

BY E-MAIL

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June 19th, 2012

Dear Ms Bednar-Giyose,

The Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary

We refer to the Hague Convention of 5 July 2006 on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary (the *Hague Securities Convention* or the *Convention*). ISDA actively participated in the public consultations leading to the adoption of the Hague Securities Convention by the Hague Conference on Private International Law (the *Hague Conference*), and we are pleased to have had the opportunity to discuss the Convention with various states over the years since the Convention was adopted by the Hague Conference. We understand that the Republic of South Africa is currently considering whether to sign the Convention. On behalf of ISDA's members, we encourage the Republic of South Africa to do so.

The International Swaps and Derivatives Association, Inc. (*ISDA*) is the global trade association representing leading participants in the privately negotiated derivatives industry, a business that includes interest rate, currency, commodity, credit, and equity swaps, options and forwards, as well as related products such as caps, collars, floors and swaptions. Among ISDA's members are large number of South African financial institutions and corporates active in the derivatives markets. Promoting enhancement through law reform of legal certainty for cross-border financial transactions is one of ISDA's key missions. A considerable proportion of the resources of ISDA and its members are devoted to acquiring legal opinions from a wide range of jurisdictions on netting and collateral arrangements, and related issues, as well as promoting law reform and participating in consultations on legislative and regulatory developments affecting the financial markets. Additional information on ISDA, its membership and its interest in and commitment to the development of international law affecting the financial markets is set out in Annex 1 to this letter.

In view of the great importance of the Convention for international financial market participants, we have taken the liberty of contacting you:

- (1) to express our support for the Convention; and

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- (2) to offer our continuing assistance to you in addressing any questions or concerns you may have regarding financial market practice or other issues of relevance to the Convention.

ISDA believes that the the Convention represents a careful balance of the fundamental objectives of

- (1) *ex ante* certainty for financial market participants achieved by simplifying the conflict of law rules for dispositions of securities held in book-entry form by financial intermediaries;
- (2) compatibility with current developments in technology and the realities of modern systems for holding and transferring book-entry securities; and
- (3) ensuring a neutral approach that is compatible with a broad range of legal traditions.

The importance of the Hague Securities Convention, timing and process

1. There is a clear consensus within the international financial community that the “place of the relevant intermediary approach” or “PRIMA principle”, broadly conceived, is the proper approach to determining the law applicable to interests in securities held with an intermediary. The evolution of the principle, the development of a consensus with respect to its new expression (i.e., where the applicable law is no longer determined based on an attempt to localise the relevant securities account or the relevant intermediary) and the pressing need for its adoption are all made clear in the Explanatory Report to the Convention which has been drafted by eminent jurists from a wide range of legal traditions. We simply note that only the pragmatic approach chosen by the Convention, which is focusing on the relationship between the relevant intermediary and the account holder, leads to the desired degree of legal certainty and predictability.
2. It is in the interests of the global financial markets that the Convention rule be established as widely as possible internationally, replacing the myriad of different and inconsistent rules currently followed by jurisdictions around the world and eliminating the associated legal uncertainty. The need to address this issue has been highlighted by the work of a number of international groups studying the international financial markets. We note that Switzerland, Mauritius and the United States of America have signed the Convention. The former two states have ratified it with the US being in the process towards doing so, we understand. Several other states are currently looking into the Convention.
3. Existing rules across various legal systems, such as Article 9(2) of the EU Settlement Finality Directive (SFD) and Article 9 of the EU Financial Collateral Arrangements Directive (FCAD) do not, for example, provide an answer to the fundamental question of how an account is localised, nor do they address other difficult questions which are worked out in detail in the Hague Securities Convention, and explained in detail in the Explanatory Report. These - historically speaking - fairly recent provisions therefore do not provide the *ex ante* certainty that has always been one of the key objectives of this process. The Explanatory Report describes in some detail why these provisions do not provide adequate long-term solutions on their own to the need for legal certainty on these questions.

Financial market participants across the globe need certainty in their international financial dealings with market participants in other parts of the world. An international measure is therefore necessary to resolve these issues. The Convention is the only international legal instrument of that kind.

4. On a private international law matter of this type, there is clearly no international organisation better placed than the Hague Conference to provide a forum for the creation of the necessary international consensus and to combine the expertise of the various Hague Member States (including South Africa), as well as other financial market stakeholders, to work out the issues and solutions in detail and to provide an institutional infrastructure for the promotion of an international convention reflecting those solutions, commanding sufficient respect internationally to stand a reasonable chance of widespread adoption.
5. The meticulous detail of the preliminary work carried out by the Permanent Bureau of the Hague Conference to launch the project along proper lines and the quality of the on-going support provided by the Permanent Bureau during the process were impressive, including the quality of the working materials prepared to support the informal consultation process, the meetings of national experts, the Diplomatic Conferences and the work of the Drafting Group. The Drafting Group itself was composed of an impressive array of established experts in the field drawn from the world's leading jurisdictions and legal traditions. The relevant legal traditions were well represented in this process. Financial market participants and other observer organisations, including various public bodies and supranational organisations, were given ample opportunity to participate in the debate, to offer comment and to consider a wide variety of views. The dialectic of debate was reflected in succeeding drafts of the Convention as the Drafting Group sought to reconcile views and work out a consensus on a wide variety of issues.
6. We make these points because we believe that:
 - The process that resulted in the Hague Securities Convention was a good one that allowed ample opportunity for many different stakeholders from a variety of legal traditions to express their views. Accordingly, the process and the end result of that process, namely, the Convention itself, deserve a high degree of respect.
 - It is of great importance to the global financial markets that the Hague Securities Convention now be adopted as widely as possible, both by the Member States of the European Union and by their trading partners around the world.

We hope that the foregoing is helpful in your deliberations on this crucial measure for the financial markets. It will be highly beneficial for the South African financial markets to have put this measure in place.

We would be pleased to discuss the issues raised in this letter with you in more detail if you would find that helpful. If so, please do not hesitate to contact either of the undersigned.

Yours sincerely,

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The International Swaps and Derivatives Association

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ISDA was chartered in 1985 and today numbers over 830 member institutions from 59 countries on six continents. These members include most of the world's major institutions who deal in, and leading end-users of, privately negotiated derivatives as well as associated service providers and consultants. A list of ISDA's members is available from the website at <http://www.isda.org/membership/isdamemberslist.pdf>.

Roughly half of ISDA's members are institutions from Europe, the Middle East and Africa (EMEA), with the next largest group being from the Americas, followed by members from the Asia-Pacific region. Of ISDA's non-EMEA membership, the vast majority have significant operations in the EMEA financial markets and/or regular dealings with other market participants operating from within the EMEA financial markets.

ISDA's members therefore have a deep and longstanding interest in the legal and regulatory framework for financial transactions across the globe.

ISDA has participated in many global, regional and national consultations on legal and regulatory matters affecting the financial markets and is grateful for each opportunity to express financial market concerns about legislative initiatives affecting financial markets, to provide information about financial market practice where helpful in shaping legislative policy and generally to encourage appropriate and market-sensitive modernisation of legal and regulatory regimes in this area.