

Reply of Austria
to the questionnaire in relation to the law applicable to insolvency proceedings

Part I – Provision of specific applicable law rules

1) Does the law of your country provide for applicable law rules in relation to insolvency? Please respond by YES or NO.

Yes

2) If you have replied YES to Question 1), please specify if these rules are found in the insolvency legislation or, for example, in other norms of a more general nature or the common law.

Rules are found in insolvency legislation and in a regulation by the EU.

Part II – Principles, scope and object of the law applicable in insolvency proceedings

3) Does the insolvency law in your country abide to the following general rule on conflict of laws: the law of the country of the opening of the insolvency proceedings should be applicable (*i.e. lex concursus*)? Please respond by YES or NO. If NO, please explain. See Part III below for exceptions to the general rule.

Yes

4) If you have replied YES to Question 3), please specify the connecting factors used to determine the competent jurisdiction (*i.e.* where the debtor is habitually resident, e.g. the jurisdiction: where it has its statutory seat; under whose law it is incorporated or formed; where it has its central administration; where it has its principal place of business; etc.).

In principle, the place of the centre of a debtor's main interests is the connecting factor used to determine the competent jurisdiction; in case the debtor is a company or legal person, the place of the registered office is presumed to be the centre of its main interests (unless otherwise proven); see Article 3 § 1 European Council Regulation 1346/2000 on Insolvency Proceedings.

Furthermore, under the condition that the debtor has his centre of main interests/registered office in another country the establishment of a debtor can constitute a sufficient connecting factor for a country's jurisdiction, but this country (which has jurisdiction because of a debtor's establishment) is competent for the debtor's assets within its territory, only; see Art 3 § 2 European Council Regulation 1346/2000 on Insolvency Proceedings.

Outside the scope of this EU-Regulation assets of the debtor can serve as a sufficient basis for jurisdiction, if no other of the criteria mentioned above is fulfilled.

5) If you have replied YES to Question 3), please confirm / explain if the *lex concursus* determines all the effects of the insolvency proceedings, both procedural and substantive, on the persons and legal relations concerned.

Confirmed

6) If you have replied YES to Question 3), please confirm / explain if the *lex concursus* governs all the conditions for the opening, conduct and closure of the insolvency proceedings.

Confirmed

7) Does the insolvency law in your country provide for exceptional conflict of laws rules in relation to insolvency proceedings involving specific types of debtors such as, for example, credit institutions, insurance companies. Please respond by YES or NO. If YES, please specify.

Yes, there are special rules for credit institutions and insurance companies which, however, do not vary much from the general rules.

8) If you have replied YES to Question 3), please indicate if the *lex concursus* rule is valid both for main proceedings and for secondary proceedings in your country within the meaning of the *UNCITRAL Model Law on Cross-border Insolvency*. Please respond by YES or NO. If NO please explain.

Yes

9) The 30 September 2003 version of Legislative Provision No 179 of the UNCITRAL Draft Legislative Guide on Insolvency Law (*text available only in English*) provides that:

“(179) The insolvency law should provide [that the law] of the place where insolvency proceedings are commenced should apply to all aspects of the conduct, administration and conclusion of those insolvency proceedings, including:

- (a) eligibility and commencement criteria;
- (b) creation and scope of the insolvency estate;
- (c) treatment of property of the estate, including the scope of, exceptions to, and relief from application of a stay;
- (d) costs and expenses;

- (e) proposal, approval, confirmation and implementation of a plan of reorganization;
- (f) the voidness, voidability or unenforceability of legal acts detrimental to creditors;
- (g) effect of the commencement of the proceedings upon contracts under which both the debtor and its counterparty have not yet fully performed their respective obligations, including the enforceability of automatic termination and anti-assignment provisions in those contracts;
- (h) conditions under which setoff can occur after commencement of insolvency proceedings;
- (i) rights and obligations of the debtor, insolvency representative, creditors and creditors' committee;
- (j) claims and their treatment;
- (k) priorities for ranking of claims;
- (l) distribution of proceeds of liquidation; and
- (m) resolution and conclusion of the proceedings."

Question: Do you have any views on this list and the items included therein? Would you add other items? If so, please provide examples.

There is no need to add other items.

Part III – Exceptions to the general applicable law rule

10) Does the insolvency law of your country provide for exceptions to the *lex concursus* rule? Please respond by YES or NO. If NO, please explain.

Yes

11) Does the insolvency law of your country provide for a specific rule in the case of rights *in rem* over assets located abroad? Please respond by YES or NO. If NO, please explain.

Yes

12) If you have replied YES to Question 11), please confirm / explain if the effects of the opening of insolvency proceedings are determined by other conflict of laws rules applicable outside of insolvency (e.g. *lex rei sitae*) or if the opening of insolvency proceedings does not affect rights *in rem* located abroad.

The opening of insolvency proceedings does not affect rights in rem located abroad.

13) If you have replied YES to Question 11), please confirm / explain if the special rules designed for rights *in rem* also apply to intangibles (receivables).

Confirmed

14) Does the insolvency law of your country provide for special rules for foreign payment systems and financial markets (e.g. position-closing agreements, netting agreements, sale of securities and the guarantees provided for such transactions)? Please respond by YES or NO. If NO, please explain.

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Yes

15) Does the insolvency law of your country provide for special rules in relation to the set-off of a transaction,¹ governed by a foreign law, which occurred before the application for the opening or the opening of insolvency proceedings? Please respond by YES or NO. If YES, please explain.

No

The opening of insolvency proceedings does not affect the right of the creditor to set-off against claims of the debtor where such a set-off is permitted by the law applicable to the insolvent debtor's claim.

16) Does the insolvency law of your country provide for special rules in relation to the avoidance of a transaction,² governed by a foreign law, which occurred before the application for the opening or the opening of insolvency proceedings? Please respond by YES or NO. If YES, please explain.

Yes. The lex concursus does not apply where the person who benefited from a legal act detrimental to all the creditors provides proof that the said act is subject to the law of a State other than the State of the opening of proceedings, and that law does not allow any means of challenging that act in the relevant case.

17) Does the insolvency law of your country provide for special protection in relation to employment contracts and relationships governed by a foreign law? Please respond by YES or NO. In both cases, please explain.

No. The effects of insolvency proceedings on employment contracts are governed solely by the law applicable to the contract.

18) Does the insolvency law of your country provide for other exceptions? Please respond by YES or NO. If YES, please explain and provide examples.

Yes.

- *The effects of insolvency proceedings on pending lawsuits is governed by the law of the state in which the lawsuit is pending;*
- *on contracts conferring the right to acquire or make use of immovable property shall be governed solely by the law of the state where the immovable is situated;*
- *reservation of title.*

Part IV – Other information

19) Does the insolvency law of your country apply to both natural persons and legal persons? Please respond by YES or NO. In both cases, please explain.

Yes In general the insolvency law applies to both natural and legal persons. An additional set of rules however only applies to natural persons and allows under certain circumstances for a discharge for remaining debts.

¹ The use of the word "transaction" in this section is intended to refer generally to the wide range of legal acts by which assets may be disposed of or obligations incurred including by way of a transfer, a payment, a security, a guarantee, a loan or a release [or an action making a security interest effective against third parties] and may include a composite series of transactions.

² Ibid.

20) Does the insolvency law of your country provide special rules in relation to consumers? Please respond by YES or NO. If YES, please explain.

No.

21) Please indicate / explain if, according to the insolvency law of your country, a contractual provision, to which the debtor is a party, indicating the law applicable to the contract could be set aside by virtue of a public policy exception.

Under other than insolvency law an contractual choice of law may be invalid (e.g. consumer protection).

22) Please feel free to provide any other views, comments or information that would be relevant to the issue under study.

Questionnaire de la Conférence de La Haye relatif à la loi applicable en matière de procédures d'insolvabilité

Réponses de la Section du droit international privé de l'Office fédéral de la justice à Berne/Suisse

1) Non

3) Oui dans le sens actif (procédure principale suisse), non dans les sens passif (procédure principale étrangère). Dans le cas d'une procédure étrangère, elle peut déclencher une procédure spéciale (type entraide, ev. secondaire) en Suisse. Cette procédure est soumise au droit suisse.

4) Siège statutaire ou établissement ou domicile

5) Dans le sens actif: lex fori concursus sans restriction. Sens passif: Aucune application de la lex concursus étrangère.

6) System de reconnaissance de l'ouverture étrangère.

7) Non

8) La lex fori concursus s'applique soit sur la procédure principale soit sur la procédure d'entraide

9) Voir texte séparé

10) Non

11) Non. Mais le concepte selon lequel l'insolvabilité suisse s'étend aussi aux bien réels à l'étranger reste aujourd'hui théorique, au moins en dehors des traités.

13) Oui

15) Non

16) Non

17) Non

18) Non

19) Oui

20) Non

21) Non

22) Informations supplémentaires volontiers à l'occasion de la séance du groupe d'expert le 11/12 décembre à Vienne

**MINISTÈRE DE LA JUSTICE
DE LA RÉPUBLIQUE TCHÈQUE**

Vyšehradská 16, 128 10 Praha 2

VOTRE RÉF.: L. c. ON No (03)

NOTRE RÉF.: 352/2003-MO-J

NOM: JUDr. Anna Šlechtová

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**Conférence de la Haye
de Droit International Privé**
Bureau Permanent
à l'attention de Monsieur Philippe Lortie
6, Scheveningseweg
2517 La Haye
PAYS-BAS
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Prague, le 5 décembre 2003

Objet: Questionnaire relatif à la loi applicable en matière de procédures d'insolvabilité

Cher Monsieur,

Faisant suite à la lettre du Bureau Permanent du 11- novembre 2003 le Ministère de la Justice de la République tchèque a l'honneur de transmettre ci-joint sous forme électronique ses observations relatives au Questionnaire à la loi applicable en matière de procédures d'insolvabilité.

Partie I - Mise en place de règles spécifiques en matière de loi applicable

1. Oui
2. Le droit tchèque règle les conditions d'insolvabilité par la loi No 328/1991 relatif au concours (redressement judiciaire) et au concordat modifiée et complétée ultérieurement. Sur les questions qui ne sont pas expressément réglées par cette loi s'applique la loi No 99/1963, le Code de procédure civile et les autres normes juridiques pour l'application de la loi du concours, par exemple l'arrêté No 476/1991 et le Règlement intérieur des tribunaux.

Partie II – Principes, portée et objet de la loi applicable à la procédure d'insolvabilité

3. Oui. La loi relatif au concours et au concordat et la loi de droit international privé et de procédure civile No 97/1963 ne contiennent pas expressément la règle générale du droit de conflit – la *lex concursus*. D'après l'interprétation de ces normes juridiques la loi du pays où la procédure du redressement judiciaire a été ouverte devrait être applicable. Le 01/05/2004 la République tchèque deviendra membre des Communautés européennes . A partir de cette date les normes de droit communautaire, par exemple le Règlement du Conseil

No 1346/2000 seront directement applicable. L'unique règle du droit de conflits cependant contenue dans le § 69 de la loi No 328/1991. Selon cette loi, les biens meubles d'un débiteur qui font l'objet d'un redressement judiciaire à l'étranger et se trouvant sur le territoire tchèque, en l'absence d'une liquidation des biens ouverte par un tribunal tchèque, seraient remis au tribunal étranger sur demande de celui-ci, s'il s'agit d'un état respectant la réciprocité. Or, la remise à l'étranger de tels biens ne peut se faire qu'au moment où il a été satisfait aux droits à l'exception de ces biens de la masse et à la distraction, et ce avant la demande du tribunal étranger.

4. Le for compétent est déterminé selon la résidence habituelle du débiteur chez une personne physique ou par une raison sociale - siège statutaire du débiteur chez une personne morale. La propriété du débiteur devrait être située en République tchèque.
5. Oui
6. Oui
7. Non. Actuellement, un amendement de la loi au concours et au concordat est en préparation. La proposition d'amendement prévoit une nouvelle réglementation des questions 5.-7.
8. Oui
9. A notre opinion la liste est suffisante. Nous n'avons aucune objection.

Partie III – Exceptions à la règle générale sur la loi applicable

10. Non, avec une exception au en point 11.
11. Conformément au § 69 (alinéa 1) de la loi No 328/1991, si le traité international qui est obligatoire pour la République tchèque et qui est publié au Recueil des lois de la République tchèque - (*Equivalent du Journal officiel de la République française*) ne contient pas d'autre réglementation, un concours déclaré par un tribunal tchèque s'applique aussi aux biens d'un débiteur situés à l'étranger.
12. La question est réglée par le point 11.
13. Non
14. Non
15. Non. La loi No 328/1991 ne contient pas de règle particulière relative à l'étranger.
16. Non. La loi No 328/1991 ne contient pas de règle particulière relative à l'étranger.

17. Non. La loi No 328/1991 ne contient pas de règle particulière relative à l'étranger. Les créances des employés sont des créances privilégiées, qui peuvent être réglées à tout moment pendant le concours.

18. Non

Partie IV – Autres informations

19. Oui. La loi relative au concours et au concordat s'applique tant aux personnes physiques (mais seulement des entrepreneurs privés) qu'aux personnes morales en République tchèque et aussi à l'étranger.

20. Non

21. La question n'est pas réglée par la loi de concours mais l'exception d'ordre public en relation avec le droit contractuel international est réglée par la loi No 97/1963 sur le droit international privé et la procédure civile. Selon la loi tchèque, certains actes du débiteur commis soit avant la déposition d'une demande d'ouverture de procédure d'insolvabilité, soit après la déclaration, par le tribunal, d'une faillite individuelle, sont interdits. Ainsi une compensation de droits par les biens est interdite après la déclaration d'insolvabilité. Une exception d'ordre public s'appliquerait même si le contrat sur la compensation des droits entre les créanciers et le débiteur était régi par une législation étrangère permettant une telle compensation.

22. -

Nous nous permettons de vous informer qu'actuellement un amendement de la loi du concours et du concordat qui a pour but la transposition des dispositions du droit communautaires concernant la procédure d'insolvabilité en droit tchèque est négocié par le gouvernement tchèque, notamment concernant la Directive No 22/1993 de la CEE, la Directive No 1998/26/CE, la Directive No 2001/17/CE, la Directive No 2001/24/CE, la Directive No 2002/47/CE, et le Règlement (CE) No 2000/1346 du Conseil. Les travaux sur la nouvelle loi d'insolvabilité et la nouvelle loi de droit international privé et de la procédure civile ont été engagés.

Veillez agréer, Cher Monsieur, l'expression de mes sentiments distingués.

Directeur du Département International

JUDr. Jindrich Babický

II – QUESTIONNAIRE IN RELATION TO THE LAW APPLICABLE TO INSOLVENCY PROCEEDINGS

Part I – Provision of specific applicable law rules

1) Does the law of your country provide for applicable law rules in relation to insolvency? Please respond by YES or NO.

- Yes

2) If you have replied YES to Question 1), please specify if these rules are found in the insolvency legislation or, for example, in other norms of a more general nature or the common law.

- *The rules are found in the insolvency legislation*

Part II – Principles, scope and object of the law applicable in insolvency proceedings

3) Does the insolvency law in your country abide to the following general rule on conflict of laws: the law of the country of the opening of the insolvency proceedings should be applicable (*i.e. lex concursus*)? Please respond by YES or NO. If NO, please explain. See Part III below for exceptions to the general rule.

- Yes

4) If you have replied YES to Question 3), please specify the connecting factors used to determine the competent jurisdiction (*i.e.* where the debtor is habitually resident, e.g. the jurisdiction: where it has its statutory seat; under whose law it is incorporated or formed; where it has its central administration; where it has its principal place of business; etc.).

- *The insolvency court in whose district the debtor has his usual venue shall have exclusive local jurisdiction. The usual venue of natural persons is where the debtor is habitually resident. The usual venue of legal persons is where it has its statutory seat. If the centre of the debtor's self-employed business activity is located elsewhere, the insolvency court in whose district such place is located shall have the exclusive jurisdiction.*

5) If you have replied YES to Question 3), please confirm / explain if the *lex concursus* determines all the effects of the insolvency proceedings, both procedural and substantive, on the persons and legal relations concerned.

- *Basically the lex concursus determines all the effects of the insolvency proceedings, the procedural and the substantive, on the persons and legal relations concerned.*

6) If you have replied YES to Question 3), please confirm / explain if the *lex concursus* governs all the conditions for the opening, conduct and closure of the insolvency proceedings.

- *The lex concursus governs all the conditions for the opening, conduct and closure of the insolvency proceedings.*

7) Does the insolvency law in your country provide for exceptional conflict of laws rules in relation to insolvency proceedings involving specific types of debtors such as, for example, credit institutions, insurance companies. Please respond by YES or NO. If YES, please specify.

- No

8) If you have replied YES to Question 3), please indicate if the *lex concursus* rule is valid both for main proceedings and for secondary proceedings in your country within the meaning of the *UNCITRAL Model Law on Cross-border Insolvency*. Please respond by YES or NO. If NO please explain.

- Yes

9) The 30 September 2003 version of Legislative Provision No 179 of the UNCITRAL Draft Legislative Guide on Insolvency Law (*text available only in English*) provides that:

“(179) The insolvency law should provide [that the law] of the place where insolvency proceedings are commenced should apply to all aspects of the conduct, administration and conclusion of those insolvency proceedings, including:

- (a) eligibility and commencement criteria;
- (b) creation and scope of the insolvency estate;
- (c) treatment of property of the estate, including the scope of, exceptions to, and relief from application of a stay;
- (d) costs and expenses;
- (e) proposal, approval, confirmation and implementation of a plan of reorganization;
- (f) the voidness, voidability or unenforceability of legal acts detrimental to creditors;
- (g) effect of the commencement of the proceedings upon contracts under which both the debtor and its counterparty have not yet fully performed their respective obligations, including the enforceability of automatic termination and anti-assignment provisions in those contracts;
- (h) conditions under which setoff can occur after commencement of insolvency proceedings;
- (i) rights and obligations of the debtor, insolvency representative, creditors and creditors’ committee;
- (j) claims and their treatment;
- (k) priorities for ranking of claims;
- (l) distribution of proceeds of liquidation; and
- (m) resolution and conclusion of the proceedings.”

Question: Do you have any views on this list and the items included therein? Would you add other items? If so, please provide examples.

Part III – Exceptions to the general applicable law rule

10) Does the insolvency law of your country provide for exceptions to the *lex concursus* rule? Please respond by YES or NO. If NO, please explain.

- Yes

11) Does the insolvency law of your country provide for a specific rule in the case of rights *in rem* over assets located abroad? Please respond by YES or NO. If NO, please explain.

- Yes

12) If you have replied YES to Question 11), please confirm / explain if the effects of the opening of insolvency proceedings are determined by other conflict of laws rules applicable outside of insolvency (e.g. *lex rei sitae*) or if the opening of insolvency proceedings does not affect rights *in rem* located abroad.

- *The opening of insolvency proceedings does not affect rights in rem located abroad.*

13) If you have replied YES to Question 11), please confirm / explain if the special rules designed for rights *in rem* also apply to intangibles (receivables).

- No

14) Does the insolvency law of your country provide for special rules for foreign payment systems and financial markets (e.g. position-closing agreements, netting agreements, sale of securities and the guarantees provided for such transactions)? Please respond by YES or NO. If NO, please explain.

- Yes

15) Does the insolvency law of your country provide for special rules in relation to the set-off of a transaction,¹ governed by a foreign law, which occurred before the application for the opening or the opening of insolvency proceedings? Please respond by YES or NO. If YES, please explain.

- *Yes. The opening of insolvency proceedings shall not affect the right of creditors to demand the set-off of their claims against the claims of the debtor, where such a set-off is permitted by the law applicable to the insolvent debtor's claim.*

16) Does the insolvency law of your country provide for special rules in relation to the avoidance of a transaction,² governed by a foreign law, which occurred before the application for the opening or the opening of insolvency proceedings? Please respond by YES or NO. If YES, please explain.

- *Yes. Transactions made prior to the opening of insolvency proceedings and disadvantaging the creditors may be contested under the law of the country of the opening of the insolvency proceedings. The *lex concursus* shall not apply, where the person who benefited from a legal act detrimental to all the creditors provides proof that, the said act is subject to the law of a other state than that of the state of the opening of proceedings, and that law does not allow any means of challenging that act in the relevant case.*

17) Does the insolvency law of your country provide for special protection in relation to employment contracts and relationships governed by a foreign law? Please respond by YES or NO. In both cases, please explain.

- *Yes. The effects of insolvency proceedings on employment contracts and relationships shall be governed solely by the law of the state applicable to the contract of employment.*

18) Does the insolvency law of your country provide for other exceptions? Please respond by YES or NO. If YES, please explain and provide examples.

¹ The use of the word "transaction" in this section is intended to refer generally to the wide range of legal acts by which assets may be disposed of or obligations incurred including by way of a transfer, a payment, a security, a guarantee, a loan or a release [or an action making a security interest effective against third parties] and may include a composite series of transactions.

² Ibid.

- Yes. Other exceptions are:

a) *The opening of insolvency proceedings against the purchaser of an asset shall not affect the seller's rights based on a reservation of title where at the time of the opening of proceedings the asset is situated within the territory of an other country than the country of opening of proceedings.*

b) *The effects of insolvency proceedings on a contract conferring the right to acquire or make use of immoveable property shall be governed solely by the law of the country within the territory of which the immoveable property is situated.*

c) *the effects of insolvency proceedings on the rights of the debtor in immoveable property, a ship or an aircraft subject to registration in a public register shall be determined by the law of the country under the authority of which the register is kept.;*

d) *the effects of insolvency proceedings on a lawsuit pending concerning an asset or a right of which the debtor has been divested shall be governed solely by the law of the country in which that lawsuit is pending.*

Part IV – Other information

19) Does the insolvency law of your country apply to both natural persons and legal persons? Please respond by YES or NO. In both cases, please explain.

- *Basically the german law makes no distinction between natural an legal persons.*

20) Does the insolvency law of your country provide special rules in relation to consumers? Please respond by YES or NO. If YES, please explain.

- *Yes, natural persons shall be given the opportunity to achieve discharge of residual debt.*

21) Please indicate / explain if, according to the insolvency law of your country, a contractual provision, to which the debtor is a party, indicating the law applicable to the contract could be set aside by virtue of a public policy exception.

- *The german insolvency law doesn't allow such contractual provisions.*

22) Please feel free to provide any other views, comments or information that would be relevant to the issue under study.

**QUESTIONNAIRE IN RELATION TO THE LAW APPLICABLE TO
INSOLVENCY PROCEEDINGS**

— SPAIN —

Part I – Provision of specific applicable law rules

1) Does the law of your country provide for applicable law rules in relation to insolvency? Please respond by YES or NO. **YES.**

2) If you have replied YES to Question 1), please specify if these rules are found in the insolvency legislation or, for example, in other norms of a more general nature or the common law.

These rules are found in the Council Regulation (EC) 1346/2000, of 29 May 2000, on insolvency proceedings (*OJ L 160, 30.6.2000, p. 1*) and the Spanish Act 22/2003, of 9 July 2003, on insolvency (*BOE 164, 10.7.2003, p. 26905*). The Regulation applies only to proceedings where the centre of the debtor's main interests is located in the European Community (recital no. 14), except Denmark, and deals only with the intra-Community effects of insolvency proceedings.

There are also specific applicable law rules on the reorganisation and winding-up of insurance undertakings (Act 34/2003, *BOE 265, 5.11.2003, p. 39190* – implementing Directive 2001/17/EC) and on the reorganisation and winding up of credit institutions (Directive 2001/24/EC implementation).

Part II – Principles, scope and object of the law applicable in insolvency proceedings

3) Does the insolvency law in your country abide to the following general rule on conflict of laws: the law of the country of the opening of the insolvency proceedings

should be applicable (*i.e. lex concursus*)? Please respond by YES or NO. If NO, please explain. See Part III below for exceptions to the general rule. **YES.**

4) If you have replied YES to Question 3), please specify the connecting factors used to determine the competent jurisdiction (*i.e.* where the debtor is habitually resident, e.g. the jurisdiction: where it has its statutory seat; under whose law it is incorporated or formed; where it has its central administration; where it has its principal place of business; etc.).

The centre of a debtor's main interests is the connecting factor to determine the competent jurisdiction to open insolvency proceedings with universal scope. The concept of centre of main interests must be interpreted as the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties. In principle, in the case of professionals, this centre will be the place of their professional domicile. For natural persons, the place of their habitual residence. For companies and legal persons Spanish legislation presumes that the debtor's centre of main interests is the place of the registered office.

It is also possible to open insolvency proceedings in the State where the debtor has an establishment (= any place of operations where the debtor carries out a non-transitory economic activity with human means and goods). These proceedings shall have territorial scope.

5) If you have replied YES to Question 3), please confirm / explain if the *lex concursus* determines all the effects of the insolvency proceedings, both procedural and substantive, on the persons and legal relations concerned.

Under Spanish legislation, the *lex concursus* determines both procedural and substantive effects of the insolvency proceedings.

6) If you have replied YES to Question 3), please confirm / explain if the *lex concursus* governs all the conditions for the opening, conduct and closure of the insolvency proceedings.

Under Spanish legislation, the law of the State of the opening of insolvency proceedings determines the conditions for the opening of those proceedings, their conduct and their closure. Nevertheless, there are several exceptions to this general statement.

Article 4 of Regulation 1346/2000 includes a non-exhaustive list of questions that are governed by the *lex concursus*: “a) against which debtors insolvency proceedings may be brought on account of their capacity; b) the assets which form part of the estate and the treatment of assets acquired by or devolving on the debtor after the opening of insolvency proceedings; c) the respective powers of the debtor and the liquidator; d) the conditions under which set-offs may be invoked; e) the effects of insolvency proceedings on proceedings brought by individual creditors, with the exception of lawsuits pending; g) the claims which are to be lodged against the debtor’s estate and the treatment of claims arising after the opening of insolvency proceedings; h) the rules governing the lodging, verification and admission of claims; I) the rules governing the distribution of proceeds from the realisation of assets, the ranking of claims and the rights of creditors who have obtained partial satisfaction after the opening of insolvency proceedings by virtue of a right in rem or through a set-off; j) the conditions for and effects of closure of insolvency proceedings, in particular by composition; k) creditor’s rights after the closure of insolvency proceedings; l) who is to bear the costs and expenses incurred in the insolvency proceedings; m) the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all creditors”.

Even though Act 22/2003 does not enclose a similar list of items, it can be interpreted that the same questions are submitted to the *lex concursus* under this Act, because it is inspired in the dispositions of the Regulation and responds to the same principles.

7) Does the insolvency law in your country provide for exceptional conflict of laws rules in relation to insolvency proceedings involving specific types of debtors such as, for example, credit institutions, insurance companies. Please respond by YES or NO. If YES, please specify. **YES.**

We have specific regulations for the applicable law on the reorganisation and winding-up of insurance undertakings and credit institutions (s. answer to question 1). Anyhow, their conflict of law rules are inspired by the same principles as the general ones explained before.

8) If you have replied YES to Question 3), please indicate if the *lex concursus* rule is valid both for main proceedings and for secondary proceedings in your country within the meaning of the *UNCITRAL Model Law on Cross-border Insolvency*. Please respond by YES or NO. If NO please explain. **YES.**

9) The 30 September 2003 version of Legislative Provision No 179 of the UNCITRAL Draft Legislative Guide on Insolvency Law (*text available only in English*) provides that:

“(179) The insolvency law should provide [that the law] of the place where insolvency proceedings are commenced should apply to all aspects of the conduct, administration and conclusion of those insolvency proceedings, including:

- (a) eligibility and commencement criteria;
- (b) creation and scope of the insolvency estate;
- (c) treatment of property of the estate, including the scope of, exceptions to, and relief from application of a stay;
- (d) costs and expenses;
- (e) proposal, approval, confirmation and implementation of a plan of reorganization;
- (f) the voidness, voidability or unenforceability of legal acts detrimental to creditors;
- (g) effect of the commencement of the proceedings upon contracts under which both the debtor and its counterparty have not yet fully performed their respective obligations, including the enforceability of automatic termination and anti-assignment provisions in those contracts;
- (h) conditions under which setoff can occur after commencement of insolvency proceedings;
- (i) rights and obligations of the debtor, insolvency representative, creditors and creditors’ committee;

- (j) claims and their treatment;
- (k) priorities for ranking of claims;
- (l) distribution of proceeds of liquidation; and
- (m) resolution and conclusion of the proceedings.”

Question: Do you have any views on this list and the items included therein?

Comments on a): We think that the meaning of the term “eligibility” should be clarified.

Comments on d): We consider that “costs and expenses” should be situated in the last part of this provision (for example, they could be moved to letter l).

Would you add other items? If so, please provide examples.

YES.

It could be added:

- **creditor’s rights after the closure of insolvency proceedings. In particular, the effects of a discharge.**
- **administrators obligations to ask for the opening of proceedings.**

Part III – Exceptions to the general applicable law rule

10) Does the insolvency law of your country provide for exceptions to the *lex concursus* rule? Please respond by YES or NO. If NO, please explain. **YES. In Articles 5 to 15 of the Council Regulation and Articles 201 to 209 Act 22/2003.**

11) Does the insolvency law of your country provide for a specific rule in the case of rights *in rem* over assets located abroad? Please respond by YES or NO. If NO, please explain. **YES.**

These rules can be found in the following provisions:

Art. 5 R1346/2000: “*Third parties’ rights in rem. 1. The opening of insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immovable assets – both specific assets and collections of indefinite assets as a whole which change from time to time – belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings. 2) The rights referred to in paragraph 1 shall in particular mean: a) the right to dispose of assets or have them disposed of and to obtain satisfaction from the proceeds of or income from those assets, in particular by virtue of a lien or a mortgage; b) the exclusive right to have a claim met, in particular a right guaranteed by a lien in respect of the claim or by assignment of the claim by way of a guarantee; c) the right to demand the assets from, and/or to require restitution by, anyone having possession or use of them contrary to the wishes of the party so entitled; d) a right in rem to the beneficial use of assets. 3. The right, recorded in a public register and enforceable against third parties, under which a right in rem within the meaning of paragraph 1 may be obtained, shall be considered a right in rem. 4. Paragraph 1 shall not preclude actions for voidness, voidability or unenforceability as referred to in article 4.2 m)*”.

Art. 201 Act 22/2003: “*Rights in rem and reservations of title. 1. The effects of insolvency proceedings on the rights in rem of creditors or third parties in respect of assets or rights of any kind belonging to the debtor, including collections of assets as a whole whose composition can change from time to time, situated within the territory of another State at the time of the opening of proceedings shall be governed solely by the law of that State...*”

12) If you have replied YES to Question 11), please confirm / explain if the effects of the opening of insolvency proceedings are determined by other conflict of laws rules applicable outside of insolvency (e.g. *lex rei sitae*) or if the opening of insolvency proceedings does not affect rights *in rem* located abroad.

In the case of the Council Regulation the opening of the proceedings does not affect rights in rem located in another Member State. Nevertheless, Act 22/2003 provides the application of the insolvency rules of the *lex rei sitae*.

13) If you have replied YES to Question 11), please confirm / explain if the special rules designed for rights *in rem* also apply to intangibles (receivables). **YES.**

14) Does the insolvency law of your country provide for special rules for foreign payment systems and financial markets (*e.g.* position-closing agreements, netting agreements, sale of securities and the guarantees provided for such transactions)? Please respond by YES or NO. If NO, please explain. **YES.**

These rules can be found in the following provisions:

Art. 9 R1346/2000: *“Payment systems and financial markets. 1. Without prejudice to Article 5 [rights in rem], the effects of insolvency proceedings on the rights and obligations of the parties to a payment or settlement system or to a financial market shall be governed solely by the law of the Member State applicable to that system or market. 2. Paragraph 1 shall not preclude any action for voidness, voidability or unenforceability which may be taken to set aside payments or transactions under the law applicable to the relevant payment system or financial market”.*

Art. 204 Act 22/2003: *“Securities, payment systems and financial markets. The effects of insolvency proceedings on the rights on dematerialised securities shall be governed by the law of the State of the register where those securities are listed. This provision encloses any register of securities legally admitted, including those carried out by financial institutions submitted to legal supervision.*

Without prejudice to Article 201 [rights in rem], the effects of insolvency proceedings on the rights and obligations of the parties to a payment or settlement system or to a financial market shall be governed solely by the law of the State applicable to that system or market”.

Finally, Directive 24/2001 on the reorganisation and winding up of credit institutions encloses a rule on netting agreements in Article 25: *“Netting agreements shall be governed solely by the law of the contract which governs such*

agreements". This rule has not yet been implemented in Spanish Law (see answer to question 1).

15) Does the insolvency law of your country provide for special rules in relation to the set-off of a transaction, governed by a foreign law, which occurred before the application for the opening or the opening of insolvency proceedings? Please respond by YES or NO. If YES, please explain. **YES.**

Under Regulation 1346/2000, in principle, the *lex concursus* applies to “the conditions under which set-offs may be invoked” (Art. 4.2 d). But Art. 6 R1346/2000 also provides: “1. The opening of insolvency proceedings shall not affect the right of creditors to demand the set-off of their claims against the claims of the debtor, where such a setoff is permitted by the law applicable to the insolvent debtor’s claim. 2. Paragraph 1 shall not preclude actions for voidness, voidability or unenforceability as referred to in Article 4.2 m).”.

Act 22/2003 encloses similar provisions concerning set-off. In principle, the *lex concursus* applies to the conditions for the opening of insolvency proceedings and their effects, their conduct and their closure (art. 200). But Article 205 provides that “1. The opening of insolvency proceedings shall not affect the right of a creditor to setoff when under the law applicable to the insolvent debtor’s claim setoff is permitted in insolvency situations. 2. The previous paragraph does not affect the actions concerning restitution which could proceed.”

16) Does the insolvency law of your country provide for special rules in relation to the avoidance of a transaction, governed by a foreign law, which occurred before the application for the opening or the opening of insolvency proceedings? Please respond by YES or NO. If YES, please explain. **YES.**

These rules can be found in the following provisions:

Article 4.2 m) of Regulation 1346/2000 provides that the *lex concursus* shall determine “the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all creditors” and Article 13 provides: “Detrimental acts. Article

4.2 m) shall not apply where the person who benefited from an act detrimental to all creditors provides proof that: – the said act is subject to the law of a Member State other than that of the State of the opening of proceedings, and – that law does not allow any means of challenging that act in the relevant case.”

In the case of Act 22/2003, Article 208 provides *“Actions concerning restitution. In relation to this law, restitution actions shall not proceed when the person who benefited from an act detrimental to all creditors provides proof that the said act is subject to the law of a another State which does not allow any means of challenging that act”.*

17) Does the insolvency law of your country provide for special protection in relation to employment contracts and relationships governed by a foreign law? Please respond by YES or NO. In both cases, please explain. **YES.**

These rules are:

Article 10 of Regulation 1346/2000: *“Contracts of employment. The effects of insolvency proceedings on employment contracts and relationships shall be governed solely by the law of the Member State applicable to the contract of employment”.*

Article 207 of Act 22/2003: *“Employment Contracts. The effects of insolvency proceedings on employment contracts and relationships shall be governed solely by the law of the State applicable to that contract.”*

18) Does the insolvency law of your country provide for other exceptions? Please respond by YES or NO. If YES, please explain and provide examples. **YES.**

In relation to Regulation 1346/2000:

Art. 7: *“Reservation of title. 1. The opening of insolvency proceedings against the purchaser of an asset shall not affect the seller’s rights based on a reservation of title where at the time of the opening of proceedings the asset is situated within the territory of a Member State other than the State of opening of proceedings. 2. The*

opening of insolvency proceedings against the seller of an asset, after delivery of the asset, shall not constitute grounds for rescinding or terminating the sale and shall not prevent the purchaser from acquiring title where at the time of the opening of proceedings the asset sold is situated within the territory of a Member State other than the State of the opening of proceedings. 3. Paragraphs 1 and 2 shall not preclude actions for voidness, voidability or unenforceability as referred to in Article 4.2 m)''.

Art. 8: *“Contracts relating to immovable property. The effects of insolvency proceedings on a contract conferring the right to acquire or make use of immovable property shall be governed solely by the law of the Member State within the territory of which the immovable property is situated.”*

Art. 11: *“Effects on rights subject to registration. The effects of insolvency proceedings on the rights of the debtor in immovable property, a ship or an aircraft subject to registration in a public register shall be determined by the law of the Member State under the authority of which the register is kept.”*

Art. 14: *“Protection of third-party purchasers. Where, by an act concluded after the opening of insolvency proceedings, the debtor disposes, for consideration, of: – an immovable asset, or – a ship or an aircraft subject to registration in a public register, or – securities whose existence presupposes registration in a register laid down by law, the validity of that act shall be governed by the law of the State within the territory of which the immovable asset is situated or under the authority of which the register is kept.”*

Art. 15: *“Effects of insolvency proceedings on lawsuits pending. The effects of insolvency proceedings on a lawsuit pending concerning an asset or a right of which the debtor has been divested shall be governed solely by the law of the Member State in which that lawsuit is pending”.*

In the case of Act 22/2003:

Art. 201 also provides special rules for the reservation of title. “...*the same rule* [as the one for the rights in rem] *shall apply to the seller’s rights concerning the assets sold to the insolvent debtor with reservation of title.* 2. *The opening of insolvency proceedings against the seller of an asset with reservation of title, which has yet been delivered and is situated within the territory of another State at the time of the opening of proceedings, shall not constitute grounds for rescinding or terminating the sale and shall not prevent the purchaser from acquiring title.*”

Article 202: “*Protection of third-party purchasers. The validity of an onerous act of disposition to the debtor on immoveable assets, ships or aircrafts subject to registration in a public register, concluded after the opening of insolvency proceedings shall be governed by the law of the State within the territory of which the immovable asset is situated or under the authority of which the register of ships or aircrafts is kept*”.

Article 206: “*Contracts relating to immoveable property. The effects of insolvency proceedings on a contract conferring the right to acquire or make use of immovable property shall be governed solely by the law of the Member State within the territory of which the immovable property is situated*”.

Article 209: “*Lawsuits pending. The effects of insolvency proceedings on a lawsuit pending concerning an asset or a right of which the debtor has been divested shall be governed solely by the law of the State in which the lawsuit is pending*”.

Part IV – Other information

19) Does the insolvency law of your country apply to both natural persons and legal persons? Please respond by YES or NO. In both cases, please explain. **YES.**

In the case of the Council Regulation 1346/2000, recital no. (9) provides “*This Regulation should apply to insolvency proceedings, whether the debtor is a natural person or a legal person, a trader or an individual...*”. Spanish Act 22/2003 follows the principle of unity of proceedings which means that the proceedings, called “concurso” apply to any person, trader or not (Stated Purpose, II). Article

1.1 states that “the opening of proceedings can be declared against any person, natural or legal.”. There is no exception to this general rule in respect to the private international law rules of this Act.

20) Does the insolvency law of your country provide special rules in relation to consumers? Please respond by YES or NO. If YES, please explain. **NO.**

There is an exceptional case in the Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (OJ, L 158, p. 59). Art. 7 provides that “the organizer and/or retailer party to the contract shall provide sufficient evidence of security for the refund of money paid over and for the repatriation of the consumer in the event of insolvency”.

21) Please indicate / explain if, according to the insolvency law of your country, a contractual provision, to which the debtor is a party, indicating the law applicable to the contract could be set aside by virtue of a public policy exception.

In Spanish insolvency legislation, there is not an specific provision establishing that the *lex concursus* can be set aside by virtue of a public policy exception. Despite of that, the general public policy clause enclosed in Art. 12.3 of the Spanish Civil Code could be applied. There is also a public policy clause concerning the recognition of insolvency proceedings in Art. 26 R1346/2000: “Any Member State may refuse to recognise insolvency proceedings opened in another Member State or to enforce a judgment handed down in the context of such proceedings where the effects of such recognition or enforcement would be manifestly contrary to that State’s public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual”. And also in Art. 220. 1. 5º Act 22/2003.

In the case of the law applicable to a contract to which the debtor is a party, it should be considered that the EC Convention on the Law Applicable to Contractual Obligations (Rome 1980) encloses a provision about “ordre public” (art. 16). According to this Article: “The application of a rule of the law of any country specified by this Convention may be refused only if such application is manifestly incompatible with the public policy (“ordre public”) of the forum”.

22) Please feel free to provide any other views, comments or information that would be relevant to the issue under study.

We would like the following information to be considered:

1) Both, Regulation 1346/2000 and Act 22/2003, enclose a return rule and a rule concerning the honouring of an obligation to a debtor:

Art. 20.1 R1346/2000: *“A creditor who, after the opening of the proceedings, referred to in Article 3(1) obtains by any means, in particular through enforcement, total or partial satisfaction of his claim on the assets belonging to the debtor situated within the territory of another Member State, shall return what he has obtained to the liquidator, subject to Articles 5 and 7”.*

Art. 24 R1346/2000: *“Honouring of an obligation to a debtor. 1. Where an obligation has been honoured in a Member State for the benefit of a debtor who is subject to insolvency proceedings opened in another Member State, when it should have been honoured for the benefit of the liquidator in those proceedings, the person honouring the obligation shall be deemed to have discharged it if he was unaware of the opening of proceedings. 2. Where such an obligation is honoured before the publication provided for in Article 21 has been effected, the person honouring the obligation shall be presumed, in the absence of proof to the contrary, to have been unaware of the opening of insolvency proceedings; where the obligation is honoured after such publication has been effected, the person honouring the obligation shall be presumed, in the absence of proof to the contrary, to have been aware of the opening of proceedings”.*

Act 22/2003 provides:

Art. 218. 1: *“A creditor who, after the opening of a main insolvency proceeding in Spain, obtains total or partial satisfaction of his claim on assets belonging to the debtor situated within the territory of a foreign country or through their enforcement, shall return what he has obtained to the liquidator, without prejudice to the provisions in article 201”.*

Art. 216: “*Payment to the insolvent debtor in a foreign country. 1. The payment to the insolvent debtor in a foreign country, satisfied by a debtor who has his habitual residence, domicile or registered office in a foreign country, discharges the person who made it only if he was unaware of the opening of proceedings in Spain. 2. In the absence of proof to the contrary, it shall be presumed that the person who honoured the debtor, before the publication of the opening of proceedings referred to in paragraph 1 of the precedent article, was unaware of the opening*”.

Art. 225: “*Honouring of an obligation for the benefit of a debtor. 1. The payment in Spain to a debtor who is subject to insolvency proceedings opened in another State and according to which it should have been honoured to the benefit of the liquidator, shall discharge the person who made it if he was unaware of the opening of proceedings. 2. In the absence of proof to the contrary, it shall be presumed that the person who honoured the debtor, before the publication of the opening of proceedings referred to in paragraph 3 of article 221, was unaware of the opening*”.

2) We think that the Guide should include a reference to the different approaches to the principle of the *vis attractiva concursus*. In the case of the Spanish legislation, Regulation 1346/2000 adopts a model of non-*vis attractiva concursus*. The EC Regulation does not modify the general rules of international jurisdiction of the Member States, except where this directly concerns the insolvency proceedings. This model is also followed by Act 22/2003 at the international level. On the contrary, in relation to internal jurisdiction, Arts. 8 and 9 of the Act adopt the principle of *vis attractiva* as a point of departure.

ANNEX A
Experts invited by
the Permanent Bureau and the UNCITRAL Secretariat
to the Vienna meeting, 11-12 December 2003

The experts invited by the Permanent Bureau of the Hague Conference are:

Johan Willem Byvanck, Lawyer, Netherlands

Dr. Francisco Garcimartín, Professor, Universidad De Castilla-La Mancha, Spain

Jean-Pierre Remery, Président de chambre à la Cour d'appel d'Orléans, France

The experts invited by UNCITRAL Secretariat include:

Susan Block-Lieb, Professor, Fordham Law School, United States of America

Alexander Markus, Ministry of Justice, Switzerland

Chris Redmond, Husch & Eppenberger, LLC, United States of America

Ed Smith, Bingham Dana, United States of America

Jean-Luc Vallens, Magistrat, France

Catherine Walsh, Professor, McGill University, Canada



MINISTRY OF JUSTICE
Finland
Marja Tuokila
5.12.2003

{PRIVATE }

The Hague Conference on Private International Law: Responses of Finland to the questionnaire in relation to the law applicable to insolvency proceedings

Part I - Provision of specific applicable law rules

1) Yes.

2) Explicit applicable law rules to insolvency proceedings can be found in the EU legislation and in the Nordic Bankruptcy Convention, signed 1933 (in the following, *the NBC*).

The most important of the European Community acts is the Council Regulation (EC) No 1346/2000 on insolvency proceedings (in the following, *the Regulation*) which entered into force on 31 May 2002. The Regulation contains several rules on conflict of laws which are directly applicable in the member states.

Moreover, a directive 2001/17/EC of the European Parliament and of the Council on the reorganisation and winding up of insurance undertakings (in the following, *the Directive on insurance undertakings*) and a directive 2001/24/EC of the European Parliament and of the Council on the reorganisation and winding up of credit institutions (in the following, *the Directive on credit institutions*) contain rules on the law applicable to insolvency proceedings. The implementation of these directives is currently underway and new rules will enter into force next year. New rules will not be found in general insolvency legislation but in specific laws applicable to insurance undertakings and credit institutions.

The above European Community acts deal only with the intra-Community effects of insolvency proceedings. As to the effects in relation to non-member states, it is for the member states to adopt appropriate rules on conflict of laws.

In Finland, the NBC and its rules on the law applicable to insolvency proceedings have relevance in relation to Sweden, Denmark, Norway and Iceland.

In relation to states not covered by the above rules there are no explicit rules on the law applicable to insolvency proceedings. In such cases, the general principles of private international law are applied.

Part II – Principles, scope and object of the law applicable in insolvency proceedings

3) Yes.

4) According to Article 3 (1) of the Regulation, main insolvency proceedings can be opened in a member state in which the centre of a debtor's main interests is situated. If the debtor is a company or a legal person, the place of the registered office is presumed to be the centre of its main interests, unless proved otherwise. Secondary proceedings can be opened in a member state where the debtor has an establishment in the meaning of the Regulation.

In the scope of the Directives on insurance companies and credit institutions only the 'home member state' has jurisdiction to open insolvency proceedings. The home member state is the member state in which the insurance undertaking or the credit institution has been authorised. Secondary proceedings can not be opened.

The NBC provide that so called domiciliary proceedings can be opened in a state in which a bankrupt individual has his/her residence and, in a case of a company, the state in which the debtor's registered office is located.

5) Yes.

6) Yes.

7) Yes, after the Directive on insurance undertakings and the Directive on credit institutions have been implemented. The applicable law rules of these directives are mainly the same as those of the Regulation. Yet the Directive on credit institutions has additional applicable law provisions specific to financial markets.

8) Yes, as far as the Regulation is concerned.

As far as we understand, the UNCITRAL Model Law on Cross Border Insolvency is based on concepts 'Foreign Main Proceedings' and 'Foreign Non-Main Proceedings' which have almost the same meaning as concepts 'main proceedings' and 'secondary proceedings' of the Regulation.

9) No views.

Part III – Exceptions to the general applicable law rule

10) Yes, as far as the EU legislation is concerned.

Also the NBC contains several exceptions to the general rule on the law applicable to insolvency proceedings.

In relation to states not covered by the above rules the situation is somewhat uncertain.

11) Yes.

12) According to the EU legislation opening of the insolvency proceedings does not affect rights in rem in respect of assets located in another member state (Article 5 of the Regulation and corresponding provisions in the Directives).

In the scope of the NBC, the rights of a secured creditor are determined by the law of the state in which the assets used as collateral are situated.

13) Yes.

14) Yes, as far as the EU legislation is concerned.

15) If the transaction is made before the opening of insolvency proceedings and the creditor demands set-off after the proceedings are opened, Article 4 (2) d and Article 6 (1) of the Regulation are applicable. Thus, if the law of the state of the opening of insolvency proceedings does not allow for set-off, the set-off is, nevertheless, possible if it is permitted by the law applicable to the insolvent debtor's claim.

If the set-off has taken place before the opening of insolvency proceedings and it is an action detrimental to all creditors, an action for voidness, voidability or unenforceability can be brought. Such an action is governed by the law of the state of the opening of insolvency proceedings.

There are similar provisions in the Directives on insurance undertakings and credit institutions.

There is no specific provision in respect of the law applicable to set-off in the NBC.

16) Yes. Even though the Regulation contains exceptions to the general rule on conflict of laws in respect of certain rights, an action for voidness, voidability or unenforceability, nevertheless, follows the general rule (i.e. *lex concursus*). However, Article 13 of the Regulation provides for a defence against an action for avoidance of transaction if the party can prove that the transaction in question is subject to another law (than *lex concursus*) and this other law does not allow challenging the transaction in the relevant case.

In the NBC, the main rule is that avoidance of a transaction is governed by *lex concursus*. However, there are specific rules in relation to transactions in respect of certain kinds of property (immovable, movable, registered ships and aircrafts). The questions of validity and avoidance of such transactions are determined by the law of the situs (or in the case of registered ships etc., the law of the state where the register is kept).

17) Yes. According to the Regulation, the effects of insolvency proceedings on employment contracts are subject to the law of the member state applicable to the contract of employment. Yet other issues in insolvency proceedings, like ranking of employee's claims, are governed by *lex concursus*. Both directives contain a similar rule.

There is no specific rule on the law applicable to employment contracts in the NBC.

18) Yes. The Regulation contains specific applicable law rules on, for example, contracts relating to immovable property, effects on rights subject to registration, Commu-

nity patents and trade marks and effects of insolvency proceedings on lawsuits pending. The Directive on insurance undertakings has similar rules. In addition to rules mentioned above, there are some specific exceptions in the Directive on credit institutions (e.g. netting agreements, repurchase agreements).

The NBC, in turn, contains specific rules on the law applicable, for example, to the effects of bankruptcy on the rights of an attachment creditor and to preferential treatment of certain claims (taxes and claims of public nature).

Part IV – Other Information

19) Yes. Currently, there are three specific insolvency proceedings in Finland, i.e. bankruptcy, reorganisation of enterprises and debt adjustment of private individuals.

Bankruptcy is a liquidation procedure. Bankruptcy legislation applies both to natural and legal persons. In practice, the majority of debtors are companies.

Reorganisation of enterprises and debt adjustment of private individuals aim at rehabilitation of the debtor. Reorganisation of enterprises is applicable to all engaged in business, i.e. not only big enterprises but even private entrepreneurs and independent tradesmen. Debt adjustment of private individuals in turn is mainly applicable to consumers but also to those having been engaged in business.

20) See the former response as to the debt adjustment of private individuals.

21) In the Regulation there is a provision on public policy (Article 26). The provision in question allows a member state not to recognise insolvency proceedings opened in another state or to enforce a judgment handed down in such proceedings. Thus, this provision does not explicitly address the question whether a contractual provision indicating the law applicable can be set aside on the basis of public policy. There is no provision in national insolvency law addressing the question either.

However, the Rome Convention allows such a use of public policy (Article 16).

Therefore, public policy could be applied in order to set aside a choice of law clause by the parties. However, it is not likely that insolvency courts in Finland would in practice resort to the public policy exception in such a case.

22) -

QUESTIONNAIRE RELATIF À LA LOI APPLICABLE EN MATIÈRE DE PROCÉDURES D'INSOLVABILITÉ

Réponses (France)

1. Oui.

2. La loi sur l'insolvabilité contient une règle de compétence juridictionnelle. Les règles de conflit de lois découlent résulte de la jurisprudence.

3. Oui. Mais l'application de la loi du pays d'ouverture résulte de la règle de compétence juridictionnelle : les tribunaux appliquent naturellement la loi française sur l'insolvabilité (la règle de conflit de juridiction préexiste à la règle de conflit de lois et la détermine).

4. La compétence juridictionnelle est définie par le siège de l'entreprise, et, à défaut de siège en France, par le centre principal des intérêts du débiteur en France (ce qui correspond à l'établissement secondaire). Cette règle de compétence interne est étendue à l'ordre international de la jurisprudence.

5. La loi française s'applique à tous les aspects de la procédure ouverte par le tribunal : les personnes concernées, la situation du débiteur pendant la procédure, les droits et les obligations des créanciers, les règles de procédure.

6. La loi régit également toute les conditions relatives à l'ouverture, au déroulement et la clôture de la procédure.

7. Non.

8. Le droit français ne permet l'ouverture d'une procédure secondaire qu'en présence d'une procédure principale préalablement ouverte dans un Etat de l'Union européenne. En ce cas, le Règlement communautaire soumet cette procédure secondaire à la loi française.

9. La liste des effets est conforme aux principes appliqués en France, comme aux autres Etats européens signataires du Règlement communautaire du 29 mai 2000. Il serait possible d'y ajouter les droits des créanciers et du débiteur à l'issue de la clôture de la procédure, et le régime applicable aux personnes morales en liquidation.

10. Non. Les exceptions à la loi de l'Etat d'ouverture applicable à la procédure d'insolvabilité découlent des règles de conflit applicable aux droits des tiers lorsque ceux-ci sont concernés (par ex., clauses contenues dans un contrat en cours d'exécution, droits d'un créancier au titre d'une créance produite, efficacité d'une décision sur un bien localisé à l'étranger).

Sont en outre applicables les exceptions découlant de l'application du Règlement communautaire du 29 mai 2000.

11. Non. Sont cependant applicables les règles relatives aux conflits de lois en matière de sûretés et de droits réels résultant du droit international privé (jurisprudence) et du Règlement communautaire du 29 mai 2000.

12. Les effets de la procédure d'insolvabilité sont déterminés par la loi française, mais n'excluent pas l'application d'une loi étrangère, si celle-ci s'applique aux effets de la procédure sur un contrat soumis une loi étrangère ou sur un bien situé à l'étranger : Pour un contrat, les tribunaux combinent la loi étrangère (pour définir le fond du droit) et la loi française (pour définir l'efficacité de ce droit dans le cadre de la procédure d'insolvabilité). Pour un bien situé à l'étranger, la procédure d'insolvabilité ne peut produire d'effet que si la décision d'ouverture ou une décision ultérieure de condamnation ou une vente ordonnée par le tribunal obtient l'exequatur à l'étranger.

13. Il n'existe pas de règles spécifiques pour les actifs incorporels.

14. Oui.

15. Pour la compensation de deux créances réciproques, intervenue avant l'ouverture de la procédure d'insolvabilité, la loi sur l'insolvabilité pourrait prévoir que la loi d'un autre pays s'applique aux droits et aux obligations réciproques, ainsi qu'au contrat dans le cadre duquel la compensation est invoquée.

Pour une compensation intervenant après l'ouverture de la procédure d'insolvabilité (si l'une des créances devient exigible après), la loi sur l'insolvabilité devrait primer.

Pour l'annulation d'une transaction antérieure, la loi sur l'insolvabilité devrait seule jouer, sous réserve des conditions prévues par le Règlement communautaire du 29 mai 2000 (application éventuelle des règles de la loi étrangère applicable qui ferait obstacle à toute annulation).

16. La loi sur l'insolvabilité ne prévoit pas de règles particulières sur les contrats de travail ou les rapports de travail soumis à une loi étrangère. La jurisprudence applique le droit international privé découlant de la Convention de Rome de 1980, relative à la loi applicable au contrat, et de la Directive de 1980 pour l'institution de garantie des créances salariales.

17. Voir la réponse précédente.

18. Oui.

19. Oui.

20. Oui. Seules les personnes physiques et les personnes morales de droit privé sont concernées. Les entreprises publiques ne peuvent être soumises à une procédure d'insolvabilité. Une autre exception concerne les professions libérales et indépendantes, mais cette exception devrait prendre fin avec la réforme de la loi en cours.

21. Oui, mais ces clauses sont rendues inopérantes en cas d'ouverture d'une procédure d'insolvabilité, sauf pour les contrats dont l'administrateur demande la poursuite d'exécution.

22. La procédure est entièrement considérée comme d'ordre public en raison des

**objectifs poursuivis par la loi sur l'insolvabilité.
L'ordre public écarte de ce fait toute clause contraire.**

RESPONSE OF JAPAN

- 1) No, it doesn't.
- 2) No answer
- 3) Yes; our law of insolvency abides to the general rule of the lex concursus albeit there is no specific statutory provision providing for it.
- 4) A Japanese court shall have competent jurisdiction for a bankruptcy or civil rehabilitation of a natural person only when a debtor has its business address, domicile, residence or property in Japan. In case of a bankruptcy or civil rehabilitation of a legal person such as an aggregate corporation or a foundation, a Japanese court shall have competent jurisdiction only when the legal person has its business address, office or property in Japan. These rules are provided for by Article 104 bis of Bankruptcy Law and Article 4 paragraph 1 of Civil Rehabilitation Law. According to Article 4 of Corporate Reorganisation Law, a Japanese court has the competent jurisdiction of a corporate reorganisation proceeding, which is applied only to stock corporations (kabusiki-gaisya, large scale companies limited by shares), only when they have business address in Japan.
- 5) There is no specific statutory provision in this regard. Academic opinions agree that the lex concursus determines the procedural effects but it is controversial whether this is the case to the substantive effects as well or not.
- 6) There is no specific statutory provision in this regard. Academic opinions cogently argue that, in principle, the lex concursus governs the conditions for the opening, conduct and closure of the insolvency proceedings.
- 7) No, it doesn't.
- 8) There is no specific statutory provision in this regard. Academic opinions understand that the lex concursus rule is valid for both proceedings.
- 9) As is seen in the answer to the question 5), the application of the lex concursus to the substantive effects is a question in controversy. We think, therefore, that we need a further deliberate consideration on the items with such effects provided for in the Legislative Provision No 179.
- 10) As there is no specific statutory provision about the lex concursus (see the answer to the question 5)) then there is no provision providing for its exceptions either.
- 11) There is neither a specific statutory provision nor a predominant academic view in this regard. On the one hand, some argue that the

general rule of private international law to rights in rem (*lex rei sitae*) should decide whether or not the secured creditors may enforce their legal or contractual rights as well as whether or not the owners may reclaim their assets. On the other hand, there is an academic opinion insisting that the *lex concursus* should cover the matters above.

12) No answer

13) No answer

14) There is no specific statutory provision in this regard and the issue raised in the question is understood as the matter of interpretation.

15) No, it doesn't. There is no specific statutory provision in this regard. Academic opinions argue cogently that the *lex concursus* should apply.

16) No, it doesn't. There is no specific statutory provision in this regard. Academic opinions argue cogently that the *lex concursus* should apply.

17) No, it doesn't. There is no specific statutory provision in this regard. There is an academic opinion arguing that the *lex concursus* should, in principle, apply to employment contracts but that the law of the place where the service is delivered should also apply in respect of protecting employees (*die Sonderanknützung*).

18) No answer

19) Yes, it applies to both natural and legal persons. However, Corporate Reorganisation Law is applied only to stock corporations (*kabusiki-gaisya*, large scale companies limited by shares). See the answer to the question 4).

20) No, it doesn't. There is no specific statutory provision in this regard.

21) Our insolvency laws do not have any specific statutory provisions in this regard. However, if an applied foreign law produces a result which is against public policy, then the application can be excluded by our private international law (Article 33 of Horei).

22) No answer

RESPONSE OF LITHUANIA

Ministry of Justice of the Republic of Lithuania has the honour to give responses to the questionnaire provided by the Hague Conference on Private International Law concerning the Draft legislative Guide on Insolvency.

Part I

1. Yes
2. It is regulated in the Art. 1.20 of the Civil Code among general rules for applicable law. Special rules can be found in the Law on Bankruptcy.

Part II

3. Yes
4. The connecting factor used to determine the competent jurisdiction is under whose law it is incorporated or formed.
5. Yes, the lex concursus determines all the effects of the insolvency proceedings, both procedural and substantive, on the persons and legal relations concerned.
6. Yes, the lex concursus governs all the conditions for the opening, conduct and closure of the insolvency proceedings.
7. No
8. -
9. Our Law on Bankruptcy harmonized with the provided issues.

Part III

10. No.
11. No.
12. -
13. -
14. Yes.
15. Yes. Special rules are provided in the Law on Settlement Finality in Payment and Securities Settlement Systems.
16. No.
17. No.
18. -
19. No. Law on Bankruptcy is applied only to legal persons.
20. No.
21. No.
22. -

The Royal Ministry of Justice and the Police

Hague Conference on Private International Law
Att: Philippe Lortie
6, Scheveningseweg
2517 KT den Haag
The Netherlands

Your ref.

Our ref.
2003/08832 EP VIL/KJL/an

Date
05.12.2003

QUESTIONNAIRE IN RELATION TO THE LAW APPLICABLE TO INSOLVENCY PROCEEDINGS

Reference is made to the letter of 11th November 2003 from the Hague Conference. We present Norway's answers to the questionnaire:

Part I – Provision of specific applicable law rules

1) Does the law of your country provide for applicable law rules in relation to insolvency? Please respond by YES or NO.

Answer: No, there is no general legislation on this area. Applicable law rules in relation to insolvency may, however, be deduced from general principles and legal theory. A convention between the Nordic countries give applicable law rules for insolvency proceedings. Members of the convention are Denmark, Finland, Iceland, Sweden and Norway.

2) If you have replied YES to Question 1), please specify if these rules are found in the insolvency legislation or, for example, in other norms of a more general nature or the common law.

Answer: Not applicable.

Part II – Principles, scope and object of the law applicable in insolvency proceedings

3) Does the insolvency law in your country abide to the following general rule on conflict of laws: the law of the country of the opening of the insolvency proceedings should be

applicable (i.e. lex concursus)? Please respond by YES or NO.

Answer: Yes.

4) If you have replied YES to Question 3), please specify the connecting factors used to determine the competent jurisdiction (i.e. where the debtor is habitually resident, e.g. the jurisdiction: where it has its statutory seat; under whose law it is incorporated or formed; where it has its central administration; where it has its principal place of business; etc.).

Answer: If a debtor is registered with the Norwegian Register of Business Enterprises, jurisdiction is determined by its principal place of business. For personal debtors, jurisdiction is determined by the debtor's domicile. For legal entities not registered with the Register of Business Enterprises, jurisdiction is determined by statutory seat. When insolvency proceedings are opened against the estate of a deceased debtor, jurisdiction lies with the court handling the estate.

5) If you have replied YES to Question 3), please confirm / explain if the lex concursus determines all the effects of the insolvency proceedings, both procedural and substantive, on the persons and legal relations concerned.

Answer: Yes.

6) If you have replied YES to Question 3), please confirm / explain if the lex concursus governs all the conditions for the opening, conduct and closure of the insolvency proceedings.

Answer: Yes.

7) Does the insolvency law in your country provide for exceptional conflict of laws rules in relation to insolvency proceedings involving specific types of debtors such as, for example, credit institutions, insurance companies. Please respond by YES or NO. If YES, please specify.

Answer: No.

8) If you have replied YES to Question 3), please indicate if the lex concursus rule is valid both for main proceedings and for secondary proceedings in your country within the meaning of the UNCITRAL Model Law on Cross-border Insolvency. Please respond by YES or NO. If NO please explain.

Answer: The term "secondary proceedings" does not appear in the Model Law. We assume that the question refers to Article 28 of the Model Law, and the answer would then be yes. Lex concursus applies when insolvency proceedings are opened in Norway, regardless of the character of these proceedings.

9) The 30 September 2003 version of Legislative Provision No 179 of the UNCITRAL Draft Legislative Guide on Insolvency Law (text available only in English) provides that:

“(179) The Insolvency law should provide [that the law] of the place where insolvency proceedings are commenced should apply to all aspects of the conduct, administration and conclusion of those insolvency proceedings, including:

- (a) eligibility and commencement criteria;
- (b) creation and scope of the insolvency estate;
- (c) treatment of property of the estate, including the scope of, exceptions to, and relief from application of a stay;
- (d) costs and expenses;
- (e) proposal, approval, confirmation and implementation of a plan of reorganization;
- (f) the voidness, voidability or unenforceability of legal acts detrimental to creditors;
- (g) effect of the commencement of the proceedings upon contracts under which both the debtor and its counterparty have not yet fully performed their respective obligations, including the enforceability of automatic termination and anti-assignment provisions in those contracts;
- (h) conditions under which setoff can occur after commencement of insolvency proceedings;
- (i) rights and obligations of the debtor, insolvency representative, creditors and creditors’ committee;
- (j) claims and their treatment;
- (k) priorities for ranking of claims;
- (l) distribution of proceeds of liquidation; and
- (m) resolution and conclusion of the proceedings.”

Question: Do you have any views on this list and the items included therein? Would you add other items? If so, please provide examples.

Answer: The list seems to cover the important parts of the insolvency proceedings, and we have no suggestions for other items to be included.

Part III – Exceptions to the general applicable law rule

10) Does the insolvency law of your country provide for exceptions to the lex concursus rule? Please respond by YES or NO. If NO, please explain.

Answer: No. Lex concursus is not a part of formal Norwegian legislation. In reality, lex concursus equals lex fori, in the sense that if Norwegian courts have jurisdiction over a bankrupt estate, Norwegian law applies for the insolvency proceedings.

11) Does the insolvency law of your country provide for a specific rule in the case of rights in rem over assets located abroad? Please respond by YES or NO. If NO, please explain.

Answer: No. Such rights follow the ordinary Norwegian rules and procedures. There may arise questions regarding recognition and enforcement of Norwegian decisions concerning such rights, but we consider this to fall outside the scope of this questionnaire.

12) If you have replied YES to Question 11), please confirm / explain if the effects of the opening of insolvency proceedings are determined by other conflict of laws rules applicable outside of insolvency (e.g. lex rei sitae) or if the opening of insolvency proceedings does not affect rights in rem located abroad.

Answer: Not applicable.

13) If you have replied YES to Question 11) please confirm / explain if the special rules designed for rights in rem also apply to intangibles (receivables).

Answer: Not applicable.

14) Does the insolvency law of your country provide for special rules for foreign payment systems and financial markets (e.g. position-closing agreements, netting agreements, sale of securities and the guarantees provided for such transactions)? Please respond by YES or NO. If NO, please explain.

Answer: No. See answer to question 11.

15) Does the insolvency law of your country provide for special rules in relation to the set-off of a transaction, governed by a foreign law, which occurred before the application for the opening or the opening of insolvency proceedings? Please respond by YES or NO. If YES, please explain.

Answer: No.

16) Does the insolvency law of your country provide for special rules in relation to the avoidance of a transaction, governed by a foreign law, which occurred before the application for the opening or the opening of insolvency proceedings? Please respond by YES or NO. If YES, please explain.

Answer: No.

17) Does the insolvency law of your country provide for special protection in relation to employment contracts and relationships governed by a foreign law? Please respond by YES or NO. In both cases, please explain.

Answer: No. See answer to question 11.

18) Does the insolvency law of your country provide for other exceptions? Please respond by YES or NO. If YES, please explain and provide examples.

Answer: Yes. The insolvency act does not provide special rules in relation to consumers. However, the debt settlement act, which gives an opportunity to clear the debts after a five-year-period, is only applicable to natural persons who have debts that do not arise from business activities.

Part IV – Other information

19) Does the insolvency law of your country apply to both natural persons and legal persons? Please respond by YES or NO. In both cases, please explain.

Answer: Yes. The Insolvency Act applies to both natural persons and legal persons and does not distinguish between the two, although certain rules may apply to one category only.

20) Does the insolvency law of your country provide special rules in relation to consumers? Please respond by YES or NO. If YES, please explain.

Answer: Yes. The insolvency act does not provide special rules in relation to consumers. However, the debt settlement act, which gives an opportunity to clear the debts after a five-year-period, is only applicable to natural persons who have debts that do not arise from business activities.

21) Please indicate / explain if, according to the insolvency law of your country, a contractual provision, to which the debtor is a party, indicating the law applicable to the contract could be set aside by virtue of a public policy exception.

Answer: No. The provision indicating the law applicable to the contract will not in itself be set aside. However, in rare cases, Norwegian law may still be found applicable to certain provisions in the contract under consideration of ordre public or lois d'application immédiate.

22) Please feel free to provide any other views, comments or information that would be relevant to the issue under study.

Answer: One should be aware that the principle of universality is not commonly recognized in Norway (except between the Nordic countries according to the Nordic Insolvency Convention from 1933). This means, inter alia, that insolvency proceedings may be opened in Norway even if such proceedings are already opened in another country.

Yours sincerely,

Vibeke Irene Løvold
Legal Adviser



**Response to the Questionnaire on Law Applicable to
Insolvency Proceedings**

4 December 2003

NEW ZEALAND

PART I – PROVISION OF SPECIFIC APPLICABLE LAW RULES

- 1) **Does the law of your country provide for applicable law rules in relation to insolvency? Please respond by YES or NO.**

Yes.

- 2) **If you have replied YES to Question 1), please specify if these rules are found in the insolvency legislation or, for example, in other norms of a more general nature or the common law.**

The rules are found in insolvency legislation and, to a lesser extent, in the common law.

PART II – PRINCIPLES, SCOPE AND OBJECT OF THE LAW APPLICABLE IN INSOLVENCY PROCEEDINGS

- 3) **Does the insolvency law in your country abide to the following general rule on conflict of laws: the law of the country of the opening of the insolvency proceedings should be applicable (*i.e. lex concursus*)? Please respond by YES or NO. If NO, please explain. See Part III below for exceptions to the general rule.**

Yes.

- 4) **If you have replied YES to Question 3), please specify the connecting factors used to determine the competent jurisdiction (*i.e.* where the debtor is habitually resident, e.g. the jurisdiction: where it has its statutory seat; under whose law it is incorporated or formed; where it has its central administration; where it has its principal place of business; etc.).**

In the case of insolvent companies, the company must either be registered in New Zealand, or have assets in New Zealand. In the case of other insolvencies, the debtor must have performed an act of bankruptcy under New Zealand Law and be adjudicated bankrupt in New Zealand.

- 5) **If you have replied YES to Question 3), please confirm / explain if the *lex concursus* determines all the effects of the insolvency proceedings, both procedural and substantive, on the persons and legal relations concerned.**

Yes.

- 6) **If you have replied YES to Question 3), please confirm / explain if the *lex concursus* governs all the conditions for the opening, conduct and closure of the insolvency proceedings.**

Yes.

- 7) **Does the insolvency law in your country provide for exceptional conflict of laws rules in relation to insolvency proceedings involving specific types of debtors such as, for example, credit institutions, insurance companies. Please respond by YES or NO. If YES, please specify.**

Yes. Registered banks (as defined in the Reserve Bank of New Zealand Act 1989) are subject to a statutory management regime established by the Act. A bank can be placed in statutory management if it is insolvent and in specified other circumstances. Statutory management places a moratorium on actions against the bank or in relation to its property. It also prevents the transfer or removal of any property or assets of the bank from New Zealand.

A similar statutory management regime (with an equivalent moratorium and restriction on the transfer of assets) applies in respect of certain corporations under the Corporations (Investigation and Management) Act 1989. A corporation can be brought within the procedure if it has been operating fraudulently or recklessly; or it is desirable that the Act applies for the purposes of preserving the interests of the corporation's members or creditors, protecting any beneficiary under any trust administered by the corporation or for any other reason in the public interest, provided that those interests cannot be adequately protected in any other lawful way.

- 8) **If you have replied YES to Question 3), please indicate if the *lex concursus* rule is valid both for main proceedings and for secondary proceedings in your country within the meaning of the *UNCITRAL Model Law on Cross-border Insolvency*. Please respond by YES or NO. If NO please explain.**

Yes.

- 9) **The 30 September 2003 version of Legislative Provision No 179 of the UNCITRAL Draft Legislative Guide on Insolvency Law (*text available only in English*) provides that:**

“(179) The insolvency law should provide [that the law] of the place where insolvency proceedings are commenced should apply to all aspects of the conduct, administration and conclusion of those insolvency proceedings, including:

- (a) eligibility and commencement criteria;**
- (b) creation and scope of the insolvency estate;**
- (c) treatment of property of the estate, including the scope of, exceptions to, and relief from application of a stay;**
- (d) costs and expenses;**
- (e) proposal, approval, confirmation and implementation of a plan of reorganization;**
- (f) the voidness, voidability or unenforceability of legal acts detrimental to creditors;**
- (g) effect of the commencement of the proceedings upon contracts under which both the debtor and its counterparty have not yet fully performed their respective obligations, including the enforceability of automatic termination and anti-assignment provisions in those contracts;**
- (h) conditions under which setoff can occur after commencement of insolvency proceedings;**
- (i) rights and obligations of the debtor, insolvency representative, creditors and creditors' committee;**
- (j) claims and their treatment;**
- (k) priorities for ranking of claims;**
- (l) distribution of proceeds of liquidation; and**

(m) resolution and conclusion of the proceedings.”

Question: Do you have any views on this list and the items included therein? Would you add other items? If so, please provide examples.

There are no items that we would wish to add.

PART III – EXCEPTIONS TO THE GENERAL APPLICABLE LAW RULE

10) Does the insolvency law of your country provide for exceptions to the *lex concursus* rule? Please respond by YES or NO. If NO, please explain.

No.

11) Does the insolvency law of your country provide for a specific rule in the case of rights *in rem* over assets located abroad? Please respond by YES or NO. If NO, please explain.

No.

12) If you have replied YES to Question 11), please confirm / explain if the effects of the opening of insolvency proceedings are determined by other conflict of laws rules applicable outside of insolvency (e.g. *lex rei sitae*) or if the opening of insolvency proceedings does not affect rights *in rem* located abroad.

13) If you have replied YES to Question 11), please confirm / explain if the special rules designed for rights *in rem* also apply to intangibles (receivables).

14) Does the insolvency law of your country provide for special rules for foreign payment systems and financial markets (e.g. position-closing agreements, netting agreements, sale of securities and the guarantees provided for such transactions)? Please respond by YES or NO. If NO, please explain.

No.

15) Does the insolvency law of your country provide for special rules in relation to the set-off of a transaction,¹ governed by a foreign law, which occurred before the application for the opening or the opening of insolvency proceedings? Please respond by YES or NO. If YES, please explain.

No.

¹ The use of the word “transaction” in this section is intended to refer generally to the wide range of legal acts by which assets may be disposed of or obligations incurred including by way of a transfer, a payment, a security, a guarantee, a loan or a release [or an action making a security interest effective against third parties] and may include a composite series of transactions.

- 16) Does the insolvency law of your country provide for special rules in relation to the avoidance of a transaction,² governed by a foreign law, which occurred before the application for the opening or the opening of insolvency proceedings? Please respond by YES or NO. If YES, please explain.

No.

- 17) Does the insolvency law of your country provide for special protection in relation to employment contracts and relationships governed by a foreign law? Please respond by YES or NO. In both cases, please explain.

No.

- 18) Does the insolvency law of your country provide for other exceptions? Please respond by YES or NO. If YES, please explain and provide examples.

No.

PART IV – OTHER INFORMATION

- 19) Does the insolvency law of your country apply to both natural persons and legal persons? Please respond by YES or NO. In both cases, please explain.

Yes. Company insolvencies are governed by the Companies Act 1993. Other insolvencies are governed by the Insolvency Act 1967 or entity-specific legislation, such as the Reserve Bank of New Zealand Act 1989 and the Trustees Act 1956.

- 20) Does the insolvency law of your country provide special rules in relation to consumers? Please respond by YES or NO. If YES, please explain.

No.

- 21) Please indicate / explain if, according to the insolvency law of your country, a contractual provision, to which the debtor is a party, indicating the law applicable to the contract could be set aside by virtue of a public policy exception.

No.

- 22) Please feel free to provide any other views, comments or information that would be relevant to the issue under study.

² Ibid.

ANSWER SHEET FOR THE HCCH QUESTIONNAIRE
IN RELATION TO THE LAW APPLICABLE TO INSOLVENCY PROCEEDINGS
(RUSSIAN FEDERATION)

1. YES.

2. The Federal Law on Insolvency (Bankruptcy) #127-FZ of October 26, 2002 (henceforth referred to as Federal Law on Insolvency) in Art.1 states that if foreign persons participate as creditors in the relations which fall into the Law's sphere of regulation [i.e. insolvency-related], the Law applies to these persons. Also, in the absence of a specific international agreement, foreign court decisions concerning bankruptcy will be recognized in the Russian Federation on a reciprocity basis. Finally, there is a general rule that if the applicable law is indeterminable, the law most strongly connected with the relation in question should be applied (Art.1186 of the Civil Code of the Russian Federation).

3. YES. Though it is not stated expressly, as mentioned above the Russian law will only apply to foreign persons if they are creditors (with the debtor thus being a Russian national). As stated in the Arbitration Code of the Russian Federation, Art.38 and 224, an insolvency claim may only be filed at the regional arbitration court of the debtor's place of residence.

4. The abovementioned "place of residence" factor has the following criteria: for legal persons - place of registration (which under Art.54 of the Civil Code should be where it has its central administration) and for physical persons - place of habitual residence (Art.20 of the Civil Code).

5. YES.

6. YES.

7. NO. However, insolvency of financial institutions (which include credit institutions, insurance companies, and professional stock market participants) in other aspects is regulated with considerable differences.

8. YES.

9. NO.

10. NO.

11. NO. We have not been able to locate any such rules.

12. –

13. –

14. NO. There is no special insolvency regulation concerning foreign payment systems and/or financial markets. There is, however, special treatment of credit institution and financial institution insolvency, which are guided by special laws as well as the Federal Law on Insolvency (see Q.7).

15. We have not been able to determine the existence of such a rule. So far the answer is NO.

16. Once again we have not been able to determine the existence of such a rule. So far the answer is NO.

17. NO, to our knowledge there is no special protection of employment contracts and relationships governed by foreign law in the insolvency legislation.

18. NO.

19. YES. The Federal Law on Insolvency regulates the bankruptcy of both legal and physical persons, though there is a certain difference in the regulation.

20. YES. Consumers have certain special rights, for instance, a temporary manager for a natural monopoly debtor cannot refuse to uphold the company's obligations to consumers (Art.200 of the Federal Law on Insolvency).

21. YES, though it is not set in the specific insolvency legislation but rather in the Civil Code (Art. 1193).

22. –

PART I – Provision of specific applicable law rules

Ad 1) NO.

There is no provision under current Slovak legislation that provides for the applicable law rules in relation to insolvency or which would adopt the UNCITRAL Model Law on Cross Border Insolvency, or that recognises the cross-border proceedings specifically.

However, the Ministry of Justice of the Slovak Republic according to the Plan of Legislative Tasks of the Government of the Slovak Republic prepare for the legislative proceeding a brand new act regulating the bankruptcy-related situations instead of further amending the current act No. 328/1991 Coll. The draft framework approved by the Slovak government states that the implementation of the Council Regulation (EC) 1346/2000 effective from 31st May, 2002, will be the subject matter of a separate part of the new Act. The Act should also be based on the provisions of the UNCITRAL Model Law on Cross-Border Insolvency.

These are the only provisions in the Slovak Act No.328/1991 Coll.on Bankruptcy and Settlement containing the foreign element, and they relate to jurisdiction rather than applicable law.

Article 69, paragraph 1 and 2

(1)Unless an international agreement binding upon the Slovak Republic provides otherwise, the liquidation proceeding commenced by the court applies also to the debtor's movables abroad.

(2)If a debtor's property subject to liquidation proceedings abroad is not a subject to liquidation proceedings commenced in the Slovak Republic, the debtor's movable assets present on the territory of the Slovak Republic will be surrendered to the foreign court upon its request, under the condition of reciprocity. The debtor's property may be surrendered abroad only after the rights on the bankruptcy estate preclusion and rights of separate satisfaction acquired before the delivery of the request of the foreign court are satisfied.

PART II – Principles, scope and object of the law applicable in insolvency proceedings

Ad 3) YES and NO. The law does not specify the applicable law, but it follows from its content that, in fact, lex concursus is applied: when conditions for insolvency proceedings are met, the Slovak court applies its own law, i.e. the law of the country opening the insolvency proceedings.

Ad 4) The law is not exactly clear on this, but it seems that for natural persons it is the residence and for legal persons their seat. If the legal persons does not have a seat, their principal place of business.

Ad 5) and 6) As the consequence of the above, the answer would have to be YES.

Ad 7) NO.

Ad 8) Again, as a consequence of no rule to the contrary, the answer would have to be YES.

Ad 9) No views.

To the PART III- Exceptions to the general applicable law rule

Ad 10) Since the law does not specifically name *lex concursus* (or any other applicable law for that matter), the answer would have to be NO.

Ad 11) NO.

Since the law does not provide any rule on applicable law, it does not provide applicable law rule concerning rights in rem over assets located abroad. The only rule in respect of assets abroad is the jurisdiction rule mentioned under 1) above.

Ad 12) and 13) The proceedings apply effectively to all movable property of the debtor situated abroad (§ 69 para. 1 quoted under 1), since there is, to date, no specific international treaty providing otherwise.

Ad 14) and 15) YES.

Act No.328/1991 Coll.on Bankruptcy and Settlement

The following provisions became effective as of 1 January 2003 except Article 14,paragraph 7,which shall become effective as of the date of the validity of an agreement on the accession of the Slovak Republic to the European Communities and to the European Union.

In Article 13,paragraphs 7 and 8 have the following wording:

“(7)If a debtor is the operator or participant in a payment system pursuant to a special act,^{1d)} stated in a register of the National Bank of Slovakia pursuant to a special act,^{1e)} (hereinafter called “payment system”)the court shall concurrently with the posting up of the decision pursuant to paragraph 5 notify the National Bank of Slovakia of the declaration of bankruptcy and the precise time of the declaration of bankruptcy ;the court shall send such a decision on the declaration of the bankruptcy without unreasonable delay to the National Bank of Slovakia.If the debtor is a bank,the court shall send such a decision on the declaration of bankruptcy without unreasonable delay to the Deposit Protection Fund for the purpose of protection of deposits pursuant to a special act.^{1f)}

(8)If a debtor is the operator or participant in an investment instrument clearing system pursuant to a special act,^{1g)} (hereinafter called “clearing system”)the court shall concurrently with the posting up of the decision pursuant to paragraph 5 notify the central depository of securities of the declaration of bankruptcy and the precise time of the declaration of bankruptcy ? the court shall send such a decision on the declaration of the bankruptcy without unreasonable delay to the central depository of securities.If the debtor is a securities dealer,the court shall send such a decision on the declaration of bankruptcy without unreasonable delay to the Guarantee Fund for Investment for the purpose of performance of its tasks by the protection of customer’s property pursuant to a special act.^{1h)}”.

The footnotes to references 1d to 1h have the following wording:

^{1d)}Articles 31 to 58 of Act No.510/2002 Coll.on a System of Payments and Amendments and Supplements of Certain Laws.

^{1e)}Article 65,paragraph 1 of Act No.510/2002 Coll.on a System of Payments and Amendments and

Supplements of Certain Laws

Act of the National Council of the Slovak Republic No.566/1992 Coll.on the National Bank of Slovakia as amended by subsequent regulations.

1f)Article 3,paragraph 5 of Act of the National Council of the Slovak Republic No.118/1996 Coll.on the Protection of Deposits and Amendment and Supplement of Certain Laws as amended by subsequent regulations.”.

1g)Article 99,paragraph 1 and paragraph 3,letter h)and Article 99,paragraph 15 of Act No.566/2001 Coll.on Securities and Investment Services and on Amendment and Supplement of Certain Laws (Securities Act)as amended by the Act No.291/2002 Coll.

1h)Article 82,paragraph 1,letter b)of Act No.566/2001 Coll.”

In Article 14 are paragraphs 6 and 7,which have the following wording:

“(6)A declaration of bankruptcy on the property of a operator or participant in a payment system or participant in a clearing system by the fulfilment of conditions stipulated by a special Act ^{3aa)} shall not affect:

a)the right to use funds from the account of the participant in the payment system maintained in that payment system for the fulfilment of obligations of the participant in the payment system,resulting from his participation in the payment system,

b)the right to use securities from the account of the participant in the clearing system maintained in the central depository of securities for the fulfilment of obligations of the participant in the clearing system,resulting from his participation in the clearing system,

c)the obligations of the payment system or the central depository of securities to process and clear payment orders of a participant in the payment system or the clearing system,or the validity and enforceability of its payment orders against third persons,

d)the rights to the collateral which was granted by a participant in the payment system or a participant in the clearing system with respect to his participation in this payment system or clearing system;the rights for the enforcement and exercise of claims from such collateral shall also remain unaffected at whatsoever time during the bankruptcy under the assumption that the conditions agreed for the enforcement and exercise of claims from the granted collateral will be fulfilled.”.

(7)A declaration of bankruptcy shall not affect the rights to the collateral that is granted for the securing of rights of the European Central Bank and rights of the central bank of any member country of the European Communities and the European Union,or rights of the central bank of any other country of the European Economic Area;the rights for the enforcement and exercise of claims from such a collateral shall also remain unaffected at whatsoever time during the bankruptcy under the assumption that the conditions agreed for the enforcement and exercise of claims from the granted collateral will be fulfilled.”.

The footnote to the reference 3aa has the following wording:

“3aa)Article 35 of Act No.510/2002 Coll.on a System of Payments and Amendments and Supplements of Certain Laws.”.

Article 107a of Act No.566/2001 Coll.as amended by the Act No.291/2002 Coll.”.

ACT
of the National Council of the Slovak Republic
No.510/2002 Z.z.
dated 19 August 2002
**on the Payment System and on Amendments and Supplements to Certain
Laws**

The following provisions **became effective as of 1 January 2003.**

Article 35
Irrevocability of an Order

(1) Subsequent to the moment of acceptance of an order as stipulated by the system rules neither a participant in the payment system nor any other third person may validly cancel an order accepted by the payment system, nor can the carrying out of such an order be inhibited in another way.

(2) A declaration of bankruptcy ³¹⁾ on the property of a participant in the payment system or a suspension or limitation of payments due to an action against a participant in the payment system (hereinafter called "suspension of payments") shall not affect the right to use the funds on the account of such a participant in the payment system maintained in such a payment system for the fulfilment of his obligations resulting from his participation in the payment system for the purpose of closing settlements within the payment system on the date of the declaration of bankruptcy or suspension of payments.

(3) A declaration of bankruptcy on the property of a participant in the payment system or a suspension of payments shall not affect the obligation of the payment system to process and settle the orders of that participant in the payment system, nor the validity and enforceability of such orders against third persons if these orders were accepted by the payment system in accordance with the system rules:

a) prior to the moment of a declaration of bankruptcy or the suspension of payments,
b) at the moment of the declaration of bankruptcy or the suspension of payments and following that moment, if the orders were carried out on the date of the declaration of bankruptcy or on the date of the suspension of payments, provided that the declaration of bankruptcy was not known to the operator of the payment system and provided that the participants in the settlement system whose orders are concerned are able to show that the declaration of bankruptcy or the suspension of payments was not known to them from notifications pursuant to Article 64, paragraph 4 and 5 or otherwise

(4) A reverse calculation of mutual receivables and obligations of participants in the payment system shall be prohibited.

(5) A declaration of bankruptcy on the property of a participant in the payment system or a suspension of payments shall not affect the rights to the collateral provided by this participant in the payment system to another participant in the payment system or to another person with respect to his participation in this payment system; the rights to the enforcement and exercise of entitlements from the granted collateral shall also remain unaffected.

Act No.97/1963 Coll.on International Private and Procedural Law

The following provisions **became effective as of 1 January 2003.**

Article 11a, which has the following wording:

“Article 11a

(1) The legal system which governs the agreement on the payment system specified in the register of the National Bank of Slovakia pursuant to a special act,¹⁾ shall also govern all rights and obligations that arise to the operator or participant in such a payment system with respect to his participation in the payment system, including the rights of other persons to collateral provided to them by a participant in the payment system with respect to his participation in the payment system; this shall also be valid in the event bankruptcy is declared on the property of the operator or a participant in the payment system, or if payments are suspended or limited due to another measure for the operator or participant in the payment system. The choice of other law shall be excluded.

(2) The legal relations stemming from the collateral granted in the form of securities or investment instruments, including collateral granted in the form of rights connected to securities that are:

a) provided for the securing of rights

1. of a participant in the payment system stipulated in the register of the National Bank of Slovakia pursuant to a special act,¹⁾ with regard to the participation of this participant in the payment system, or

2. of the National Bank of Slovakia, and, as of the date of the agreement on accession of the Slovak Republic to the European Communities and to the European Union becomes effective, also from collateral that is provided for the securing of the rights of the European Central Bank, the rights of the central bank of any of the member countries of the European Communities and of the European Union or the rights of the central bank of any of the other countries of the European Economic Area, and which is

b) registered for the benefit of a person stipulated in letter a) or for the benefit of a third person acting on the account of a person stipulated in letter a), and this collateral is registered

1. in the relevant register ²⁾ or other similar record ²⁾ in the Slovak Republic, or

2. as of the date, as of which the agreement on accession of the Slovak Republic to the European Communities and to the European Union becomes effective, in the relevant register or other similar record in any of the member countries of the European Communities and of the European Union, or in any of other countries forming the European Economic Area, shall be governed by the legal system of the country in which this collateral is registered. The choice of another law shall be excluded.”

The footnote to references 1 and 2 have the following wording:

“1) Article 65, paragraph 1 of Act No.510/2002 Coll.on Transfers of Funds and on Payment Systems (Act on System of Payments) and Amendment and Supplement of Laws.

2) For example Article 10, paragraph 1, letter b) and paragraph 3, Articles 45 to 53, Article 99, paragraph 3 and

Article 163, paragraphs 6 and 8 of Act No.566/2001 Coll.on Securities and Investment Services and on

Amendment and Supplement of Certain Laws (Securities Act) as amended by Act No.291/2002 Coll., Article 31, paragraph 6, Act of the National Council of the Slovak Republic No.566/1992 Coll. on the National Bank of Slovakia as amended by Act No.149/2001 Coll.”.

Act No.566/2001 Coll. on Securities and Investment services and on amendments and supplements of some Acts (the Securities Act) shall be amended and supplemented as follows:

The following provisions became effective as of 1 January 2003 except article 107a, paragraph 8, which shall become effective as of the date of the validity of an agreement on the accession of the Slovak Republic to the European Communities and to the European Union.

Article 107a

Irrevocability of an Order for Registration of Transfer

(1) Subsequent to the moment of acceptance of an order for the registration of a transfer neither a participant in the clearing system nor any other third person may validly revoke or cancel an order accepted by the clearing system nor can the carrying out of such an order otherwise be inhibited.

(2) A declaration of bankruptcy on the property of a participant in the clearing system shall not affect the right to use funds from the account of the participant in the clearing system maintained in such a clearing system for the fulfilment of obligations of the participant in the clearing system resulting from his participation in the clearing system on the date of the declaration of bankruptcy.

(3) A declaration of bankruptcy on the property of a participant in the clearing system shall not affect the obligation of the clearing system to process and settle the orders of that participant for the registration of transfer, nor the validity and enforceability of such orders for the registration of transfer against third persons, if these were orders for the registration of transfer which were accepted by the clearing system in accordance with the system rules:

a) prior to the moment of the declaration of bankruptcy,

b) at the moment of the declaration of bankruptcy and following that moment, if the orders for the registration of transfer were carried out on the date of the declaration of bankruptcy, provided that the declaration of bankruptcy was not known to the central depository, and the participants of the clearing system whose orders are concerned can provide evidence that the declaration of bankruptcy was not known to them from the notifications pursuant to paragraphs 7 and 8 or otherwise.

(4) The reverse calculation of mutual receivables and obligations of participants in the clearing system shall be prohibited.

(5) A declaration of bankruptcy on the property of a participant in the clearing system shall not affect the rights to the collateral provided by this participant in the clearing system to another participant in the clearing system or to another person with respect to his participation in this clearing system; the rights to the enforcement and exercise of entitlements to the granted collateral shall also remain unaffected.

(6) The collateral provided by a participant in the clearing system to another participant in the clearing system or to another person with respect to his

participation in this clearing system shall not be subject to the exercise of a decision pursuant to special regulations and shall be excluded from this. This shall not affect the provision of Article 159, paragraph 2.

(7) If a notification is delivered to the central depository of the court of a declaration of bankruptcy on the property or of the rejection of a proposal for the declaration of bankruptcy on the property due to a lack of property of a participant in the clearing system which is operated pursuant to this Act, the central depository shall be obliged to notify this fact to all other participants in the clearing system without unreasonable delay.

(8) The central depository shall also have the obligation pursuant to paragraph 7, in the case of a delivery of a notification of a declaration of bankruptcy on the property or of the rejection of a proposal for the declaration of bankruptcy on the property due to a lack of property of a participant in the clearing system which is operated pursuant to this Act from the bodies of a member state which have been given this role pursuant to the law of such a given state.

(9) If a notification is delivered to the central depository of a declaration of bankruptcy on the property or of the rejection of a proposal for a declaration of bankruptcy on the property due to a lack of property of a participant in the clearing system which is operated pursuant to the legal rules of other member country, and such a participant in the clearing system has its registered office or an organisational component in the Slovak Republic, the central depository shall be obliged to notify this fact to bodies of individual member countries that have been given this role pursuant to the law of such a given state,"

Ad 16) NO.

Ad 17) NO.

Ad 18) NO.

PART IV- Other information

Ad 19) YES.

The insolvency act apply to the debtor who is insolvent if its debts remain overdue for more than 30 days and to the debtor, who is the legal person, and has excessive indebtedness.

Article 67: The provisions of the Bankruptcy and Composition Act do not apply to the debtor, who is a state budget organization, state budget contributory organization, municipality and the legal person established by the law.

Ad 20) NO.

Ad 21) The insolvency law is not clear on the subject and there is no jurisprudence to that effect. It is however, very likely that indeed an applicable law agreement could be set aside for reasons of public policy.