

รายการอ้างอิง

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ภาคผนวก

ภาคผนวก ก**Bankruptcy Code, 1978****Section 365 Executory contracts and unexpired leases**

(a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

(b) (1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee--

(A) cures, or provides adequate assurance that the trustee will promptly cure, such default other than a default that is a breach of a provision relating to the satisfaction of any provision (other than a penalty rate or penalty provision) relating to a default arising from any failure to perform nonmonetary obligations under an unexpired lease of real property, if it is impossible for the trustee to cure such default by performing nonmonetary acts at and after the time of assumption, except that if such default arises from a failure to operate in accordance with a nonresidential real property lease, then such default shall be cured by performance at and after the time of assumption in accordance with such lease, and pecuniary losses resulting from such default shall be compensated in accordance with the provisions of this paragraph;

(B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and

(C) provides adequate assurance of future performance under such contract or lease.

(2) Paragraph (1) of this subsection does not apply to a default that is a breach of a provision relating to--

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title;

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement; or

(D) the satisfaction of any penalty rate or penalty provision relating to a default arising from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease.

(3) For the purposes of paragraph (1) of this subsection and paragraph (2)(B) of subsection (f), adequate assurance of future performance of a lease of real property in a shopping center includes adequate assurance--

(A) of the source of rent and other consideration due under such lease, and in the case of an assignment, that the financial condition and operating performance of the proposed assignee and its guarantors, if any, shall be similar to the financial condition and operating performance of the debtor and its guarantors, if any, as of the time the debtor became the lessee under the lease;

(B) that any percentage rent due under such lease will not decline substantially;

(C) that assumption or assignment of such lease is subject to all the provisions thereof, including (but not limited to) provisions such as a radius, location, use, or exclusivity provision, and will not breach any such provision contained in any other lease, financing agreement, or master agreement relating to such shopping center; and

(D) that assumption or assignment of such lease will not disrupt any tenant mix or balance in such shopping center.

(4) Notwithstanding any other provision of this section, if there has been a default in an unexpired lease of the debtor, other than a default of a kind specified in paragraph (2) of this subsection, the trustee may not require a lessor to provide services or

supplies incidental to such lease before assumption of such lease unless the lessor is compensated under the terms of such lease for any services and supplies provided under such lease before assumption of such lease.

(c) The trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if--

(1) (A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(B) such party does not consent to such assumption or assignment; or

(2) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor; or

(3) such lease is of nonresidential real property and has been terminated under applicable nonbankruptcy law prior to the order for relief.

(d) (1) In a case under chapter 7 of this title, if the trustee does not assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor within 60 days after the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such contract or lease is deemed rejected.

(2) In a case under chapter 9, 11, 12, or 13 of this title, the trustee may assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor at any time before the confirmation of a plan but the court, on the request of any party to such contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease.

(3) The trustee shall timely perform all the obligations of the debtor, except those specified in section 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title. The court may extend, for cause, the time for performance of any such obligation that arises within 60 days after the date of the order for relief, but the time for performance shall not be extended beyond such 60-day period. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f) of this section. Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

(4) (A) Subject to subparagraph (B), an unexpired lease of nonresidential real property under which the debtor is the lessee shall be deemed rejected, and the trustee shall immediately surrender that nonresidential real property to the lessor, if the trustee does not assume or reject the unexpired lease by the earlier of--

(i) the date that is 120 days after the date of the order for relief; or

(ii) the date of the entry of an order confirming a plan.

(B) (i) The court may extend the period determined under subparagraph (A), prior to the expiration of the 120-day period, for 90 days on the motion of the trustee or lessor for cause.

(ii) If the court grants an extension under clause (i), the court may grant a subsequent extension only upon prior written consent of the lessor in each instance.

(5) The trustee shall timely perform all of the obligations of the debtor, except those specified in section 365(b)(2), first arising from or after 60 days after the order for relief in a case under chapter 11 of this title under an unexpired lease of personal property (other than personal property leased to an individual primarily for personal, family, or household purposes), until such lease is assumed or rejected notwithstanding section 503(b)(1) of this title, unless the court, after notice and a hearing and based on the equities of the case, orders otherwise with respect to the obligations or timely

performance thereof. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f). Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

(e) (1) Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on--

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title; or

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement.

(2) Paragraph (1) of this subsection does not apply to an executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if--

(A) (i) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to the trustee or to an assignee of such contract or lease, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(ii) such party does not consent to such assumption or assignment; or

(B) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor.

(f) (1) Except as provided in subsections (b) and (c) of this section, notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts, or conditions the assignment of such contract or lease, the trustee may assign such contract or lease under paragraph (2) of this subsection.

(2) The trustee may assign an executory contract or unexpired lease of the debtor only if--

(A) the trustee assumes such contract or lease in accordance with the provisions of this section; and

(B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

(3) Notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law that terminates or modifies, or permits a party other than the debtor to terminate or modify, such contract or lease or a right or obligation under such contract or lease on account of an assignment of such contract or lease, such contract, lease, right, or obligation may not be terminated or modified under such provision because of the assumption or assignment of such contract or lease by the trustee.

(g) Except as provided in subsections (h)(2) and (i)(2) of this section, the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease--

(1) if such contract or lease has not been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title, immediately before the date of the filing of the petition; or

(2) if such contract or lease has been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title--

(A) if before such rejection the case has not been converted under section 1112, 1208, or 1307 of this title, at the time of such rejection; or

(B) if before such rejection the case has been converted under section 1112, 1208, or 1307 of this title--

(i) immediately before the date of such conversion, if such contract or lease was assumed before such conversion; or

(ii) at the time of such rejection, if such contract or lease was assumed after such conversion.

(h) (1) (A) If the trustee rejects an unexpired lease of real property under which the debtor is the lessor and--

(i) if the rejection by the trustee amounts to such a breach as would entitle the lessee to treat such lease as terminated by virtue of its terms, applicable nonbankruptcy law, or any agreement made by the lessee, then the lessee under such lease may treat such lease as terminated by the rejection; or

(ii) if the term of such lease has commenced, the lessee may retain its rights under such lease (including rights such as those relating to the amount and timing of payment of rent and other amounts payable by the lessee and any right of use, possession, quiet enjoyment, subletting, assignment, or hypothecation) that are in or appurtenant to the real property for the balance of the term of such lease and for any renewal or extension of such rights to the extent that such rights are enforceable under applicable nonbankruptcy law.

(B) If the lessee retains its rights under subparagraph (A)(ii), the lessee may offset against the rent reserved under such lease for the balance of the term after the date of the rejection of such lease and for the term of any renewal or extension of such lease, the value of any damage caused by the nonperformance after the date of such rejection, of any obligation of the debtor under such lease, but the lessee shall not have any other right against the estate or the debtor on account of any damage occurring after such date caused by such nonperformance.

(C) The rejection of a lease of real property in a shopping center with respect to which the lessee elects to retain its rights under subparagraph (A)(ii) does not affect the enforceability under applicable nonbankruptcy law of any provision in the lease pertaining to radius, location, use, exclusivity, or tenant mix or balance.

(D) In this paragraph, "lessee" includes any successor, assign, or mortgagee permitted under the terms of such lease.

(2) (A) If the trustee rejects a timeshare interest under a timeshare plan under which the debtor is the timeshare interest seller and--

(i) if the rejection amounts to such a breach as would entitle the timeshare interest purchaser to treat the timeshare plan as terminated under its terms, applicable nonbankruptcy law, or any agreement made by timeshare interest purchaser, the timeshare interest purchaser under the timeshare plan may treat the timeshare plan as terminated by such rejection; or

(ii) if the term of such timeshare interest has commenced, then the timeshare interest purchaser may retain its rights in such timeshare interest for the balance of such term and for any term of renewal or extension of such timeshare interest to the extent that such rights are enforceable under applicable nonbankruptcy law.

(B) If the timeshare interest purchaser retains its rights under subparagraph (A), such timeshare interest purchaser may offset against the moneys due for such timeshare interest for the balance of the term after the date of the rejection of such timeshare interest, and the term of any renewal or extension of such timeshare interest, the value of any damage caused by the nonperformance after the date of such rejection, of any obligation of the debtor under such timeshare plan, but the timeshare interest purchaser shall not have any right against the estate or the debtor on account of any damage occurring after such date caused by such nonperformance.

(i) (1) If the trustee rejects an executory contract of the debtor for the sale of real property or for the sale of a timeshare interest under a timeshare plan, under which the

purchaser is in possession, such purchaser may treat such contract as terminated, or, in the alternative, may remain in possession of such real property or timeshare interest.

(2) If such purchaser remains in possession--

(A) such purchaser shall continue to make all payments due under such contract, but may, offset against such payments any damages occurring after the date of the rejection of such contract caused by the nonperformance of any obligation of the debtor after such date, but such purchaser does not have any rights against the estate on account of any damages arising after such date from such rejection, other than such offset; and

(B) the trustee shall deliver title to such purchaser in accordance with the provisions of such contract, but is relieved of all other obligations to perform under such contract.

(j) A purchaser that treats an executory contract as terminated under subsection (i) of this section, or a party whose executory contract to purchase real property from the debtor is rejected and under which such party is not in possession, has a lien on the interest of the debtor in such property for the recovery of any portion of the purchase price that such purchaser or party has paid.

(k) Assignment by the trustee to an entity of a contract or lease assumed under this section relieves the trustee and the estate from any liability for any breach of such contract or lease occurring after such assignment.

(l) If an unexpired lease under which the debtor is the lessee is assigned pursuant to this section, the lessor of the property may require a deposit or other security for the performance of the debtor's obligations under the lease substantially the same as would have been required by the landlord upon the initial leasing to a similar tenant.

(m) For purposes of this section 365 and sections 541(b)(2) and 362(b)(10), leases of real property shall include any rental agreement to use real property.

(n) (1) If the trustee rejects an executory contract under which the debtor is a licensor of a right to intellectual property, the licensee under such contract may elect--

(A) to treat such contract as terminated by such rejection if such rejection by the trustee amounts to such a breach as would entitle the licensee to treat such contract as terminated by virtue of its own terms, applicable nonbankruptcy law, or an agreement made by the licensee with another entity; or

(B) to retain its rights (including a right to enforce any exclusivity provision of such contract, but excluding any other right under applicable nonbankruptcy law to specific performance of such contract) under such contract and under any agreement supplementary to such contract, to such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law), as such rights existed immediately before the case commenced, for--

(i) the duration of such contract; and

(ii) any period for which such contract may be extended by the licensee as of right under applicable nonbankruptcy law.

(2) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, under such contract--

(A) the trustee shall allow the licensee to exercise such rights;

(B) the licensee shall make all royalty payments due under such contract for the duration of such contract and for any period described in paragraph (1)(B) of this subsection for which the licensee extends such contract; and

(C) the licensee shall be deemed to waive--

(i) any right of setoff it may have with respect to such contract under this title or applicable nonbankruptcy law; and

(ii) any claim allowable under section 503(b) of this title arising from the performance of such contract.

(3) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, then on the written request of the licensee the trustee shall--

(A) to the extent provided in such contract, or any agreement supplementary to such contract, provide to the licensee any intellectual property (including such embodiment) held by the trustee; and

(B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such embodiment) including any right to obtain such intellectual property (or such embodiment) from another entity.

(4) Unless and until the trustee rejects such contract, on the written request of the licensee the trustee shall--

(A) to the extent provided in such contract or any agreement supplementary to such contract--

(i) perform such contract; or

(ii) provide to the licensee such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law) held by the trustee; and

(B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such embodiment), including any right to obtain such intellectual property (or such embodiment) from another entity.

(o) In a case under chapter 11 of this title, the trustee shall be deemed to have assumed (consistent with the debtor's other obligations under section 507), and shall immediately cure any deficit under, any commitment by the debtor to a Federal depository institutions regulatory agency (or predecessor to such agency) to maintain the capital of

an insured depository institution, and any claim for a subsequent breach of the obligations thereunder shall be entitled to priority under section 507. This subsection shall not extend any commitment that would otherwise be terminated by any act of such an agency.

(p) (1) If a lease of personal property is rejected or not timely assumed by the trustee under subsection (d), the leased property is no longer property of the estate and the stay under section 362(a) is automatically terminated.

(2) (A) If the debtor in a case under chapter 7 is an individual, the debtor may notify the creditor in writing that the debtor desires to assume the lease. Upon being so notified, the creditor may, at its option, notify the debtor that it is willing to have the lease assumed by the debtor and may condition such assumption on cure of any outstanding default on terms set by the contract.

(B) If, not later than 30 days after notice is provided under subparagraph (A), the debtor notifies the lessor in writing that the lease is assumed, the liability under the lease will be assumed by the debtor and not by the estate.

(C) The stay under section 362 and the injunction under section 524(a)(2) shall not be violated by notification of the debtor and negotiation of cure under this subsection.

(3) In a case under chapter 11 in which the debtor is an individual and in a case under chapter 13, if the debtor is the lessee with respect to personal property and the lease is not assumed in the plan confirmed by the court, the lease is deemed rejected as of the conclusion of the hearing on confirmation. If the lease is rejected, the stay under section 362 and any stay under section 1301 is automatically terminated with respect to the property subject to the lease.

Section 1113. Rejection of collective bargaining agreements

(a) The debtor in possession, or the trustee if one has been appointed under the provisions of this chapter, other than a trustee in a case covered by subchapter IV of this chapter and by title I of the Railway Labor Act, may assume or reject a collective bargaining agreement only in accordance with the provisions of this section.

(b) (1) Subsequent to filing a petition and prior to filing an application seeking rejection of a collective bargaining agreement, the debtor in possession or trustee (hereinafter in this section "trustee" shall include a debtor in possession), shall—

(A) make a proposal to the authorized representative of the employees covered by such agreement, based on the most complete and reliable information available at the time of such proposal, which provides for those necessary modifications in the employees benefits and protections that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably; and

(B) provide, subject to subsection (d)(3), the representative of the employees with such relevant information as is necessary to evaluate the proposal.

(2) During the period beginning on the date of the making of a proposal provided for in paragraph (1) and ending on the date of the hearing provided for in subsection (d)(1), the trustee shall meet, at reasonable times, with the authorized representative to confer in good faith in attempting to reach mutually satisfactory modifications of such agreement.

(c) The court shall approve an application for rejection of a collective bargaining agreement only if the court finds that—

(1) the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (b)(1);

(2) the authorized representative of the employees has refused to accept such proposal without good cause; and

(3) the balance of the equities clearly favors rejection of such agreement.

(d) (1) Upon the filing of an application for rejection the court shall schedule a hearing to be held not later than fourteen days after the date of the filing of such application. All interested parties may appear and be heard at such hearing. Adequate notice shall be provided to such parties at least ten days before the date of such hearing. The court may extend the time for the commencement of such hearing for a period not exceeding seven days where the circumstances of the case, and the interests of justice require such extension, or for additional periods of time to which the trustee and representative agree.

(2) The court shall rule on such application for rejection within thirty days after the date of the commencement of the hearing. In the interests of justice, the court may extend such time for ruling for such additional period as the trustee and the employees' representative may agree to. If the court does not rule on such application within thirty days after the date of the commencement of the hearing, or within such additional time as the trustee and the employees' representative may agree to, the trustee may terminate or alter any provisions of the collective bargaining agreement pending the ruling of the court on such application.

(3) The court may enter such protective orders, consistent with the need of the authorized representative of the employee to evaluate the trustee's proposal and the application for rejection, as may be necessary to prevent disclosure of information provided to such representative where such disclosure could compromise the position of the debtor with respect to its competitors in the industry in which it is engaged.

(e) If during a period when the collective bargaining agreement continues in effect, and if essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate, the court, after notice and a hearing, may authorize the trustee to implement interim changes in the terms, conditions, wages, benefits, or work rules provided by a collective bargaining agreement. Any hearing under this paragraph shall be scheduled in accordance with the needs of the trustee. The implementation of such interim changes shall not render the application for rejection moot.

(f) No provision of this title shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section.

ภาคผนวก ข**Insolvenzordnung, 1994****Part Three: Effects of the Opening of Insolvency Proceedings****Chapter Two: Performance of Transactions. Cooperation of the Works Council****Section 103: Option to be Exercised by the Insolvency Administrator**

(1) If a mutual contract was not (or not completely) performed by the debtor and its other party at the date when the insolvency proceedings were opened the insolvency administrator may perform such contract replacing the debtor and claim the other party's consideration.

(2) If the administrator refuses to perform such contract the other party shall be entitled to its claims for non-performance only as a creditor of the insolvency proceedings. If the other party requires the administrator to opt for performance or non-performance the administrator shall state his intention to claim performance without negligent delay. If the administrator does not give his statement he may no longer insist on performance.

Section 104: Fixed-date Transactions Financial Futures

(1) If the delivery of goods with a market or stock exchange price was agreed to take place exactly on a definitely fixed date or within a definitely fixed period, and if such date or expiry of the period occurs after the insolvency proceedings were opened performance may not be claimed, but only claims for non-performance.

(2) If financial performance with a market or stock exchange price was agreed to take place at a fixed date or within a fixed period, and if such date or expiry of the period occurs after the insolvency proceedings were opened performance may not be claimed, but only claims for non-performance. In particular the following shall be regarded as financial performance

1. the delivery of precious metals,

2. the delivery of securities or comparable rights if it is not intended to obtain a participation in a company in order to establish a long-term association,

3. performances in specie which have to be effected in foreign currency or in a mathematical unit,

4. performances in specie the amount of which is indirectly or directly determined by the exchange rate of a foreign currency or mathematical unit, by the interest rate prevailing for claims or by the price of other goods or services,

5. options and other rights to deliveries or performances in specie in the meaning of Nos. 1 to 4.

If transactions on financial performances are combined in a framework contract for which agreement has been reached that in the case of violations of the contract it may only be terminated uniformly, the totality of these transactions shall be regarded as a mutual contract in the meaning of sections 103 and 104.

(3) Such claim for non-performance shall cover the balance between the agreed price and the market or stock exchange price prevailing at the place of performance on the second workday after the insolvency proceedings were opened for a contract with the agreed period of performance. The other party may bring such claim only as a creditor of the insolvency proceedings.

Section 105: Severable Contracts

If the contractual performances due to the parties are severable, and if the other party already had performed part of the services incumbent on it on the date when the insolvency proceedings were opened such other party shall be deemed a creditor of the insolvency proceedings for the amount of its claim to consideration corresponding to the part of the services already performed by it, even if the insolvency administrator claims performance of the services not yet performed. The other party shall not be entitled to claim restitution for non-performance of its claim to the consideration of the part of services transferred to the debtor's assets before the insolvency proceedings were opened.

Section 106: Priority Notice

(1) If a priority notice was entered into the Land Register in order to secure a claim to grant or terminate a right in the debtor's real estate or in a right registered for the debtor, or in order to secure a claim to modify the contents or priority of such right the creditor may claim satisfaction of his claim from the assets involved in the insolvency proceedings. The same shall apply if the debtor undertook additional obligations with respect to the creditor and 'such obligations have not been met or have not been completely met.

(2) Subs. 1 shall apply *mutatis mutandis* to a priority notice entered into the register of ships and the register of ships under construction, or into the register of liens on aircraft.

Section 107: Retention of Title

(1) If the debtor, before the insolvency proceedings were opened, has sold a movable article while retaining title and transferring its possession to the purchaser the purchaser may claim performance of the sales contract. The same shall apply if the debtor has undertaken additional obligations with respect to the purchase and such obligations have not been met or have not been completely met.

(2) If the debtor, before the insolvency proceedings were opened, has purchased a movable article in which the has seller retained title and whose possession was transferred to the debtor by the seller, the insolvency administrator, required by the seller to opt for performance or non-performance, need not submit his declaration pursuant to section 103 subs. 2 until without negligent delay after the report meeting. This shall not apply if in the period preceding the report meeting a considerable reduction is to be expected in the value of the movable article and the creditor has notified the administrator of this circumstance.

Section 108: Continuity of Continuing Obligations

(1) Contracts concluded by the debtor for the lease and tenancy of immovables or premises and for services to be performed for the debtor shall continue to exist, but to the credit of the assets involved in the insolvency proceedings. This shall also apply in

respect of rental and lease contracts concluded by the debtor as landlord or lessor relating to other effects assigned as a security to a third party who had financed their acquisition or production.

(2) Claims arising before the insolvency proceedings were opened may be brought by the other party only as a creditor of the insolvency proceedings.

Section 109: Debtor's Status as Tenant or Lessee

(1) A contract for the tenancy or lease of immovables or premises concluded by the debtor as tenant or lessee may be terminated by the insolvency administrator with the legal period of notice irrespective of any agreed period of notice. If the dwelling of the debtor is the subject-matter of the lease agreement, termination shall be replaced by the right of the insolvency administrator to declare that claims becoming due on expiry of the period specified in the first sentence may not be asserted in the insolvency proceedings. If the administrator terminates under the first sentence, or if he submits the declaration in accordance with the second sentence, the other party may claim damages as a creditor of the insolvency proceedings for premature termination of such contract or in respect of the consequences of the declaration.

(2) If the debtor had not yet entered into possession of the immovables or premises when the insolvency proceedings were opened the administrator and the other party may withdraw from such contract. If the administrator withdraws from the contract the other party may claim damages as a creditor of the insolvency proceedings for premature termination of the contract. At the other party's request each party shall state within two weeks whether it intends to withdraw from the contract; if any of the parties does not give their statement they shall lose the right to withdraw.

Section 110: Debtor's Status as Landlord or Lessor

(1) If the debtor as landlord or lessor of immovables or premises assigned his future claim to tenancy or lease fees to a third party before the insolvency proceedings were opened the validity of such assignment shall be limited to tenancy or lease fees to be received for the current month of the opening of the insolvency proceedings. If the

insolvency proceedings were opened after the fifteenth day of a month the validity of such assignment shall also be valid in respect of the following month.

(2) In particular, collection of the tenancy or lease fees shall be deemed an assignment for the purpose of subs. 1. An assignment under contract shall be deemed equivalent to a transfer effected by way of execution.

(3) The tenant or lessee may set off any claim entitling him against the debtor against the claim to tenancy or lease fees covering the period mentioned at subs. 1. Sections 95 and 96 Nos. 2 to 4 shall remain unaffected.

Section 111: Sale of Property Let by the Debtor

If the insolvency administrator sells immovables or premises let by the debtor, and if the purchaser replaces the debtor as a party of the tenancy or lease, the purchaser may terminate the tenancy or lease with the legal period of notice. Such notice may be given only for the first date of the legal period of notice. Section 57c of the Act on Forced Sale and Sequestration (Gesetz über die Zwangsversteigerung und die Zwangsverwaltung) shall apply *mutatis mutandis*.

Section 112: Prohibition to Terminate Tenancy or Lease Contracts

Tenancy or lease contracts concluded by the debtor as tenant or lessee may not be terminated by the other party after the opening of the insolvency proceedings was requested:

1. because of default in the payment of tenancy or lease fees arising before the opening of the insolvency proceedings was requested,
2. because of degradation of the debtor's financial situation.

Section 113: Termination of a Service Contract

(1) A contract entitling the debtor to services may be terminated by the insolvency administrator and by the other party irrespective of any agreed duration of such contract or agreed exclusion of the right to routine termination. If no shorter period has been agreed, the period of notice shall be three months to month's end. If the administrator

terminates such contract the other party may claim damages as a creditor of the insolvency proceedings for premature termination of the service contract.

(2) If an employee intends to invoke the invalidity of the insolvency administrator's termination of his contract he shall even bring an action with the Labour Court within three weeks of his reception of such termination if he invokes the invalidity of such termination for other reasons than those given at section 1 subs. 2 and 3 of the Dismissals Protection Act (Kündigungsschutzgesetz). Section 4 fourth sentence and section 5 of the Dismissals Protection Act shall apply *mutatis mutandis*.

Section 114: Emoluments from a Service Contract

(1) If the debtor prior to the opening of the insolvency proceedings assigned or pledged a future claim to emoluments due to him under a service contract or to recurring emoluments replacing them, the validity of such assignment or pledge shall be limited to the emoluments to be received by the debtor prior to the end of two years following the end of the current calendar month on the date of the opening of the proceedings.

(2) Against the claim to emoluments covering the period mentioned at subs. 1 the obligated person may set off any claim entitling him against the debtor. Sections 95 and 96 Nos. 2 to 4 shall remain unaffected.

(3) If future emoluments were transferred prior to the opening of the insolvency proceedings by way of execution, the validity of such transfer shall be limited to emoluments to be received by the debtor for the current calendar month on the date of the opening of the proceedings. If the insolvency proceedings were opened after the fifteenth day of the month, the validity of such transfer shall extend to the subsequent calendar month. Section 88 shall remain unaffected; Section 89 subs. 2 second sentence shall apply *mutatis mutandis*.

Section 115: Expiry of Mandates

(1) Any mandate ordered by the debtor referring to the property forming part of the assets involved in the insolvency proceedings shall expire upon the opening of the insolvency proceedings.

(2) If suspension of such mandate would cause a risk the mandatory shall continue to perform the mandated transaction until the insolvency administrator is able to otherwise take care of such transaction himself. For this purpose the mandate shall be deemed to continue. The mandatory may claim reimbursement of his expenses incurred for such continuation as a creditor of the assets involved in the insolvency proceedings.

(3) As long as the mandatory is not at fault in being unaware of the opening of insolvency proceedings he shall benefit from the presumption that the mandate continues. The mandatory shall rank among the creditors of the insolvency proceedings with his reimbursement claims arising from such continuation.

Section 116: Expiry of Management Contracts

If anyone is obligated under a service or work contract with the debtor to manage a business transaction for the latter, section 115 shall apply *mutatis mutandis*. The provision governing reimbursement claims arising from a continuation of such management contract shall also apply to claims to remuneration.

Section 117: Expiry of Proxies

(1) A proxy granted by the debtor with respect to the property forming part of the assets involved in the insolvency proceedings shall expire upon the opening of the insolvency proceedings.

(2) As far as a mandate or a management contract is deemed to continue under section 115 subs. 2 the related authority shall also be deemed to continue.

(3) As long as the authorised person is not at fault in being unaware of the opening of insolvency proceedings he shall not be held liable under section 179 of the Civil Code.

Section 118: Liquidation of Companies

If a company without legal personality or a partnership limited by shares is liquidated by the opening of insolvency proceedings for the property owned by one partner the managing partner shall rank among the creditors of the assets involved in the insolvency proceedings with his claims arising from the provisional continuation of

urgent business transactions. As long as the managing partner is not at fault in being unaware of the opening of insolvency proceedings he shall rank among the creditors of the insolvency proceedings with his claims arising from the continuation of business transactions. Section 84 subs. 1 shall remain unaffected.

Section 119: Invalidity of Agreements Derogating from the Foregoing Provisions

Agreements excluding or limiting the application of sections 103 to 118 in advance shall be invalid.

Section 120: Termination of Plant Agreements

(1) If a plant agreement provides for benefits incumbent on the assets involved in the insolvency proceedings the insolvency administrator shall consult the works council about agreement on a reduction of such benefits. Such plant agreement may be terminated by giving three months' notice even if a longer period of notice has been agreed.

(2) The right to terminate a plant agreement for an important reason without a period of notice shall remain unaffected.

Section 121: Plant Modifications and Conciliatory Proceeding

In insolvency proceedings opened for the property owned by the entrepreneur, section 112 subs. 2 first sentence of the Industrial Constitution Act (Betriebsverfassungsgesetz) shall 1 apply with the proviso that the conciliatory proceedings shall only be preceded by an attempt on the part of the president of the Land Employment Office to settle the matter if both the insolvency administrator and the works council request such an attempt.

Section 122: Judicial Approval of a Plant Modification

(1) If a plant modification is envisaged, and if the insolvency administrator and the works council cannot reach an agreement pursuant to section 112 of the Industrial Constitution Act on reconciliation of interests within three weeks from the beginning of negotiations or written request to begin negotiations although the administrator has provided comprehensive information in good time to the works council, the administrator

may request a decision on the part of the Labour Court approving such plant modification without prior proceedings under section 112 subs. 2 of the Industrial Constitution Act. Section 113 subs. 3 of the Industrial Constitution Act shall not be applied in this respect. The administrator's right to bring about a reconciliation of interests pursuant to section 125 or to file a request for a court decision pursuant to section 126 shall remain unaffected.

(2) The Court shall approve such plant modification if the economic condition of the enterprise, also taking into account the social concerns of the employees, warrants the execution of such plant modification, without previous proceedings in accordance with section 112 subs. 2 of the Industrial Constitution Act. The provisions contained in the Labour Court Act (Arbeitsgerichtsgesetz) on decisions by order shall apply *mutatis mutandis*; the insolvency administrator and the works council shall be the parties involved in the proceedings. Pursuant to section 61 a subs. 3 to 6 of the Labour Court Act, the application is to be dealt with as a matter of priority.

(3) No complaint to the Regional Labour Court may be brought against the court order. A complaint may be made to the Federal Labour Court if this is permitted in the order of the Labour Court; section 72 subs. 2 and 3 of the Labour Court Act shall apply *mutatis mutandis*. The appeal is to be filed with the Federal Labour Court with grounds within a month of receipt of the decision of the Labour Court in its final form.

Section 123: Scope of the Social Plan

(1) A social plan established subsequent to opening of insolvency proceedings may provide for a total amount of up to two and one half month's wages (section 10 subs. 3 of the Dismissals Protection Act) of the dismissed employees to recompense for or to attenuate their economic disadvantages under the envisaged plant modification.

(2) The obligations under such social plan are obligations incumbent on the assets involved in the insolvency proceedings. However, if no insolvency plan comes into being, no more than one third of the assets involved in the insolvency proceedings available for distribution among the creditors of the insolvency proceedings without such social plan may be used for the settlement of social plan claims. If the total amount

of all social plan claims exceeds such limit each claim shall be reduced on a proportionate basis.

(3) As soon as adequate cash funds are available in the assets involved in the insolvency proceedings the insolvency administrator shall make advance payments on social plan claims with the consent of the insolvency court. No execution into the assets involved in the insolvency proceedings for social plan claims shall be permitted.

Section 124: Social Plan Established prior to the Opening of Insolvency Proceedings

(1) A social plan established prior to the opening of insolvency proceedings, but not earlier than three months before the opening of insolvency proceedings was requested, may be revoked by both the insolvency administrator and the works council.

(2) If such social plan is revoked the employees entitled to claims under the social plan may be taken into account when a social plan is established during the insolvency proceedings.

(3) Benefits received by an employee on his claim under a revoked social plan before the opening of insolvency proceedings may not be claimed to be restituted due to the revocation. Upon the establishment of a new social plan such benefits received by a dismissed employee shall be set off against the calculation of the total amount of social plan claims under section 123 subs. 1 up to two and a half months' wages.

Section 125: Reconciliation of Interests and Dismissals Protection

(1) If a plant modification is envisaged (section 111 of the Industrial Constitution Act) and if the insolvency administrator and the works council reach an agreement on reconciliation of interests in which the employees who are to receive notice are listed by name, section 1 of the Dismissals protection Act shall be applied, subject to the following provisos:

1. it shall be presumed that termination of the employment of the employees who are listed by name depends on urgent requirements of the plant which stand in the way of further employment on this site or of further employment under unchanged working conditions;

2. the social selection of the employees shall only be examined on the basis of duration of service, age and maintenance obligations, and in this respect only for gross errors; it shall not be regarded as grossly in error if a balanced personnel structure is maintained or created.

The first sentence shall not apply if the circumstances have changed considerably since the reconciliation of interests was brought into being.

(2) Reconciliation of interests pursuant to subs. 1 shall replace the statement of the works council pursuant to section 17 subs. 3 second sentence of the Dismissals Protection Act.

Section 126: Judicial Orders Deciding on Dismissal Protection

(1) If the plant did not elect a works council or if for other reasons reconciliation of interests pursuant to section 125 is not achieved within three weeks of opening of the negotiations or written request to open negotiations, in spite of the fact that the administrator provided comprehensive information in good time to the works council, the insolvency administrator may request a decision on the part of the Labour Court to the effect that termination of contracts covering certain employees designated in his request is conditioned by urgent operational requirements and justified under social aspects. The social selection of the employees shall only be examined on the basis of duration of service , age and maintenance obligations.

(2) The provisions of the Labour Court Act governing decisions by order shall apply *mutatis mutandis*. The insolvency administrator, the works council and those designated employees not recognizing the termination of their contracts as justified shall be parties to the proceedings. Section 122 subs. 2 third sentence and subs. 3 shall apply *mutatis mutandis*.

(3) Section 12 a subs. 1 first and second sentences of the Labour Court Act shall apply *mutatis mutandis* to the costs incurred by the parties concerned during the first stage of proceedings. During proceedings before the Federal Labour Court the provisions contained in the Code of Civil Procedure governing the reimbursement of costs shall apply *mutatis mutandis*.

Section 127: Action brought by an Employee

(1) If the insolvency administrator gives notice to an employee listed in the application pursuant to section 126 subs. 1, and if the employee files an action to determine that employment has not been terminated by dismissal, or that the change in the working conditions is socially unjustified, the legally binding decision in proceedings pursuant to section 126 shall be binding on the parties. This shall not apply if the circumstances have changed considerably since the last oral hearing.

(2) If the employee has already filed an action prior to the decision taken in proceedings pursuant to section 126 becoming legally binding, at the request of the administrator the proceedings on the action shall be suspended until this time.

Section 128: Sale of plant

(1) Application of sections 125 to 127 shall not be excluded by the plant modification on which the reconciliation of interests or application for determination is based not being carried out until subsequent to sale of plant. The plant buyer shall be a party to the proceedings pursuant to section 126.

(2) In the case of a transfer of plant, the presumption in accordance with section 125 subs. 1 first sentence No. 1 or the court decision pursuant to section 126 subs. 1 first sentence shall also imply that termination of employment does not occur because of the transfer of plant.

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UNCITRAL Legislative Guide on Insolvency Law

Treatment of contracts, Recommendation 69-86

Purpose of legislative provisions

The purpose of provisions on treatment of contracts is:

- (a) To establish the manner in which contracts, under which both the debtor and its counterparty have not yet fully performed their respective obligations, should be addressed in the insolvency law, including the relationship between the insolvency law and applicable law, with the objective of maximizing the value and reducing the liabilities of the estate;
- (b) To define the scope of the powers to deal with these contracts and the situations in which and by whom these powers may be exercised;
- (c) To identify the types of contract that should be excepted from the exercise of these powers; and
- (d) To identify the kinds of protection that will be available to counterparties to continued contracts.

Contents of legislative provisions

Treatment of contracts not fully performed

69. The insolvency law should specify the treatment of contracts under which both the debtor and its counterparty have not yet fully performed their respective obligations.

Automatic termination and acceleration clauses

70. The insolvency law should specify that any contract clause that automatically terminates or accelerates a contract upon the occurrence of any of the following events is unenforceable as against the insolvency representative and the debtor:

- (a) An application for commencement, or commencement, of insolvency proceedings;
- (b) The appointment of an insolvency representative.

71. The insolvency law should specify the contracts that are exempt from the operation of recommendation 70, such as financial contracts, or subject to special rules, such as labour contracts.

Continuation or rejection

72. The insolvency law should specify that the insolvency representative may decide to continue the performance of a contract of which it is aware where continuation would be beneficial to the insolvency estate. The insolvency law should specify that:

- (a) The right to continue applies to the contract as a whole; and
- (b) The effect of continuation is that all terms of the contract are enforceable.

73. The insolvency law may permit the insolvency representative to decide to reject a contract. The insolvency law should specify that the right to reject applies to the contract as a whole.

Timing and notice of decision to continue or reject

74. The insolvency law should specify a time period within which the insolvency representative is required to make a decision to continue or reject a contract, which time period may be extended by the court.

75. The insolvency law should specify the time at which the rejection will be effective.

76. The insolvency law should specify that where a contract is continued or rejected, the counterparty is to be given notice of the continuation or rejection, including its rights with respect to submitting a claim and the time in which the claim should be submitted, and permit the counterparty to be heard by the court.

Right of the counterparty to request a decision

77. Notwithstanding recommendation 74, the insolvency law should permit a counterparty to request the insolvency representative (within any specified time limit) to make a prompt decision and, in the event that the insolvency representative fails to act, to request the court to direct the insolvency representative to make a decision to continue or reject a contract.

Consequences of failure to make a decision

78. The insolvency law should specify the consequences of the failure of the insolvency representative to make a decision within the specified time period with respect to contracts of which it is aware. Failure by the insolvency representative to act within the specified time period should not operate to continue a contract of which the insolvency representative was not aware.

Continuation of contracts where the debtor is in breach

79. The insolvency law should specify that where the debtor is in breach of a contract the insolvency representative can continue the performance of that contract, provided the breach is cured, the non-breaching counterparty is substantially returned to the economic position it was in before the breach and the estate is able to perform under the continued contract.

Performance prior to continuation or rejection

80. The insolvency law should specify that the insolvency representative may accept or require performance from the counterparty to a contract prior to continuation or rejection of the contract. Claims of the counterparty arising from performance accepted or required by the insolvency representative prior to continuation or rejection of the contract should be payable as an administrative expense:

(a) If the counterparty has performed the contract the amount of the administrative expense should be the contractual price of the performance; or

(b) If the insolvency representative uses assets owned by a third party that are in the possession of the debtor subject to contract, that party should be protected against diminution of the value of those assets and have an administrative claim in accordance with subparagraph (a).

Damages for subsequent breach of a continued contract

81. The insolvency law should specify that where a decision is made to continue performance of a contract, damages for the subsequent breach of that contract should be payable as an administrative expense.

Damages arising from rejection

82. The insolvency law should specify that any damages arising from the rejection of a pre-commencement contract would be determined in accordance with applicable law and should be treated as an ordinary unsecured claim. The insolvency law may limit claims relating to the rejection of a long-term contract.

Assignment of contracts

83. The insolvency law may specify that the insolvency representative can decide to assign a contract, notwithstanding restrictions in the contract, provided the assignment would be beneficial to the estate.

84. Where the counterparty objects to assignment of a contract, the insolvency law may permit the court to nonetheless approve the assignment provided:

- (a) The insolvency representative continues the contract;
- (b) The assignee can perform the assigned contractual obligations;
- (c) The counterparty is not substantially disadvantaged by the assignment; and
- (d) The debtor's breach under the contract is cured before assignment.

85. The insolvency law may specify that, where the contract is assigned, the assignee will be substituted for the debtor as the contracting party with effect from the date of the assignment and the estate will have no further liability under the contract.

Post-commencement contracts

86. The insolvency law should specify that contracts entered into after the commencement of insolvency proceedings are post-commencement obligations of the estate. Claims arising from those contracts should be payable as an administrative expense.



ประวัติผู้เขียนวิทยานิพนธ์

นางสาวภาสวรรณ ณ นคร เกิดวันที่ 12 มีนาคม พ.ศ. 2518 ที่จังหวัดขอนแก่น
สำเร็จการศึกษาปริญญาตรีนิติศาสตรบัณฑิต จากมหาวิทยาลัยธรรมศาสตร์ ปีการศึกษา 2540
เข้าศึกษาต่อในหลักสูตรนิติศาสตรมหาบัณฑิต ที่จุฬาลงกรณ์มหาวิทยาลัย เมื่อ พ.ศ. 2546