).

<sup>33</sup> When the new jurisdiction's substantive law is the UCC, a party with a security interest perfected under the pre-amendment law has a limited grace period, usually of four months, within which the interest remains perfected and the secured party can re-perfect under the law of the new jurisdiction. Section 9-316(f), (g). The UCC has no explicit provision protecting pre-amendment interests other than security interests.



**36. CONVENTION ON THE LAW APPLICABLE TO  
CERTAIN RIGHTS IN RESPECT OF SECURITIES  
HELD WITH AN INTERMEDIARY<sup>1</sup>**

*(Concluded 5 July 2006)*

The States signatory to the present Convention,

Aware of the urgent practical need in a large and growing global financial market to provide legal certainty and predictability as to the law applicable to securities that are now commonly held through clearing and settlement systems or other intermediaries,

Conscious of the importance of reducing legal risk, systemic risk and associated costs in relation to cross-border transactions involving securities held with an intermediary so as to facilitate the international flow of capital and access to capital markets,

Desiring to establish common provisions on the law applicable to securities held with an intermediary beneficial to States at all levels of economic development,

Recognising that the "Place of the Relevant Intermediary Approach" (or PRIMA) as determined by account agreements with intermediaries provides the necessary legal certainty and predictability,

Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions –

**CHAPTER I – DEFINITIONS AND SCOPE OF APPLICATION**

**Article 1**

**Definitions and interpretation**

**(1) In this Convention –**

- a) "securities" means any shares, bonds or other financial instruments or financial assets (other than cash), or any interest therein;
- b) "securities account" means an account maintained by an intermediary to which securities may be credited or debited;
- c) "intermediary" means a person that in the course of a business or other regular activity maintains securities accounts for others or both for others and for its own account and is acting in that capacity;
- d) "account holder" means a person in whose name an intermediary maintains a securities account;
- e) "account agreement" means, in relation to a securities account, the agreement with the relevant intermediary governing that securities account;
- f) "securities held with an intermediary" means the rights of an account holder resulting from a credit of securities to a securities account;
- g) "relevant intermediary" means the intermediary that maintains the securities account for the account holder;
- h) "disposition" means any transfer of title whether outright or by way of security and any grant of a security interest, whether possessory or non-possessory;

<sup>1</sup> This Convention, including related materials, is accessible on the website of the Hague Conference on Private International Law ([www.hcch.net](http://www.hcch.net)), under "Conventions". For the full history of the Convention, see Hague Conference on Private International Law, *Proceedings of the Nineteenth Session (2002)*, Tome II, *Securities* (ISBN 9789004148550, Brill, 2006, 752 pp.).

- i) "perfection" means completion of any steps necessary to render a disposition effective against persons who are not parties to that disposition;
  - j) "office" means, in relation to an intermediary, a place of business at which any of the activities of the intermediary are carried on, excluding a place of business which is intended to be merely temporary and a place of business of any person other than the intermediary;
  - k) "insolvency proceeding" means a collective judicial or administrative proceeding, including an interim proceeding, in which the assets and affairs of the debtor are subject to control or supervision by a court or other competent authority for the purpose of reorganisation or liquidation;
  - l) "insolvency administrator" means a person authorised to administer a reorganisation or liquidation, including one authorised on an interim basis, and includes a debtor in possession if permitted by the applicable insolvency law;
  - m) "Multi-unit State" means a State within which two or more territorial units of that State, or both the State and one or more of its territorial units, have their own rules of law in respect of any of the issues specified in Article 2(1);
  - n) "writing" and "written" mean a record of information (including information communicated by teletransmission) which is in tangible or other form and is capable of being reproduced in tangible form on a subsequent occasion.
- (2) References in this Convention to a disposition of securities held with an intermediary include –
- a) a disposition of a securities account;
  - b) a disposition in favour of the account holder's intermediary;
  - c) a lien by operation of law in favour of the account holder's intermediary in respect of any claim arising in connection with the maintenance and operation of a securities account.
- (3) A person shall not be considered an intermediary for the purposes of this Convention merely because –
- a) it acts as registrar or transfer agent for an issuer of securities; or
  - b) it records in its own books details of securities credited to securities accounts maintained by an intermediary in the names of other persons for whom it acts as manager or agent or otherwise in a purely administrative capacity.
- (4) Subject to paragraph (5), a person shall be regarded as an intermediary for the purposes of this Convention in relation to securities which are credited to securities accounts which it maintains in the capacity of a central securities depository or which are otherwise transferable by book entry across securities accounts which it maintains.
- (5) In relation to securities which are credited to securities accounts maintained by a person in the capacity of operator of a system for the holding and transfer of such securities on records of the issuer or other records which constitute the primary record of entitlement to them as against the issuer, the Contracting State under whose law those securities are constituted may, at any time, make a declaration that the person which operates that system shall not be an intermediary for the purposes of this Convention.

## Article 2

### Scope of the Convention and of the applicable law

- (1) This Convention determines the law applicable to the following issues in respect of securities held with an intermediary –
- a) the legal nature and effects against the intermediary and third parties of the rights resulting from a credit of securities to a securities account;
  - b) the legal nature and effects against the intermediary and third parties of a disposition of securities held with an intermediary;
  - c) the requirements, if any, for perfection of a disposition of securities held with an intermediary;
  - d) whether a person's interest in securities held with an intermediary extinguishes or has priority over another person's interest;
  - e) the duties, if any, of an intermediary to a person other than the account holder who asserts in competition with the account holder or another person an interest in securities held with that intermediary;
  - f) the requirements, if any, for the realisation of an interest in securities held with an intermediary;
  - g) whether a disposition of securities held with an intermediary extends to entitlements to dividends, income, or other distributions, or to redemption, sale or other proceeds.

- (2) This Convention determines the law applicable to the issues specified in paragraph (1) in relation to a disposition of or an interest in securities held with an intermediary even if the rights resulting from the credit of those securities to a securities account are determined in accordance with paragraph (1)(a) to be contractual in nature.
- (3) Subject to paragraph (2), this Convention does not determine the law applicable to –
- a) the rights and duties arising from the credit of securities to a securities account to the extent that such rights or duties are purely contractual or otherwise purely personal;
  - b) the contractual or other personal rights and duties of parties to a disposition of securities held with an intermediary; or
  - c) the rights and duties of an issuer of securities or of an issuer's registrar or transfer agent, whether in relation to the holder of the securities or any other person.

### Article 3 Internationality

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

## CHAPTER II – APPLICABLE LAW

### Article 4 Primary rule

- (1) The law applicable to all the issues specified in Article 2(1) is the law in force in the State expressly agreed in the account agreement as the State whose law governs the account agreement or, if the account agreement expressly provides that another law is applicable to all such issues, that other law. The law designated in accordance with this provision applies only if the relevant intermediary has, at the time of the agreement, an office in that State, which –
- a) alone or together with other offices of the relevant intermediary or with other persons acting for the relevant intermediary in that or another State –
    - i) effects or monitors entries to securities accounts;
    - ii) administers payments or corporate actions relating to securities held with the intermediary; or
    - iii) is otherwise engaged in a business or other regular activity of maintaining securities accounts; or
  - b) is identified by an account number, bank code, or other specific means of identification as maintaining securities accounts in that State.
- (2) For the purposes of paragraph (1) a), an office is not engaged in a business or other regular activity of maintaining securities accounts –
- a) merely because it is a place where the technology supporting the bookkeeping or data processing for securities accounts is located;
  - b) merely because it is a place where call centres for communication with account holders are located or operated;
  - c) merely because it is a place where the mailing relating to securities accounts is organised or files or archives are located; or
  - d) if it engages solely in representational functions or administrative functions, other than those related to the opening or maintenance of securities accounts, and does not have authority to make any binding decision to enter into any account agreement.
- (3) In relation to a disposition by an account holder of securities held with a particular intermediary in favour of that intermediary, whether or not that intermediary maintains a securities account on its own records for which it is the account holder, for the purposes of this Convention –
- a) that intermediary is the relevant intermediary;
  - b) the account agreement between the account holder and that intermediary is the relevant account agreement;
  - c) the securities account for the purposes of Article 5(2) and (3) is the securities account to which the securities are credited immediately before the disposition.

Article 5  
Fall-back rules

- (1) If the applicable law is not determined under Article 4, but it is expressly and unambiguously stated in a written account agreement that the relevant intermediary entered into the account agreement through a particular office, the law applicable to all the issues specified in Article 2(1) is the law in force in the State, or the territorial unit of a Multi-unit State, in which that office was then located, provided that such office then satisfied the condition specified in the second sentence of Article 4(1). In determining whether an account agreement expressly and unambiguously states that the relevant intermediary entered into the account agreement through a particular office, none of the following shall be considered –
  - a) a provision that notices or other documents shall or may be served on the relevant intermediary at that office;
  - b) a provision that legal proceedings shall or may be instituted against the relevant intermediary in a particular State or in a particular territorial unit of a Multi-unit State;
  - c) a provision that any statement or other document shall or may be provided by the relevant intermediary from that office;
  - d) a provision that any service shall or may be provided by the relevant intermediary from that office;
  - e) a provision that any operation or function shall or may be carried on or performed by the relevant intermediary at that office.
- (2) If the applicable law is not determined under paragraph (1), that law is the law in force in the State, or the territorial unit of a Multi-unit State, under whose law the relevant intermediary is incorporated or otherwise organised at the time the written account agreement is entered into or, if there is no such agreement, at the time the securities account was opened; if, however, the relevant intermediary is incorporated or otherwise organised under the law of a Multi-unit State and not that of one of its territorial units, the applicable law is the law in force in the territorial unit of that Multi-unit 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, at the time the written account agreement is entered into or, if there is no such agreement, at the time the securities account was opened.
- (3) If the applicable law is not determined under either paragraph (1) or paragraph (2), that law is the law in force in the State, or the territorial unit of a Multi-unit 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, at the time the written account agreement is entered into or, if there is no such agreement, at the time the securities account was opened.

Article 6  
Factors to be disregarded

In determining the applicable law in accordance with this Convention, no account shall be taken of the following factors –

- a) the place where the issuer of the securities is incorporated or otherwise organised or has its statutory seat or registered office, central administration or place or principal place of business;
- b) the places where certificates representing or evidencing securities are located;
- c) the place where a register of holders of securities maintained by or on behalf of the issuer of the securities is located; or
- d) the place where any intermediary other than the relevant intermediary is located.

Article 7  
Protection of rights on change of the applicable law

- (1) This Article applies if an account agreement is amended so as to change the applicable law under this Convention.
- (2) In this Article –
  - a) “the new law” means the law applicable under this Convention after the change;
  - b) “the old law” means the law applicable under this Convention before the change.
- (3) Subject to paragraph (4), the new law governs all the issues specified in Article 2(1).



- (4) Except with respect to a person who has consented to a change of law, the old law continues to govern –
- a) the existence of an interest in securities held with an intermediary arising before the change of law and the perfection of a disposition of those securities made before the change of law;
  - b) with respect to an interest in securities held with an intermediary arising before the change of law –
    - i) the legal nature and effects of such an interest against the relevant intermediary and any party to a disposition of those securities made before the change of law;
    - ii) the legal nature and effects of such an interest against a person who after the change of law attaches the securities;
    - iii) the determination of all the issues specified in Article 2(1) with respect to an insolvency administrator in an insolvency proceeding opened after the change of law;
  - c) priority as between parties whose interests arose before the change of law.
- (5) Paragraph (4) c) does not preclude the application of the new law to the priority of an interest that arose under the old law but is perfected under the new law.

#### Article 8 Insolvency

- (1) Notwithstanding the opening of an insolvency proceeding, the law applicable under this Convention governs all the issues specified in Article 2(1) with respect to any event that has occurred before the opening of that insolvency proceeding.
- (2) Nothing in this Convention affects the application of any substantive or procedural insolvency rules, including any rules relating to –
  - a) the ranking of categories of claim or the avoidance of a disposition as a preference or a transfer in fraud of creditors; or
  - b) the enforcement of rights after the opening of an insolvency proceeding.

### CHAPTER III – GENERAL PROVISIONS

#### Article 9 General applicability of the Convention

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

#### Article 10 Exclusion of choice of law rules (*renvoi*)

In this Convention, the term “law” means the law in force in a State other than its choice of law rules.

#### Article 11 Public policy and internationally mandatory rules

- (1) The application of the law determined under this Convention may be refused only if the effects of its application would be manifestly contrary to the public policy of the forum.
- (2) This Convention does not prevent the application of those provisions of the law of the forum which, irrespective of rules of conflict of laws, must be applied even to international situations.
- (3) This Article does not permit the application of provisions of the law of the forum imposing requirements with respect to perfection or relating to priorities between competing interests, unless the law of the forum is the applicable law under this Convention.

Article 12  
Determination of the applicable law for Multi-unit States

- (1) If the account holder and the relevant intermediary have agreed on the law of a specified territorial unit of a Multi-unit State –
  - a) the references to “State” in the first sentence of Article 4(1) are to that territorial unit;
  - b) the references to “that State” in the second sentence of Article 4(1) are to the Multi-unit State itself.
- (2) In applying this Convention –
  - a) the law in force in a territorial unit of a Multi-unit State includes both the law of that unit and, to the extent applicable in that unit, the law of the Multi-unit State itself;
  - b) if the law in force in a territorial unit of a Multi-unit State designates the law of another territorial unit of that State to govern perfection by public filing, recording or registration, the law of that other territorial unit governs that issue.
- (3) A Multi-unit State may, at the time of signature, ratification, acceptance, approval or accession, make a declaration that if, under Article 5, the applicable law is that of the Multi-unit State or one of its territorial units, the internal choice of law rules in force in that Multi-unit State shall determine whether the substantive rules of law of that Multi-unit State or of a particular territorial unit of that Multi-unit State shall apply. A Multi-unit State that makes such a declaration shall communicate information concerning the content of those internal choice of law rules to the Permanent Bureau of the Hague Conference on Private International Law.
- (4) A Multi-unit State may, at any time, make a declaration that if, under Article 4, the applicable law is that of one of its territorial units, the law of that territorial unit applies only if the relevant intermediary has an office within that territorial unit which satisfies the condition specified in the second sentence of Article 4(1). Such a declaration shall have no effect on dispositions made before that declaration becomes effective.

Article 13  
Uniform interpretation

In the interpretation of this Convention, regard shall be had to its international character and to the need to promote uniformity in its application.

Article 14  
Review of practical operation of the Convention

The Secretary General of the Hague Conference on Private International Law shall at regular intervals convene a Special Commission to review the practical operation of this Convention and to consider whether any amendments to this Convention are desirable.

CHAPTER IV – TRANSITION PROVISIONS

Article 15  
Priority between pre-Convention and post-Convention interests

In a Contracting State, the law applicable under this Convention determines whether a person's interest in securities held with an intermediary acquired after this Convention entered into force for that State extinguishes or has priority over another person's interest acquired before this Convention entered into force for that State.

Article 16  
Pre-Convention account agreements and securities accounts

- (1) References in this Convention to an account agreement include an account agreement entered into before this Convention entered into force in accordance with Article 19(1). References in

- this Convention to a securities account include a securities account opened before this Convention entered into force in accordance with Article 19(1).
- (2) Unless an account agreement contains an express reference to this Convention, the courts of a Contracting State shall apply paragraphs (3) and (4) in applying Article 4(1) with respect to account agreements entered into before the entry into force of this Convention for that State in accordance with Article 19. A Contracting State may, at the time of signature, ratification, acceptance, approval or accession, make a declaration that its courts shall not apply those paragraphs with respect to account agreements entered into after the entry into force of this Convention in accordance with Article 19(1) but before the entry into force of this Convention for that State in accordance with Article 19(2). If the Contracting State is a Multi-unit State, it may make such a declaration with respect to any of its territorial units.
  - (3) Any express terms of an account agreement which would have the effect, under the rules of the State whose law governs that agreement, that the law in force in a particular State, or a territorial unit of a particular Multi-unit State, applies to any of the issues specified in Article 2(1), shall have the effect that such law governs all the issues specified in Article 2(1), provided that the relevant intermediary had, at the time the agreement was entered into, an office in that State which satisfied the condition specified in the second sentence of Article 4(1). A Contracting State may, at the time of signature, ratification, acceptance, approval or accession, make a declaration that its courts shall not apply this paragraph with respect to an account agreement described in this paragraph in which the parties have expressly agreed that the securities account is maintained in a different State. If the Contracting State is a Multi-unit State, it may make such a declaration with respect to any of its territorial units.
  - (4) If the parties to an account agreement, other than an agreement to which paragraph (3) applies, have agreed that the securities account is maintained in a particular State, or a territorial unit of a particular Multi-unit State, the law in force in that State or territorial unit is the law applicable to all the issues specified in Article 2(1), provided that the relevant intermediary had, at the time the agreement was entered into, an office in that State which satisfied the condition specified in the second sentence of Article 4(1). Such an agreement may be express or implied from the terms of the contract considered as a whole or from the surrounding circumstances.

#### CHAPTER V – FINAL CLAUSES

##### Article 17

##### Signature, ratification, acceptance, approval or accession

- (1) This Convention shall be open for signature by all States.
- (2) This Convention is subject to ratification, acceptance or approval by the signatory States.
- (3) Any State which does not sign this Convention may accede to it at any time.
- (4) The instruments of ratification, acceptance, approval or accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, Depositary of this Convention.

##### Article 18

##### Regional Economic Integration Organisations

- (1) A Regional Economic Integration Organisation which is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, accept, approve or accede to this Convention. The Regional Economic Integration Organisation shall in that case have the rights and obligations of a Contracting State, to the extent that that Organisation has competence over matters governed by this Convention. Where the number of Contracting States is relevant in this Convention, the Regional Economic Integration Organisation shall not count as a Contracting State in addition to its Member States which are Contracting States.
- (2) The Regional Economic Integration Organisation shall, at the time of signature, acceptance, approval or accession, notify the Depositary in writing specifying the matters governed by this Convention in respect of which competence has been transferred to that Organisation by its Member States. The Regional Economic Integration Organisation shall promptly notify the Depositary in writing of any changes to the distribution of competence specified in the notice in accordance with this paragraph and any new transfer of competence.

- (3) Any reference to a "Contracting State" or "Contracting States" in this Convention applies equally to a Regional Economic Integration Organisation where the context so requires.

#### Article 19 Entry into force

- (1) This Convention shall enter into force on the first day of the month following the expiration of three months after the deposit of the third instrument of ratification, acceptance, approval or accession referred to in Article 17.
- (2) Thereafter this Convention shall enter into force –
- a) for each State or Regional Economic Integration Organisation referred to in Article 18 subsequently ratifying, accepting, approving or acceding to it, on the first day of the month following the expiration of three months after the deposit of its instrument of ratification, acceptance, approval or accession;
  - b) for a territorial unit to which this Convention has been extended in accordance with Article 20(1), on the first day of the month following the expiration of three months after the notification of the declaration referred to in that Article.

#### Article 20 Multi-unit States

- (1) A Multi-unit State may, at the time of signature, ratification, acceptance, approval or accession, make a declaration that this Convention shall extend to all its territorial units or only to one or more of them.
- (2) Any such declaration shall state expressly the territorial units to which this Convention applies.
- (3) If a State makes no declaration under paragraph (1), this Convention extends to all territorial units of that State.

#### Article 21 Reservations

No reservation to this Convention shall be permitted.

#### Article 22 Declarations

For the purposes of Articles 1(5), 12(3) and (4), 16(2) and (3) and 20 –

- a) any declaration shall be notified in writing to the Depositary;
- b) any Contracting State may modify a declaration by submitting a new declaration at any time;
- c) any Contracting State may withdraw a declaration at any time;
- d) any declaration made at the time of signature, ratification, acceptance, approval or accession shall take effect simultaneously with the entry into force of this Convention for the State concerned; any declaration made at a subsequent time and any new declaration shall take effect on the first day of the month following the expiration of three months after the date on which the Depositary made the notification in accordance with Article 24;
- e) a withdrawal of a declaration shall take effect on the first day of the month following the expiration of six months after the date on which the Depositary made the notification in accordance with Article 24.

#### Article 23 Denunciation

- (1) A Contracting State may denounce this Convention by a notification in writing to the Depositary. The denunciation may be limited to certain territorial units of a Multi-unit State to which this Convention applies.
- (2) The denunciation shall take effect on the first day of the month following the expiration of twelve months after the date on which the notification is received by the Depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation shall

take effect upon the expiration of such longer period after the date on which the notification is received by the Depositary.

#### Article 24 Notifications by the Depositary

The Depositary shall notify the Members of the Hague Conference on Private International Law, and other States and Regional Economic Integration Organisations which have signed, ratified, accepted, approved or acceded in accordance with Articles 17 and 18, of the following –

- a) the signatures and ratifications, acceptances, approvals and accessions referred to in Articles 17 and 18;
- b) the date on which this Convention enters into force in accordance with Article 19;
- c) the declarations and withdrawals of declarations referred to in Article 22;
- d) the notifications referred to in Article 18(2);
- e) the denunciations referred to in Article 23.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at The Hague, on the 5th day of July, 2006, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the Member States of the Hague Conference on Private International Law as of the date of its Nineteenth Session and to each State which participated in that Session.

## Appendix B

### Amendments to Official Comments

#### Section 8-110:

1. This section deals with applicability and choice of law issues concerning Article 8. The distinction between the direct and indirect holding systems plays a significant role in determining the governing law. An investor in the direct holding system is registered on the books of the issuer and/or has possession of a security certificate. Accordingly, the jurisdiction of incorporation of the issuer or location of the certificate determine the applicable law. By contrast, an investor in the indirect holding system has a security entitlement, which is a bundle of rights against the securities intermediary with respect to a security, rather than a direct interest in the underlying security. Accordingly, in the rules for the indirect holding system, the jurisdiction of incorporation of the issuer of the underlying security or the location of any certificates that might be held by the intermediary or a higher tier intermediary, do not determine the applicable law.

For securities in the indirect holding system, but not the direct holding system, this section's provisions are subject to the Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary (the "Convention" or "Hague Securities Convention"), to which the United States is a party. The Convention's primary rule is highly parallel to this section, though there are potential differences as well. See Comments 3 and 5 through 7 below and PEB Commentary No. \_\_, dated \_\_\_\_, 20\_\_.

The ~~The~~ Hague Securities Convention applies broadly to all instances "involving a choice between the laws of different [nations]", and can accordingly apply by reason of any of many elements, including without limitation a non-U.S. location of a party involved in the transaction, a non-U.S. party asserting an adverse claim, non-U.S. securities being credited to the securities account, or non-U.S. law being specified by the account agreement or other transaction document. Indeed one may wish to plan all indirect holding system transactions with the Hague Securities Convention as well as UCC Article 8 in mind, because even in transactions that appear wholly domestic, international factors may in fact be present (for example, if the securities intermediary holds securities for the entitlement holder through a non-U.S. intermediary) or may later become present (for example, if a non-U.S. party acquires an interest in or asserts an adverse claim to assets credited to the account).

In each of subsections (a), (b) and (c), the phrase "local law" refers to the law of a jurisdiction other than its conflict of laws rules. See Restatement (Second) of Conflict of Laws § 4.

## 2. [ . . . ]

Although subsection (a) provides that the issuer's rights and duties concerning registration of transfer are governed by the law of the issuer's jurisdiction, other matters related to registration of transfer, such as appointment of a guardian for a registered owner or the existence of agency relationships, might be governed by another jurisdiction's law. Neither this section nor Section 1-105 (Revised Section 1-301) deals with what law governs the appointment of the administrator or executor; that question is determined under generally applicable choice of law rules.

3. Subsection (b) ~~provides and, where the Hague Securities Convention applies, article 2(1) thereof provide~~ that the law ~~of the securities intermediary's jurisdiction governs governing~~ the issues concerning the indirect holding system that are dealt with in Article 8— are principally determined by the account agreement between the securities intermediary and the entitlement holder.

Paragraphs (1) and (2) and Hague Securities Convention article 2(1)(a) cover the matters dealt with in the Article 8 rules defining the concept of security entitlement and specifying the duties of securities intermediaries. Paragraph (3) ~~provides that the law of the security intermediary's jurisdiction determines and~~ Convention article 2(1)(e) cover whether the intermediary owes any duties to an adverse claimant. Paragraph (4) ~~provides that the law of the security intermediary's jurisdiction determines and~~ Convention article 2(1)(a) and (d) cover whether adverse claims can be asserted against entitlement holders and others.

~~Subsection (e) determines what is a "securities intermediary's jurisdiction." The policy of subsection (b)~~ Subsection (e) and Hague Securities Convention article 4 provide that the account agreement may effectively determine the applicable law for the foregoing issues in either of two ways. Most directly and doubtless most frequently, under both subsection (e)(2) and article 4(1), the law chosen by the parties to govern the account agreement determines the applicable law. Alternatively, subsection (e)(1) and article 4(1) provide mutually comparable rules that require slightly different phrasing in the agreement. Under subsection (e)(1), if the account agreement expressly provides that a particular jurisdiction is the securities intermediary's jurisdiction for purposes of UCC Article 8, then that provision determines the applicable law, even if the agreement's overall governing law clause (if any) is different. Under Convention article 4(1)'s comparable rule, if the account agreement expressly provides that a particular jurisdiction's law is applicable to all the issues specified in article 2(1) of the Hague Securities Convention, then that provision determines the applicable law, even if the agreement's overall governing law clause (if any) is different. The policy is to ensure that a securities intermediary and all of its entitlement holders can look to a single, readily-identifiable body of law to determine their rights and duties. Accordingly, subsection (e) sets out a sequential series of tests to facilitate identification of that body of law. Paragraph (1) of subsection (e) permits specification of the securities intermediary's jurisdiction by agreement. In the absence of such a specification, the law

~~chosen by the parties to govern the securities account determines the securities intermediary's jurisdiction. See paragraph (2). Because the policy of this section~~

Where the Hague Securities Convention applies, the foregoing provisions of an account agreement effectively determine the applicable law only if the intermediary, at the time of the agreement, had an office in the designated jurisdiction (which may be anywhere in the United States if the account agreement specifies a state of the United States) that is engaged in a regular activity of maintaining securities accounts. However, because the policy of this section and the Convention is to enable parties to determine, in advance and with certainty, what law will apply to transactions governed by this Article, the validation of the parties' selection of governing law by agreement is not conditioned upon a determination that the jurisdiction whose law is chosen bear a "reasonable relation" to the transaction. See Section 4A-507; compare Section 1-105(1) (Revised Section 1-301(a)). That is also true with respect to the similar provisions in subsection (d) of this section and in Section 9-305. The remaining paragraphs in subsection (e) and Convention article 5 contain additional default rules for determining the ~~securities intermediary's jurisdiction~~applicable law.

The Hague Securities Convention applies regardless of whether the law that it designates is that of a nation adhering thereto, though of course the Convention itself is the law only of adhering nations. The Convention applies to account agreements entered into before as well as after the Convention's effectiveness in the United States; however for pre-Convention agreements that specify that a state of the United States is the securities intermediary's jurisdiction for purposes of UCC Article 8 and that do not expressly refer to the Convention, article 16(3) preserves the agreements' intended effect by treating them as providing that the specified state's law is applicable to all the issues specified in article 2(1). There is no doubt that the Convention, like UCC Article 8, applies to multiple tier holding arrangements, such as where the account holder holds through a broker which in turn holds through a clearing corporation.

Subsection (f) makes explicit a point that is implicit in the UCC Article 8 description of a security entitlement as a bundle of rights against the intermediary with respect to a security or other financial asset, rather than as a direct interest in the underlying security or other financial asset. The governing law for relationships in the indirect holding system is not determined by such matters as the jurisdiction of incorporation of the issuer of the securities held through the intermediary, or the location of any physical certificates held by the intermediary or a higher tier intermediary. Hague Securities Convention article 6 is in accord.

[4. . . .]

5. The following examples illustrate how a ~~court in a jurisdiction which has enacted this section~~forum applying these rules would determine the governing law:

Example 1: John Doe, a resident of Kansas, maintains a securities account with Able & Co. Able is incorporated in Delaware. Its chief executive offices are



located in Illinois. The office where Doe transacts business with Able is located in Missouri. The agreement between Doe and Able ~~specifies~~provides that it is generally governed by the law of New York but also that Illinois is the securities intermediary's (Able's) jurisdiction for purposes of UCC Article 8 and that Illinois law is applicable to all the issues specified in article 2(1) of the Hague Securities Convention. Through the account, Doe holds securities of a Colorado corporation, which Able holds through Clearing Corporation. The rules of Clearing Corporation provide that the rights and duties of Clearing Corporation and its participants are governed by New York law. Subsection (a) specifies that a controversy concerning the rights and duties as between the issuer and Clearing Corporation is governed by Colorado law. Subsections (b) and (e) specify that a controversy concerning the rights and duties as between the Clearing Corporation and Able is governed by New York law, and that a controversy concerning the rights and duties as between Able and Doe is governed by Illinois law. Even if other facts cause the Hague Securities Convention to apply (see Comment 1), the Convention does not change the subsection (b) and (e) results, provided that at the time of the respective agreements Clearing Corporation and Able had offices in the United States engaged in a regular activity of maintaining securities accounts. The Convention does not apply to the subsection (a) result.

Example 2: Same facts as to Doe and Able as in Example 1. Through the account, Doe holds securities of a Senegalese corporation, which Able holds through Clearing Corporation. Clearing Corporation's operations are located in Belgium, and its rules and agreements with its participants provide that they are governed by Belgian law. Clearing Corporation holds the securities through a custodial account at the Paris branch office of Global Bank, which is organized under English law. The agreement between Clearing Corporation and Global Bank provides that it is governed by French law. Subsection (a) specifies that a controversy concerning the rights and duties as between the issuer and Global Bank is governed by Senegalese law. ~~Subsections (b) and (e) specify~~Prior to United States ratification of the Hague Securities Convention, subsections (b) and (e) had the effect in a U.S. forum that a controversy concerning the rights and duties as between Global Bank and Clearing Corporation ~~is~~was governed by French law, that a controversy concerning the rights and duties as between Clearing Corporation and Able ~~is~~was governed by Belgian law, and that a controversy concerning the rights and duties as between Able and Doe ~~is governed by Illinois law~~was governed by Illinois law. Under the Convention, the subsection (b) and (e) results are unchanged, provided that at the time of the respective agreements Global Bank, Clearing Corporation and Able had offices in France, Belgium and the United States, respectively, engaged in a regular activity of maintaining securities accounts. The Convention does not apply to the subsection (a) result.

Example 3: John Doe, a resident of Kansas, maintains a securities account with Able & Co. Able is organized in Switzerland and has its chief executive offices there. The agreement between Doe and Able provides that New York is the

securities intermediary's jurisdiction for purposes of UCC Article 8. The agreement was entered into before the Hague Securities Convention's effectiveness in the United States, does not expressly provide that New York or any other law is applicable to all the issues specified in article 2(1) of the Hague Securities Convention, and does not otherwise expressly refer to the Convention. Through the account, Doe holds securities of a Japanese issuer. Roe, who lives in Japan, claims ownership of the securities and seeks to hold Able liable for not transferring the asset to Roe. Because the agreement between Doe and Able was entered into before the Convention's effectiveness in the United States, Convention article 16(3) specifies that the controversy between Roe and Able is governed by the law of New York, provided that at the time of the agreement between Doe and Able, Able had an office in the United States engaged in a regular activity of maintaining securities accounts.

6. To the extent that this section ~~does not~~ or the Hague Securities Convention do not specify the governing law, general choice of law rules apply. For example, suppose that in ~~either any~~ of the examples in the preceding Comment, Doe enters into an agreement with Roe, ~~also a resident of Kansas,~~ in which Doe agrees to transfer all of his interests in the securities held through Able to Roe. Neither UCC Article 8 ~~does not deal~~ nor the Convention deals with whether such an agreement is enforceable or whether it gives Roe some interest in Doe's security entitlement. This section ~~specifies~~ and the Convention specify what jurisdiction's law governs the issues that are dealt with in UCC Article 8 ~~or listed in Convention article 2(1) respectively.~~ UCC Article 8, however, does specify that securities intermediaries have only limited duties with respect to adverse claims. See Section 8-115. Subsection (b)(3) of this section ~~provides~~ and Convention article 2(1)(e) provide that Illinois law governs whether Able owes any duties to an adverse claimant. Thus, ~~if because~~ Illinois has adopted Revised Article 8, Section 8-115 as enacted in Illinois determines whether Roe has any rights against Able.

7. The UCC choice of law provisions concerning security interests in securities and security entitlements are set out in Section 9-305, and within its scope the Hague Securities Convention also applies to such transactions.

\* \* \*

## Section 9-305:

[1. . . .]

2. Investment Property: General Rules. This section specifies choice-of-law rules for perfection and priority of security interests in investment property. Subsection (a)(1) covers security interests in certificated securities. Subsection (a)(2) covers security interests in uncertificated securities. Subsection (a)(3) covers security interests in security entitlements and securities accounts, and where the Hague Securities Convention applies it may in occasional instances modify subsection (a)(3)'s results in manageable ways as discussed in Comments 3, 5 and 6 to Section 8-110. Subsection (a)(4) covers security interests in commodity contracts and commodity accounts. The approach of each of these

paragraphs is essentially the same. They identify the jurisdiction's law that governs questions of perfection and priority by using the same principles that Article 8 uses to determine other questions concerning that form of investment property. Thus, for certificated securities, the law of the jurisdiction in which the certificate is located governs. Cf. Section 8-110(c). For uncertificated securities, the law of the issuer's jurisdiction governs. Cf. Section 8-110(a). For security entitlements and securities accounts, the law ~~of designated by the securities intermediary's jurisdiction~~ account agreement generally governs. Cf. Section 8-110(b), (e)(1) and (2) and Hague Securities Convention article 4(1). For commodity contracts and commodity accounts, the law of the commodity intermediary's jurisdiction governs. ~~Because commodity~~ Commodity contracts and commodity accounts are not governed by Article 8, or the Convention, and for this reason subsection (b) contains rules that specify the commodity intermediary's jurisdiction. ~~These that~~ are analogous to the rules in Section 8-110(e) specifying a securities intermediary's jurisdiction. Subsection (b)(1) affords the parties greater flexibility than did former Section 9-103(6)(3). See also Section 9-304(b) (bank's jurisdiction); Revised Section 8-110(e)(1) and (2) (securities intermediary's jurisdiction).

3. Investment Property: Exceptions. Subsection (c) establishes an exception to the general rules ~~set out in subsection (a)~~ discussed in the preceding Comment. It provides that perfection of a security interest by filing, automatic perfection of a security interest in investment property created by a debtor who is a broker or securities intermediary (see Section 9-309(10)), and automatic perfection of a security interest in a commodity contract or commodity account of a debtor who is a commodity intermediary (see Section 9-309(11)) are governed by the law of the jurisdiction in which the debtor is located, as determined under Section 9-307. In cases to which the Hague Securities Convention applies, Convention article 12(2)(b) generally preserves these results, unless the account agreement designates or the debtor is located in a non-U.S. jurisdiction.

4. Examples: The following examples illustrate the rules in this section:

Example 1: A customer residing in New Jersey maintains a securities account with Able & Co. The agreement between the customer and Able specifies that it is governed by Pennsylvania law but expressly provides that ~~the law of~~ California is Able's jurisdiction for purposes of the Uniform Commercial Code. Through the account the customer holds securities of a Massachusetts corporation, which Able holds through a clearing corporation located in New York. The customer obtains a margin loan from Able. Subsection (a)(3) provides that California law—the law of the securities intermediary's jurisdiction—governs perfection and priority of the security interest, even if California has no other relationship to the parties or the transaction. Even if other facts cause the Hague Securities Convention to apply (see Comment 1 to Section 8-110), the Convention does not change this result, provided that the account agreement either was entered into before the Convention's effectiveness in the United States or expressly specifies that the law of California is applicable to all issues specified in Convention article 2(1), and also provided that at the time of the agreement Able had an office in the United States engaged in a regular activity of maintaining

securities accounts.

Example 2: A customer residing in New Jersey maintains a securities account with Able & Co. The agreement between the customer and Able specifies that it is governed by Pennsylvania law. Through the account the customer holds securities of a Massachusetts corporation, which Able holds through a clearing corporation located in New York. The customer obtains a loan from a lender located in Illinois. The lender takes a security interest and perfects by obtaining an agreement among the debtor, itself, and Able, which satisfies the requirement of Section 8-106(d)(2) to give the lender control. Subsection (a)(3) provides that Pennsylvania law—the law of the securities intermediary's jurisdiction—governs perfection and priority of the security interest, even if Pennsylvania has no other relationship to the parties or the transaction. Even if other facts cause the Hague Securities Convention to apply, the Convention does not change this result, provided that at the time of the agreement between the customer and Able, Able had an office in the United States engaged in a regular activity of maintaining securities accounts.

Example 3: A customer residing in New Jersey maintains a securities account with Able & Co. The agreement between the customer and Able specifies that it is governed by Pennsylvania law. Through the account, the customer holds securities of a Massachusetts corporation, which Able holds through a clearing corporation located in New York. The customer borrows from SP-1, and SP-1 files a financing statement in New Jersey. Later, the customer obtains a loan from SP-2. SP-2 takes a security interest and perfects by obtaining an agreement among the debtor, itself, and Able, which satisfies the requirement of Section 8-106(d)(2) to give ~~the~~ SP-2 control. Subsection (c)(1) provides that perfection of SP-1's security interest by filing is governed by the location of the debtor, so the filing in New Jersey was appropriate. Even if other facts cause the Hague Securities Convention to apply, Convention article 12(2)(b) preserves this result. Subsection (a)(3), however, provides that Pennsylvania law—the law ~~of the securities intermediary's jurisdiction~~ designated by the agreement between the customer and Able—governs all other questions of perfection and priority, and the Convention preserves this result, provided that at the time of the agreement between the customer and Able, Able had an office in the United States engaged in a regular activity of maintaining securities accounts. Thus, Pennsylvania law governs perfection of SP-2's security interest, and Pennsylvania law also governs the priority of the security interests of SP-1 and SP-2.

5. Change in Law Governing Perfection. When the issuer's jurisdiction, the securities intermediary's jurisdiction, or commodity intermediary's jurisdiction changes, the jurisdiction whose law governs perfection under subsection (a) changes, as well. Similarly, the law governing perfection of a possessory security interest in a certificated security changes when the collateral is removed to another jurisdiction, see subsection (a)(1), and the law governing perfection by filing changes when the debtor changes its location. See subsection (c). Nevertheless, under the UCC these changes will not result in

an immediate loss of perfection. See Section 9-316. Along generally similar lines in cases to which the Hague Securities Convention applies, article 7 provides that when the account agreement is amended to designate a new jurisdiction's law under article 4(1), the new law governs perfection, except that the old law continues to govern the perfection of interests that arose before the amendment and a limited number of other issues affecting such interests, without limitation as to time.

\* \* \*

### Section 9-301:

[ . . . ]

2. Scope of This Subpart. Part 3, Subpart 1 (Sections 9-301 through 9-307) contains choice-of-law rules similar to those of former Section 9-103. Former Section 9-103 generally addresses which State's law governs "perfection and the effect of perfection or non-perfection of" security interests. See, e.g., former Section 9-103(1)(b). This Article follows the broader and more precise formulation in former Section 9-103(6)(b), which was revised in connection with the promulgation of Revised Article 8 in 1994: "perfection, the effect of perfection or non-perfection, and the priority of" security interests. Priority, in this context, subsumes all of the rules in Part 3, including "cut off" or "take free" rules such as Sections 9-317(b), (c), and (d), 9-320(a), (b), and (d), and 9-332. This subpart does not address choice of law for other purposes. For example, the law applicable to issues such as attachment, validity, characterization (e.g., true lease or security interest), and enforcement is governed by the rules in Section 1-105(1) (Revised Section 1-301(a) and (b)); that governing law typically is specified in the same agreement that contains the security agreement. For security interests and other dispositions of investment securities in Article 8's indirect holding system, in transactions to which the Hague Securities Convention applies, the requirements governing foreclosure and the question of whether the security interest or other disposition confers on the transferee a right to proceeds will generally be governed by the law specified in the account agreement. See PEB Commentary No. \_\_, dated \_\_, 20\_\_. And, another jurisdiction's law may govern other third-party matters addressed in this Article. See Section 9-401, Comment 3.

[ . . . ]

\* \* \*

### Section 1-301:

[ . . . ]

4. Subsection (c) spells out essential limitations on the parties' right to choose the applicable law. Especially in Article 9 parties taking a security interest or asked to extend

credit which may be subject to a security interest must have sure ways to find out whether and where to file and where to look for possible existing filings.

5. Sections 9-301 through 9-307 should be consulted as to the rules for perfection of security interests and agricultural liens and the effect of perfection and nonperfection and priority. For security interests and other dispositions of investment securities in Article 8's indirect holding system, in transactions to which the Hague Securities Convention applies, the requirements governing foreclosure and the question of whether the security interest or other disposition confers on the transferee a right to proceeds will generally be governed by the law specified in the account agreement. See PEB Commentary No. \_\_, dated \_\_\_\_, 20\_\_.

[ . . . ]