

**Convention on the Law Applicable to Certain Rights
in respect of Securities held with an Intermediary
(summary)**

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On December 13, 2002, the Hague Conference on Private International Law adopted a new convention "Convention on the Law Applicable to Certain Rights in respect of Securities Held with an Intermediary."

The traditional rule in private international law for determining the substantive property law applicable to a transfer or pledge of investment securities is based on the *lex situs* principle. Under this principle, the effectiveness of the disposition is determined by the law of the place where the securities are located. Although this test is easy to apply in the case of bearer securities or directly held securities, it does not fit well with an indirect holding pattern that is popular in today's practice around the world : securities are held through one or more intermediaries.

A new approach has thus been proposed. It is to look to the law of the location of the intermediary maintaining the account to which the securities are credited (called the "PRIMA" approach). The Convention adopts this approach and substantiates PRIMA as follows:

Article 4 : The first step is to look to the law expressly agreed between the account holder and its direct (relevant) intermediary to govern the securities account in their account agreement. The range of possible chosen laws is limited by the "reality test." This reality test provides that (i) the relevant intermediary must have an office in that jurisdiction, and (ii) that office must either alone or together with other offices of the relevant intermediary, or with other persons acting for the relevant intermediary, engage in a business or other regular activity of

maintaining securities accounts. But the office does not need to maintain the specific account that is governed by the account agreement. Note that Article 4 contains a black list of activities, which by themselves do not qualify as elements of maintaining securities accounts.

Article 5 (1) : If the previous rule does not apply, but there is a written account agreement that “expressly and unambiguously” states that the relevant intermediary entered into the account agreement through a particular office, the applicable law is the law of the location of that office, again, provided that the reality test is fulfilled.

Article 5 (2) and (3) : If this test also provides no answer, the Convention looks, as a fallback, to the law of the place of incorporation or organization of the relevant intermediary.

In this article, we explain the major points of the Convention and examine certain important issues with the Convention.