



**DIPLOMATIC CONFERENCE TO ADOPT A
CONVENTION ON SUBSTANTIVE RULES
REGARDING INTERMEDIATED SECURITIES
Final session**

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Comments on Article 29(2)

(submitted by the Association of Global Custodians)

1. We write on behalf of the members of the Association of Global Custodians ("Association"), to express its members' views regarding the current draft of Article 29(2) of the above-referenced Convention¹. The Association's representative to the Diplomatic Conference concerning the Convention, Robert Sussman, Esq., reports that consideration is being given to either changing the text or the interpretation in the Commentary of Article 29(2) in a manner that Association members believe would be detrimental to account holders and intermediaries. For the reasons discussed below, the Association recommends that no such change be made.
2. **Background.** Although the internal corporate laws of many Contracting States adequately address the holding of domestic securities and the exercise of rights attached to those securities solely within the Contracting State, the Association believes that the corporate laws of various Contracting States do not adequately take into account the nature of the modern cross-border, multi-tiered securities holding systems and the manner in which tiered intermediaries hold securities on behalf of numerous investors and exercise rights on behalf of the numerous investors on whose behalf each intermediary is acting.
3. The Association believes that Article 29(2) addresses this shortcoming, and creates a harmonized approach to the treatment of account holders and intermediaries in the context of a cross-border, multi-tiered securities holding system, by requiring a Contracting State to recognize the status of an intermediary. Such recognition would, in the Association's view, protect the rights of account holders as direct beneficial owners. The Association firmly believes that this Article is fundamental to the operation of an efficient cross-border, multi-tiered securities holding system.
4. **Comments.** A cross-border, multi-tiered securities holding system allows underlying investors (i.e., "beneficial owners") in one Contracting State to hold securities in another Contracting State through a series of intermediaries. One essential element of such a cross-border securities holding system is that the beneficial owner is able to enjoy, through the various intermediaries in the chain of intermediaries, the rights and privileges (such as voting and taking advantage of corporate action distributions and events) that are attached to the securities.

¹ Members of the Association provide securities custody services and related asset-servicing functions to global institutional investors, including mutual funds, pension funds and insurance companies. Most such investors acquire and hold securities in numerous markets around the globe, and Association members engage routinely and extensively in servicing cross-border investment activities. Association members, listed on the letterhead above, hold in custody approximately US\$ 45 Trillion.

5. Cross-border, multi-tiered securities holding systems operate most efficiently and economically when each intermediary in the chain holds the subject securities in omnibus accounts (indeed, in depositary receipt programs, securities can *only* be held in omnibus accounts). Omnibus accounts allow for a single account to be established at each intermediary in the chain rather than many separate accounts, one for each investor, at each intermediary in the chain. This is a particularly important (and particularly efficient) accounting convention where securities of an issuer are widely held by multiple individual and institutional investors. In addition, as is the case in many Contracting States, securities are registered at an issuer's registrar in the name (or the nominee) of an intermediary. Use of omnibus accounts typically facilitates a single listing on the issuer's register -- i.e., a listing in the name of the relevant intermediary (or its nominee). This, in turn, promotes ease of transfer, efficiency and speed in the transfer process and re-registration of securities.

6. In contrast, requiring individual accounts to be established for each investor at each intermediary in the chain necessarily increases the number of processing, handling and settlement steps that the interconnected intermediaries each must take, which seriously interferes with the efficiency and speed of transfers and settlements in the system, significantly increases the holding cost for each investor, and significantly increases the risk of errors.

7. With respect to the exercise of rights and privileges attached to securities, the ability of account holders to exercise rights and privileges is a fundamental requirement of the Convention. Article 9(1) confers on the account holder, once securities are credited to a securities account, the right to receive and exercise any rights attached to the securities; Article 10 requires the intermediary to take appropriate measures to enable its account holders to receive and exercise the rights specified in Article 9(1); and Article 23 requires the intermediary to act upon instructions of account holders.

8. As is clearly recognized by the current draft of the Convention, intermediaries act -- and hold securities -- on behalf of multiple account holders. Information regarding rights to be exercised is delivered by an issuer to the registered holder of such securities and is communicated to the many "beneficial owners" -- the ultimate decision makers -- through the chain of various intermediaries; and thereafter the "beneficial owners'" instructions are communicated back to its relevant intermediary (and eventually to the issuer) through the same chain of intermediaries.

9. Article 29(2) recognizes the status of an intermediary as an intermediary acting on behalf of others. As such, Article 29(2), as currently drafted, assures that the intermediary is able to comply with the instructions of each "beneficial owner" and is not prevented from doing so if it receives different instructions from different "beneficial owners". As one example, in connection with share voting, because the securities are registered in the name of the intermediary, the intermediary is typically required to cast the votes under the internal corporate laws of the Contracting State. As discussed in the draft Commentary to Article 29(2), in a case where some account holders instruct the intermediary to vote in favor of a shareholder proposal, while other account holders instruct the intermediary to vote against the proposal, and still others instruct the intermediary to abstain, the intermediary will necessarily be required to split its vote. Article 29(2) facilitates the exercise by the intermediary of the voting instructions of each and every account holder, thereby advancing fundamental aspects of securities ownership. If the intermediary is treated as the "beneficial owner" and therefore not permitted to split its vote in accordance with the actual "beneficial owner's" instructions, the actual "beneficial owner" would be denied a fundamental right attached to the securities in its account.

10. In summary, the Association believes that Article 29(2) reflects important principles that facilitate efficient securities handling in modern cross-border intermediated securities holding systems and strongly urges the Convention to retain the concepts discussed above as embodied in Article 29(2).

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11. Association members would be pleased to provide additional information or respond to questions should that be useful to you. If you have any questions regarding the points conveyed in this letter, please contact Mr Sussman or Mr Schneider (Counsel to the Association) at 312.861.2620.

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