

รายการอ้างอิง

ภาษาไทย

กุลมาศ รัตนสุนทรากุล. การบังคับใช้ข้อสัญญา Netting ในสัญญา 1992 ISDA Master Agreement, วิทยานิพนธ์ปริญญามหาบัณฑิต, สาขาวิชานิติศาสตร์ คณะนิติศาสตร์ จุฬาลงกรณ์มหาวิทยาลัย, 2541.

ตลาดหลักทรัพย์แห่งประเทศไทย. ตลาดการเงินและการกำกับดูแล. ตลาดหลักทรัพย์แห่งประเทศไทย, 2548.

ทิพาภรณ์ (โลกาพัฒนา) ทวีกุลวัฒน์. การซื้อขายสินค้าในตลาดล่วงหน้า. กรุงเทพมหานคร : สำนักพิมพ์จุฬาลงกรณ์มหาวิทยาลัย, 2525.

ธนาคารแห่งประเทศไทย, เอกสารแนบ หนังสือธนาคารแห่งประเทศไทยที่ ธปท. วพ. (ว) 901/2538. เรื่องแนวทางในการบริหารความเสี่ยงจากธุรกรรมอนุพันธ์ (Derivatives), 2538.

พระวรภักติปิบูลย์. ประวัติศาสตร์กฎหมายไทย. กรุงเทพมหานคร : โรงพิมพ์ของสมาคม สังคมศาสตร์แห่งประเทศไทย, 2504.

พิเศษ เสตเสถียร. กฎหมายหลักทรัพย์และตลาดหลักทรัพย์. กรุงเทพมหานคร : สำนักพิมพ์ นิติธรรม, พ.ศ. 2537.

ไพฑูริย์ เพ็ชรน้อย. นายหน้าซื้อขายล่วงหน้าในตลาดซื้อขายสินค้าเกษตรล่วงหน้า. วิทยานิพนธ์ ปริญญามหาบัณฑิต, สาขาวิชานิติศาสตร์ คณะนิติศาสตร์ จุฬาลงกรณ์มหาวิทยาลัย, 2550.

ภาสวรรณ ณ นคร. การปฏิบัติต่อสัญญาในคดีล้มละลาย. วิทยานิพนธ์ปริญญามหาบัณฑิต, สาขาวิชานิติศาสตร์ คณะนิติศาสตร์ จุฬาลงกรณ์มหาวิทยาลัย, 2549.

วรรณรัตน์ จันทรแสงทอง. ปัญหากฎหมายเกี่ยวกับการประกอบธุรกิจสัญญาซื้อขายหลักทรัพย์.
วิทยานิพนธ์ปริญญามหาบัณฑิต, สาขาวิชานิติศาสตร์ คณะนิติศาสตร์ จุฬาลงกรณ์
มหาวิทยาลัย, 2546.

วิชา มหาคุณ. คำอธิบายกฎหมายล้มละลายและการฟื้นฟูกิจการของลูกหนี้. พิมพ์ครั้งที่ 12
กรุงเทพมหานคร: สำนักพิมพ์นิติบรรณาการ, 2551.

วิศิษฐ์ วิศิษฐ์สรอรรถ. กฎหมายฟื้นฟูกิจการ. กรุงเทพมหานคร: บริษัท วิศิษฐ์สรอรรถ จำกัด,
2547.

ศูนย์ซื้อขายตราสารหนี้. เกร็ดความรู้: มารู้จักธุรกรรมการซื้อคืน (Repurchase Agreement).
กรุงเทพมหานคร, 2541, หน้า1 (เอกสารไม่ตีพิมพ์).

สถาบันพัฒนาความรู้ตลาดทุน. การลงทุนในตราสารอนุพันธ์. ตลาดหลักทรัพย์แห่งประเทศไทย:
กรุงเทพ, 2548.

สุธีร์ ศุภนิตย. หลักกฎหมายล้มละลายและการฟื้นฟูกิจการ. พิมพ์ครั้งที่ 7. กรุงเทพมหานคร:
สำนักพิมพ์วิญญูชน, 2549.

สุโชติ เปี่ยมชล. บทบาทของ ธปท. ในการดำเนินนโยบายทางการเงิน. ฝ่ายนโยบายทางการเงิน,
ธนาคารแห่งประเทศไทย, 2552 [online]. แหล่งที่มา
http://www.bot.or.th/Thai/AboutBOT/project/Slide_EconTraining/Chapter05b_52.pdf [2553, ตุลาคม 23].

สุภา ศิรินทร. มาตรการคุ้มครองผู้ลงทุนกรณีบริษัทหลักทรัพย์ล้มละลาย. วิทยานิพนธ์ปริญญา
มหาบัณฑิต, สาขาวิชานิติศาสตร์ คณะนิติศาสตร์ จุฬาลงกรณ์มหาวิทยาลัย, 2541.

สุรพล ไตรเวทย์. คำอธิบายสัญญาซื้อขายล่วงหน้า. วิญญูชน: กรุงเทพมหานคร, 2546.

อภิรักษ์ จินศิริวานิชย์. ธุรกรรมการซื้อขายค้ำประกันเอกชน. ฝ่ายวิจัยและพัฒนา สมาคมตลาดตราสาร
หนี้ไทย, หน้า 1-3 [online]. แหล่งที่มา
http://www.thaibma.or.th/bond_tutor/pdf/Private%20Repo.pdf
[2010, พฤศจิกายน 12].

เจ็อน ชุนแกว. คู่มือการศึกษากฎหมายล้มละลาย. กรุงเทพมหานคร:สำนักพิมพ์พลสยาม พรินติ้ง
(ประเทศไทย), 2553.

ภาษาต่างประเทศ

Colin, C. A. Futures and Options Markets : An Introduction. Texas:Prentice Hall, 2003.

Crawford,B. The legal foundations of netting agreements for foreign exchange contracts.
Canadian Business Law Journal 22 (September 1993).

Europe Union Law. Consolidated versions of the Treaty on European Union and the
Treaty on the Functioning of the European Union. Official Journal C 83 of
30.3.201 [online]. Available from:
<http://eur-lex.europa.eu/en/treaties/index.htm> [2010, October 15].

European Union Law. Council Regulation (EC) No. 1346/2000 of 29 May 2000 on
Insolvency Proceedings [online]. Available from: [http://eur-
lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:160:0001:0018:EN:
PDF](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:160:0001:0018:EN:PDF) [2010, October 20].

European Union Law. Directive 98/26/EC of The European Parliament and of the Council
of 19 May 1998 on settlement finality in payment and securities settlement
systems[online]. Available from: [http://eur-
lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1998:166:0045:0050:EN:
PDF](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1998:166:0045:0050:EN:PDF) [2010, August 20].

European Union Law. Directive 2002/47/EC of The European Parliament and of the Council of 6 June 2002 on Financial Collateral arrangements
 [online]. Available from: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2002L0047:20090630:EN:PDF> [2010, October 20].

European Union Law. Directive 2009/44/EC of 6 May 2009 amending Directive 98/26/EC on settlement finality in payment and securities settlement systems and Directive 2002/47/EC of The European Parliament and of the Council on Financial Collateral arrangements as regards linked systems and credit claims[online] Available from: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:146:0037:0043:EN:PDF> [2010, October 20].

Fletcher, I.F. Law of Bankruptcy. Plymouth:Macdonald & Evans Ltd, 1978.

Glass, G.R. Primer on netting. The Journal of Commercial Lending (October 1994).

Hudson, A. The Law on Financial Derivatives. London: Sweet & Maxwell, 1998.

Hull, J. Introduction to Futures and Options Markets. New Jersey: Prentice-Hall, Inc 1995

Kaey,R.A. and Walton, P. Insolvency Law Corporate and Personal.Essex: Pearson Education Limited, 2003.

King, L.P. Fundamental of American Law : Bankruptcy and Other Insolvency Remedies. New York : New York University School of Law, 1996.

Malaguti, M.C. The Payments System in The European Union Law and Practice. London:Sweet & Maxwell, 1997.

Swan, E.J. The Development of Law of Financial Services. London: Gevendish Publishing Limited, 1993.

The Chicago Board of Trade. The Chicago Board of Trade Handbook of Futures and Options. Newyork:McGraw-Hill,2006.

Tillotson, J., Foster, N. Text, Cases and Materials on European Union Law. London : Cavendish, 2003.

United Nations Commission on International Trade Law. (2005). Legislative Guide on Insolvency Law [online]. Available from:
http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2004Guide.html
[2010, October 15].

Wessel, B. International Insolvency Law. The Netherlands : Kluwer, 2006.

Wood, R.P. Title Finance, Derivatives, Securitisations, Set-off and Netting. London: Sweet&Maxwell, 1995.

Wood, R.P. English and International set off. London: Sweet & Maxwell, 1989.

ภาคผนวก

ภาคผนวก ก

UNCITRAL Legislative Guide on Insolvency Law excerpt on Recommendations 101-107

Purpose of legislative provisions

The purpose of provisions on netting and set-off in the context of financial transactions on financial markets is to reduce the potential for systemic risk that could threaten the stability of financial markets by providing certainty with respect to the rights of parties to financial contract when one of those parties fails to perform for reasons of insolvency. These recommendations are not intended to apply to transactions that are not financial contracts and they would remain subject to the law applicable to set-off and netting

Contents of legislative provisions

101. The insolvency law should recognize contractual termination rights associated with financial contracts that permit the termination of those contracts and the set-off and netting of outstanding obligations under those contracts promptly after the commencement of insolvency proceedings. Where the insolvency law stays the termination of contracts or limits the enforceability of automatic termination clauses on commencement of insolvency proceedings, financial contracts exempt from such limitation

102. Once the financial contracts of the debtor have been terminated by a counterparty, the insolvency law should permit the counterparty to net or set off obligations under those terminated financial contracts to establish a net exposure

* This will allow market participants to extend credit based on "net" positions and make it impossible for the debtor to "cherry-pick" contracts by performing some and breaching others, which is especially important with regard to financial contracts because of systemic risk.

position relative to the debtor. This termination and set-off to establish a net exposure should be permitted regardless of whether the termination of the contracts occurs prior to or after the commencement of insolvency proceedings. Where the insolvency law limits or stay the exercise of set-off rights upon commencement of insolvency proceedings, set-off and netting of financial contracts should be exempt from such limitation.

103. Once the financial contracts of the debtor have been terminated, the insolvency law should permit counterparties to enforce and apply their security interest to obligations arising out of financial contracts. Financial contracts should be exempt from any stay under the insolvency law that applies to the enforcement of security interest.

104. The insolvency law should specify that routine pre-bankruptcy transfers consistent with market practice, such as the putting up of margin for financial contracts^{*} and transfer to settle financial contract obligations,^{**} should be exempt from avoidance.

105. The insolvency law should recognize and protect the finality of the netting, clearing and settlement of financial contracts through payment and settlement systems upon insolvency of participant in the system.

* "Margin" is the process of posting additional cash or securities as a security for the transactions in accordance with a contractual formula that accounts for fluctuations in the market value of the contract and the existing security. For example, on a swap, a margin of 105 per cent might be required to maintain the termination value of contract. If the security position falls to 100 per cent, an additional margin might have to be posted.

** In some circumstances, a settlement payment might be viewed as a preference. In the example of a swap, settlement payments are to be made monthly or upon termination of the contract based on the market value of the contract. These payments are not value for value transfers, but rather payment of an accrued debt obligation that has matured, such payment might also be subject to avoidance.

106. Recommendations 101-105 should apply to all transactions that are considered to be "financial contracts", whether or not one of the counterparties is a financial institution.*

107. Financial contracts should be defined broadly enough to encompass existing varieties of financial contract and to accommodate new types of financial contract as they appear.

* Even if a given financial contract does not involve a financial institution, the impact of the insolvency of a counterparty could entail systemic risk.

ภาคผนวก ข

United States Code Title 11 Bankruptcy

Chapter 3 Case Administration

Subchapter IV Administrative Powers

§ 365. Executory contracts and unexpired leases

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

(b)

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

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

compensated in accordance with the provisions of this paragraph;

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

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

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

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

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

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

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

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

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

performance of the debtor and its guarantors, if any, as of the time the debtor became the lessee under the lease;

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

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

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

(4) Notwithstanding any other provision of this section, if there has been a default in an unexpired lease of the debtor, other than a default of a kind specified in paragraph (2) of this subsection, the trustee may not require a lessor to provide services or supplies incidental to such lease before assumption of such lease unless the lessor is compensated under the terms of such lease for any services and supplies provided under such lease before assumption of such lease.

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

(1)

(A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such

contract or lease prohibits or restricts assignment of rights or delegation of duties; and

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

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

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

(d)

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

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

(3) The trustee shall timely perform all the obligations of the debtor, except those specified in section 365 (b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503 (b)(1) of this title. The court may extend, for cause, the time for performance of any such obligation that arises within 60 days after the date of the order for

relief, but the time for performance shall not be extended beyond such 60-day period. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f) of this section. Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

(4)

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

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

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

(B)

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

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

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

of this title, unless the court, after notice and a hearing and based on the equities of the case, orders otherwise with respect to the obligations or timely performance thereof. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f). Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

(e)

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

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

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

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

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

(A)

(i) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to the trustee or to an assignee of such contract or lease, whether or not such

contract or lease prohibits or restricts assignment of rights or delegation of duties; and

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

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

(f)

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

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

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

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

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

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

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

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

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

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

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

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

(h)

(1)

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

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

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

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

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

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

(2)

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

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

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

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

(i)

(1) If the trustee rejects an executory contract of the debtor for the sale of real property or for the sale of a timeshare interest under a timeshare plan, under which the purchaser is in possession, such purchaser may treat such contract as terminated, or, in the alternative, may remain in possession of such real property or timeshare interest.

(2) If such purchaser remains in possession—

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

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

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

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

(l) If an unexpired lease under which the debtor is the lessee is assigned pursuant to this section, the lessor of the property may require a deposit or other

security for the performance of the debtor's obligations under the lease substantially the same as would have been required by the landlord upon the initial leasing to a similar tenant.

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

(n)

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

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

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

(i) the duration of such contract; and

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

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

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

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

(C) the licensee shall be deemed to waive—

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

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

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

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

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

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

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

(i) perform such contract; or

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

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

(o) In a case under chapter 11 of this title, the trustee shall be deemed to have assumed (consistent with the debtor's other obligations under section 507), and shall immediately cure any deficit under, any commitment by the debtor to a Federal depository institutions regulatory agency (or predecessor to such agency) to maintain the capital of an insured depository institution, and any claim for a subsequent breach of the obligations thereunder shall be entitled to priority under section 507. This subsection shall not extend any commitment that would otherwise be terminated by any act of such an agency.

(p)

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

(2)

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

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

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

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

Chapter 5 Creditors, the Debtor, and the Estate

Subchapter III The Estate

§ 555. Contractual right to liquidate, terminate, or accelerate a securities contract

The exercise of a contractual right of a stockbroker, financial institution, financial participant, or securities clearing agency to cause the liquidation, termination, or acceleration of a securities contract, as defined in section 741 of this title, because of a condition of the kind specified in section 365 (e)(1) of this title shall not be stayed, avoided, or otherwise limited by operation of any provision of this title or by order of a court or administrative agency in any proceeding under this title unless such order is authorized under the provisions of the Securities Investor Protection Act of 1970 or any statute administered by the Securities and Exchange Commission. As used in this section, the term "contractual right" includes a right set forth in a rule or bylaw of a derivatives clearing organization (as defined in the Commodity Exchange Act), a

multilateral clearing organization (as defined in the Federal Deposit Insurance Corporation Improvement Act of 1991), a national securities exchange, a national securities association, a securities clearing agency, a contract market designated under the Commodity Exchange Act, a derivatives transaction execution facility registered under the Commodity Exchange Act, or a board of trade (as defined in the Commodity Exchange Act), or in a resolution of the governing board thereof, and a right, whether or not in writing, arising under common law, under law merchant, or by reason of normal business practice.

§ 556. Contractual right to liquidate, terminate, or accelerate a commodities contract or forward contract

The contractual right of a commodity broker, financial participant, or forward contract merchant to cause the liquidation, termination, or acceleration of a commodity contract, as defined in section 761 of this title, or forward contract because of a condition of the kind specified in section 365 (e)(1) of this title, and the right to a variation or maintenance margin payment received from a trustee with respect to open commodity contracts or forward contracts, shall not be stayed, avoided, or otherwise limited by operation of any provision of this title or by the order of a court in any proceeding under this title. As used in this section, the term "contractual right" includes a right set forth in a rule or bylaw of a derivatives clearing organization (as defined in the Commodity Exchange Act), a multilateral clearing organization (as defined in the Federal Deposit Insurance Corporation Improvement Act of 1991), a national securities exchange, a national securities association, a securities clearing agency, a contract market designated under the Commodity Exchange Act, a derivatives transaction execution facility registered under the Commodity Exchange Act, or a board of trade (as defined in the Commodity Exchange Act) or in a resolution of the governing board thereof and a right, whether or not evidenced in writing, arising under common law, under law merchant or by reason of normal business practice.

§ 559. Contractual right to liquidate, terminate, or accelerate a repurchase agreement

The exercise of a contractual right of a repo participant or financial participant to cause the liquidation, termination, or acceleration of a repurchase agreement because of a condition of the kind specified in section 365 (e)(1) of this title shall not be stayed, avoided, or otherwise limited by operation of any provision of this title or by order of a court or administrative agency in any proceeding under this title, unless, where the debtor is a stockbroker or securities clearing agency, such order is authorized under the provisions of the Securities Investor Protection Act of 1970 or any statute administered by the Securities and Exchange Commission. In the event that a repo participant or financial participant liquidates one or more repurchase agreements with a debtor and under the terms of one or more such agreements has agreed to deliver assets subject to repurchase agreements to the debtor, any excess of the market prices received on liquidation of such assets (or if any such assets are not disposed of on the date of liquidation of such repurchase agreements, at the prices available at the time of liquidation of such repurchase agreements from a generally recognized source or the most recent closing bid quotation from such a source) over the sum of the stated repurchase prices and all expenses in connection with the liquidation of such repurchase agreements shall be deemed property of the estate, subject to the available rights of setoff. As used in this section, the term "contractual right" includes a right set forth in a rule or bylaw of a derivatives clearing organization (as defined in the Commodity Exchange Act), a multilateral clearing organization (as defined in the Federal Deposit Insurance Corporation Improvement Act of 1991), a national securities exchange, a national securities association, a securities clearing agency, a contract market designated under the Commodity Exchange Act, a derivatives transaction execution facility registered under the Commodity Exchange Act, or a board of trade (as defined in the Commodity Exchange Act) or in a resolution of the governing board thereof and a right, whether or not evidenced in writing, arising under common law, under law merchant or by reason of normal business practice.

§ 560. Contractual right to liquidate, terminate, or accelerate a swap agreement

The exercise of any contractual right of any swap participant or financial participant to cause the liquidation, termination, or acceleration of one or more swap agreements because of a condition of the kind specified in section 365 (e)(1) of this title or to offset or net out any termination values or payment amounts arising under or in connection with the termination, liquidation, or acceleration of one or more swap agreements shall not be stayed, avoided, or otherwise limited by operation of any provision of this title or by order of a court or administrative agency in any proceeding under this title. As used in this section, the term "contractual right" includes a right set forth in a rule or bylaw of a derivatives clearing organization (as defined in the Commodity Exchange Act), a multilateral clearing organization (as defined in the Federal Deposit Insurance Corporation Improvement Act of 1991), a national securities exchange, a national securities association, a securities clearing agency, a contract market designated under the Commodity Exchange Act, a derivatives transaction execution facility registered under the Commodity Exchange Act, or a board of trade (as defined in the Commodity Exchange Act) or in a resolution of the governing board thereof and a right, whether or not evidenced in writing, arising under common law, under law merchant, or by reason of normal business practice.

§ 561. Contractual right to terminate, liquidate, accelerate, or offset under a master netting agreement and across contracts; proceedings under chapter 15

(a) Subject to subsection (b), the exercise of any contractual right, because of a condition of the kind specified in section 365 (e)(1), to cause the termination, liquidation, or acceleration of or to offset or net termination values, payment amounts, or other transfer obligations arising under or in connection with one or more (or the termination, liquidation, or acceleration of one or more)—

- (1) securities contracts, as defined in section 741 (7);
- (2) commodity contracts, as defined in section 761 (4);
- (3) forward contracts;

- (4) repurchase agreements;
- (5) swap agreements; or
- (6) master netting agreements,

shall not be stayed, avoided, or otherwise limited by operation of any provision of this title or by any order of a court or administrative agency in any proceeding under this title.

(b)

(1) A party may exercise a contractual right described in subsection (a) to terminate, liquidate, or accelerate only to the extent that such party could exercise such a right under section 555, 556, 559, or 560 for each individual contract covered by the master netting agreement in issue.

(2) If a debtor is a commodity broker subject to subchapter IV of chapter 7—

(A) a party may not net or offset an obligation to the debtor arising under, or in connection with, a commodity contract traded on or subject to the rules of a contract market designated under the Commodity Exchange Act or a derivatives transaction execution facility registered under the Commodity Exchange Act against any claim arising under, or in connection with, other instruments, contracts, or agreements listed in subsection (a) except to the extent that the party has positive net equity in the commodity accounts at the debtor, as calculated under such subchapter; and

(B) another commodity broker may not net or offset an obligation to the debtor arising under, or in connection with, a commodity contract entered into or held on behalf of a customer of the debtor and traded on or subject to the rules of a contract market designated under the Commodity Exchange Act or a derivatives transaction execution facility registered under the Commodity Exchange Act against any claim arising under, or in connection

with, other instruments, contracts, or agreements listed in subsection (a).

(3) No provision of subparagraph (A) or (B) of paragraph (2) shall prohibit the offset of claims and obligations that arise under—

(A) a cross-margining agreement or similar arrangement that has been approved by the Commodity Futures Trading Commission or submitted to the Commodity Futures Trading Commission under paragraph (1) or (2) of section 5c(c) of the Commodity Exchange Act and has not been abrogated or rendered ineffective by the Commodity Futures Trading Commission; or

(B) any other netting agreement between a clearing organization (as defined in section 761) and another entity that has been approved by the Commodity Futures Trading Commission.

(c) As used in this section, the term "contractual right" includes a right set forth in a rule or bylaw of a derivatives clearing organization (as defined in the Commodity Exchange Act), a multilateral clearing organization (as defined in the Federal Deposit Insurance Corporation Improvement Act of 1991), a national securities exchange, a national securities association, a securities clearing agency, a contract market designated under the Commodity Exchange Act, a derivatives transaction execution facility registered under the Commodity Exchange Act, or a board of trade (as defined in the Commodity Exchange Act) or in a resolution of the governing board thereof, and a right, whether or not evidenced in writing, arising under common law, under law merchant, or by reason of normal business practice.

(d) Any provisions of this title relating to securities contracts, commodity contracts, forward contracts, repurchase agreements, swap agreements, or master netting agreements shall apply in a case under chapter 15, so that enforcement of contractual provisions of such contracts and agreements in accordance with their terms will not be stayed or otherwise limited by operation of any provision of this title or by order of a court in any case under this title, and to limit avoidance powers to the same extent as in a proceeding under chapter 7

or 11 of this title (such enforcement not to be limited based on the presence or absence of assets of the debtor in the United States).

§ 562. Timing of damage measurement in connection with swap agreements, securities contracts, forward contracts, commodity contracts, repurchase agreements, and master netting agreements

(a) If the trustee rejects a swap agreement, securities contract (as defined in section 741), forward contract, commodity contract (as defined in section 761), repurchase agreement, or master netting agreement pursuant to section 365 (a), or if a forward contract merchant, stockbroker, financial institution, securities clearing agency, repo participant, financial participant, master netting agreement participant, or swap participant liquidates, terminates, or accelerates such contract or agreement, damages shall be measured as of the earlier of—

- (1) the date of such rejection; or
- (2) the date or dates of such liquidation, termination, or acceleration.

(b) If there are not any commercially reasonable determinants of value as of any date referred to in paragraph (1) or (2) of subsection (a), damages shall be measured as of the earliest subsequent date or dates on which there are commercially reasonable determinants of value.

(c) For the purposes of subsection (b), if damages are not measured as of the date or dates of rejection, liquidation, termination, or acceleration, and the forward contract merchant, stockbroker, financial institution, securities clearing agency, repo participant, financial participant, master netting agreement participant, or swap participant or the trustee objects to the timing of the measurement of damages—

- (1) the trustee, in the case of an objection by a forward contract merchant, stockbroker, financial institution, securities clearing agency, repo participant, financial participant, master netting agreement participant, or swap participant; or

(2) the forward contract merchant, stockbroker, financial institution, securities clearing agency, repo participant, financial participant, master netting agreement participant, or swap participant, in the case of an objection by the trustee,

has the burden of proving that there were no commercially reasonable determinants of value as of such date or dates.

ภาคผนวก ค

DIRECTIVE 98/26/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
of 19 May 1998

on settlement finality in payment and securities settlement systems

Amended by: Directive 2009/44/EC of the European Parliament and of the Council of 6
May 2009

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE
EUROPEAN UNION,

Having regard to the Treaty establishing the European
Community, and in particular Article 100a thereof,

Having regard to the proposal from the Commission (1),

Having regard to the opinion of the European Monetary
Institute (2),

Having regard to the opinion of the Economic and Social
Committee (3),

Acting in accordance with the procedure laid down in
Article 189b of the Treaty (4),

(1) Whereas the Lamfalussy report of 1990 to the Governors of the
central banks of the Group of Ten Countries demonstrated the important systemic risk
inherent in payment systems which operate on the basis of several legal types of
payment netting, in particular multilateral netting; whereas the reduction of legal risks
associated with participation in real time gross settlement systems is of paramount
importance, given the increasing development of these systems;

(2) Whereas it is also of the utmost importance to reduce the risk associated with participation in securities settlement systems, in particular where there is a close connection between such systems and payment systems;

(3) Whereas this Directive aims at contributing to the efficient and cost effective operation of cross-border payment and securities settlement arrangements in the Community, which reinforces the freedom of movement of capital in the internal market; whereas this Directive thereby follows up the progress made towards completion of the internal market, in particular towards the freedom to provide services and liberalisation of capital movements, with a view to the realisation of Economic and Monetary Union;

(4) Whereas it is desirable that the laws of the Member States should aim to minimise the disruption to a system caused by insolvency proceedings against a participant in that system;

(5) Whereas a proposal for a Directive on the reorganization and winding-up of credit institutions submitted in 1985 and amended on 8 February 1988 is still pending before the Council; whereas the Convention on Insolvency Proceedings drawn up on 23 November 1995 by the Member States meeting within the Council explicitly excludes insurance undertakings, credit institutions and investment firms;

(6) Whereas this Directive is intended to cover payment and securities settlement systems of a domestic as well as of a cross-border nature; whereas the Directive is applicable to Community systems and to collateral security constituted by their participants, be they Community or third country participants, in connection with participation in these systems;

(7) Whereas Member States may apply the provisions of this Directive to their domestic institutions which participate directly in third country systems and to collateral security provided in connection with participation in such systems;

(8) Whereas the reduction of systemic risk requires in particular the finality of settlement and the enforceability of collateral security; whereas collateral security is meant to comprise all means provided by a participant to the other participants in the payment and/or securities settlement systems to secure rights and obligations in connection with that system, including repurchase agreements, statutory liens and fiduciary transfers; whereas regulation in national law of the kind of collateral security which can be used should not be affected by the definition of collateral security in this Directive;

(9) Whereas this Directive, by covering collateral security provided in connection with operations of the central banks of the Member States functioning as central banks, including monetary policy operations, assists the European Monetary Institute in its task of promoting the efficiency of cross-border payments with a view to the preparation of the third stage of Economic and Monetary Union and thereby contributes to developing the necessary legal framework in which the future European central bank may develop its policy;

(10) Whereas transfer orders and their netting should be legally enforceable under all Member States' jurisdictions and binding on third parties;

(11) Whereas rules on finality of netting should not prevent systems testing, before the netting takes place, whether orders that have entered the system comply with the rules of that system and allow the settlement of that system to take place;

(12) Whereas nothing in this Directive should prevent a participant or a third party from exercising any right or claim resulting from the underlying transaction which they may have in law to recovery or restitution in respect of a transfer order which has entered a system, e.g. in case of fraud or technical error, as long as this leads neither to the unwinding of netting nor to the revocation of the transfer order in the system;

(13) Whereas it is necessary to ensure that transfer orders cannot be revoked after a moment defined by the rules of the system;

(14) Whereas it is necessary that a Member State should immediately notify other Member States of the opening of insolvency proceedings against a participant in the system;

(14a) Whereas national competent authorities or supervisors should ensure that the operators of the systems establishing the interoperable systems have agreed to the extent possible on common rules on the moment of entry into the interoperable systems. National competent authorities or supervisors should ensure that the rules on the moment of entry into an interoperable system are coordinated insofar as possible and necessary in order to avoid legal uncertainty in the event of default of a participating system;

(15) Whereas insolvency proceedings should not have a retroactive effect on the rights and obligations of participants in a system;

(16) Whereas, in the event of insolvency proceedings against a participant in a system, this Directive furthermore aims at determining which insolvency law is applicable to the rights and obligations of that participant in connection with its participation in a system;

(17) Whereas collateral security should be insulated from the effects of the insolvency law applicable to the insolvent participant;

(18) Whereas the provisions of Article 9(2) should only apply to a register, account or centralized deposit system which evidences the existence of proprietary rights in or for the delivery or transfer of the securities concerned;

(19) Whereas the provisions of Article 9(2) are intended to ensure that if the participant, the central bank of a Member State or the future European central bank has a valid and effective collateral security as determined under the law of the Member State where the relevant register, account or centralized deposit system is located, then the validity and enforceability of that collateral security as against that system (and the operator thereof) and against any other person claiming directly or indirectly through it, should be determined solely under the law of that Member State;

(20) Whereas the provisions of Article 9(2) are not intended to prejudice the operation and effect of the law of the Member State under which the securities are constituted or of the law of the Member State where the securities may otherwise be located (including, without limitation, the law concerning the creation, ownership or transfer of such securities or of rights in such securities) and should not be interpreted to mean that any such collateral security will be directly enforceable or be capable of being recognised in any such Member State otherwise than in accordance with the law of that Member State;

(21) Whereas it is desirable that Member States endeavour to establish sufficient links between all the securities settlement systems covered by this Directive with a view towards promoting maximum transparency and legal certainty of transactions relating to securities;

(22) Whereas the adoption of this Directive constitutes the most appropriate way of realising the abovementioned objectives and does not go beyond what is necessary to achieve them,

(22a) Whereas in the case of interoperable systems, a lack of coordination as to which rules apply on the moment of entry and irrevocability may expose participants in one system, or even the system operator itself, to the spill-over effects of a default in another system. In order to limit systemic risk, it is desirable to provide that system operators of interoperable systems coordinate the rules on the moment of entry and irrevocability in the systems they operate.

HAVE ADOPTED THIS DIRECTIVE:

SECTION I

SCOPE AND DEFINITIONS

Article 1

The provisions of this Directive shall apply to:

- (a) any system as defined in Article 2(a), governed by the law of a Member State and operating in any currency, the euro or in various currencies which the system converts one against another;
- (b) any participant in such a system;
- (c) collateral security provided in connection with:
 - participation in a system, or
 - operations of the central banks of the Member States or the European Central Bank in the context of their function as central banks

Article 2

For the purpose of this Directive:

(a) system shall mean a formal arrangement:

-between three or more participants, excluding the system operator of that system, a possible settlement agent, a possible central counterparty, a possible clearing house or a possible indirect participant, with common rules and standardised arrangements for the clearing, whether or not through a central counterparty, or execution of transfer orders between the participants,

An arrangement entered into between interoperable systems shall not constitute a system,

- governed by the law of a Member State chosen by the participants; the participants may, however, only choose the law of a Member State in which at least one of them has its head office, and
- designated, without prejudice to other more stringent conditions of general application laid down by national law, as a system and notified to the Commission by the Member State whose law is applicable, after that Member State is satisfied as to the adequacy of the rules of the system.

Subject to the conditions in the first subparagraph, a Member State may designate as a system such a formal arrangement whose business consists of the execution of transfer orders as defined in the second indent of (i) and which to a limited extent executes orders relating to other financial instruments, when that Member State considers that such a designation is warranted on grounds of systemic risk.

A Member State may also on a case-by-case basis designate as a system such a formal arrangement between two participants, without counting a possible settlement agent, a possible central counterparty, a possible clearing house or

a possible indirect participant, when that Member State considers that such a designation is warranted on grounds of systemic risk;

(b)'institution' shall mean:

- a credit institution as defined in Article 4(1) of Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast) including the institutions listed in Article 2 of that Directive, or
- an investment firm as defined in Article 4(1)(1) of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments, excluding the institutions set out in Article 2(1) thereof, or
- public authorities and publicly guaranteed undertakings, or
- any undertaking whose head office is outside the Community and whose functions correspond to those of the Community credit institutions or investment firms as defined in the first and second indent,

which participates in a system and which is responsible for discharging the financial obligations arising from transfer orders within that system.

If a system is supervised in accordance with national legislation and only executes transfer orders as defined in the second indent of (i), as well as payments resulting from such orders, a Member State may decide that undertakings which participate in such a system and which have responsibility for discharging the financial obligations arising from transfer orders within this system, can be considered institutions, provided that at least three participants of this system are covered by the categories referred to in the first subparagraph and that such a decision is warranted on grounds of systemic risk;

(c) 'central counterparty' shall mean an entity which is interposed between the institutions in a system and which acts as the exclusive counterparty of these institutions with regard to their transfer orders;

(d) 'settlement agent' shall mean an entity providing to institutions and/or a central counterparty participating in systems, settlement accounts through which transfer orders within such systems are settled and, as the case may be, extending credit to those institutions and/or central counterparties for settlement purposes;

(e) 'clearing house' shall mean an entity responsible for the calculation of the net positions of institutions, a possible central counterparty and/or a possible settlement agent;

(f) 'participant' shall mean an institution, a central counterparty, a settlement agent, a clearing house or a system operator

According to the rules of the system, the same participant may act as a central counterparty, a settlement agent or a clearing house or carry out part or all of these tasks.

A Member State may decide that, for the purposes of this Directive, an indirect participant may be considered a participant if that is justified on the grounds of systemic risk. Where an indirect participant is considered to be a participant on grounds of systemic risk, this does not limit the responsibility of the participant through which the indirect participant passes transfer orders to the system

(g) 'indirect participant' shall mean an institution, a central counterparty, a settlement agent, a clearing house or a system operator with a contractual relationship with a participant in a system executing transfer orders which enables the indirect

participant to pass transfer orders through the system, provided that the indirect participant is known to the system operator;

(h) 'securities' shall mean all instruments referred to in section C of Annex I to Directive 2004/39/EC;

(i) 'transfer order' shall mean:

- any instruction by a participant to place at the disposal of a recipient an amount of money by means of a book entry on the accounts of a credit institution, a central bank, a central counterparty or a settlement agent, or any instruction which results in the assumption or discharge of a payment obligation as defined by the rules of the system , or
- an instruction by a participant to transfer the title to, or interest in, a security or securities by means of a book entry on a register, or otherwise;

(j) 'settlement accounts' shall mean an account at a central bank, a settlement agent or a central counterparty used to hold funds or securities and to settle transactions between participants in a system;

(k) 'netting' shall mean the conversion into one net claim or one net obligation of claims and obligations resulting from transfer orders which a participant or participants either issue to, or receive from, one or more other participants with the result that only a net claim can be demanded or a net obligation be owed;

(l) 'settlement account' shall mean an account at a central bank, a settlement agent or a central counterparty used to hold funds and securities and to settle transactions between participants in a system;

(m) 'collateral security' shall mean all realisable assets, including, without limitations, financial collateral referred to in Article 1(4)(a) of Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral

arrangements, provided under a pledge (including money provided under a pledge), a repurchase or similar agreement, or otherwise, purpose of securing rights and obligations potentially arising in connection with a system, or provided to central banks of the Member States or to the European Central Bank;

(n) 'business day' shall cover both day and night-time settlements and shall encompass all events happening during the business cycle of a system;

(o) 'interoperable systems' shall mean two or more systems whose system operators have entered into an arrangement with one another that involves cross-system execution of transfer orders;

(p) 'system operator' shall mean the entity or entities legally responsible for the operation of a system. A system operator may also act as a settlement agent, central counterparty or clearing house.'.

SECTION II

NETTING AND TRANSFER ORDERS

Article 3

1. Transfer orders and netting shall be legally enforceable and binding on third parties even in the event of insolvency proceedings against a participant, provided that transfer orders were entered into the system before the moment of opening of such insolvency proceedings as defined in Article 6(1). This shall apply even in the event of insolvency proceedings against a participant (in the system concerned or in an interoperable system) or against the system operator of an interoperable system which is not a participant

Where transfer orders are entered into a system after the moment of opening of insolvency proceedings and are carried out within the business day, as defined by the rules of the system, during which the opening of such proceedings

occur, they shall be legally enforceable and binding on third parties only if the system operator can prove that, at the time that such transfer orders become irrevocable, it was neither aware, nor should have been aware, of the opening of such proceedings.

2. No law, regulation, rule or practice on the setting aside of contracts and transactions concluded before the moment of opening of insolvency proceedings, as defined

in Article 6(1) shall lead to the unwinding of a netting.

3. The moment of entry of a transfer order into a system shall be defined by the rules of that system. If there are conditions laid down in the national law governing the system as to the moment of entry, the rules of that system must be in accordance with such conditions.

4. In the case of interoperable systems, each system determines in its own rules the moment of entry into its system, in such a way as to ensure, to the extent possible, that the rules of all interoperable systems concerned are coordinated in this regard. Unless expressly provided for by the rules of all the systems that are party to the interoperable systems, one system's rules on the moment of entry shall not be affected by any rules of the other systems with which it is interoperable.

Article 4

Member States may provide that the opening of insolvency proceedings against a participant or a system operator of an interoperable system shall not prevent funds or securities available on the settlement account of that participant from being used to fulfil that participant's obligations in the system or in an interoperable system on the business day of the opening of the insolvency proceedings. Member States may also provide that such a participant's credit facility connected to the system be used against available, existing collateral security to fulfil that participant's obligations in the system or in an interoperable system.

Article 5

In the case of interoperable systems, each system determines in its own rules the moment of irrevocability, in such a way as to ensure, to the extent possible, that the rules of all interoperable systems concerned are coordinated in this regard. Unless expressly provided for by the rules of all the systems that are party to the interoperable systems, one system's rules on the moment of irrevocability shall not be affected by any rules of the other systems with which it is interoperable.

SECTION III

PROVISIONS CONCERNING INSOLVENCY PROCEEDINGS

Article 6

1. For the purpose of this Directive, the moment of opening of insolvency proceedings shall be the moment when the relevant judicial or administrative authority handed down its decision.

2. When a decision has been taken in accordance with paragraph 1, the relevant judicial or administrative authority shall immediately notify that decision to the appropriate authority chosen by its Member State.

3. The Member State referred to in paragraph 2 shall immediately notify other Member States.

Article 7

Insolvency proceedings shall not have retroactive effects on the rights and obligations of a participant arising from, or in connection with, its participation in a

system before the moment of opening of such proceedings as defined in Article 6(1). This shall apply, *inter alia*, as regards the rights and obligations of a participant in an interoperable system, or of a system operator of an interoperable system which is not a participant.

Article 8

In the event of insolvency proceedings being opened against a participant in a system, the rights and obligations arising from, or in connection with, the participation of that participant shall be determined by the law governing that system.

SECTION IV

INSULATION OF THE RIGHTS OF HOLDERS OF COLLATERAL SECURITY FROM THE EFFECTS OF THE INSOLVENCY OF THE PROVIDER

Article 9

1. The rights of a system operator or of a participant to collateral security provided to them in connection with a system or any interoperable system, and the rights of central banks of the Member States or the European Central Bank to collateral security provided to them, shall not be affected by insolvency proceedings against;

- (a) the participant (in the system concerned or in an interoperable system);
- (b) the system operator of an interoperable system which is not a participant;
- (c) a counterparty to central banks of the Member States or the European Central Bank; or
- (d) any third party which provided the collateral security.

2. Where securities including rights in securities are provided as collateral security to participants, system operators or to central banks of the Member States or the European Central Bank as described in paragraph 1, and their right or that of any nominee, agent or third party acting on their behalf with respect to the securities is legally recorded on a register, account or centralised deposit system located in a Member State, the determination of the rights of such entities as holders of collateral security in relation to those securities shall be governed by the law of that Member State.

SECTION V

FINAL PROVISIONS

Article 10

1. Member States shall specify the systems, and the respective system operators, which are to be included in the scope of this Directive and shall notify them to the Commission and inform the Commission of the authorities they have chosen in accordance with Article 6(2).

The system operator shall indicate to the Member State whose law is applicable the participants in the system, including any possible indirect participants, as well as any change in them.

In addition to the indication provided for in the second subparagraph, Member States may impose supervision or authorisation requirements on systems which fall under the jurisdiction.

An institution shall, on request, inform anyone with a legitimate interest of the systems in which it participates and provide information about the main rules governing the functioning of those systems.

2. A system designated prior to the entry into force of national provisions implementing Directive 2009/44/EC of the European Parliament and of the Council of 6 May 2009 amending Directive 98/26/EC on settlement finality in payment and securities settlement systems and Directive 2002/47/EC on financial collateral arrangements as regards linked systems and credit claims shall continue to be designated for the purposes of this Directive.

A transfer order which enters a system before the entry into force of national provisions implementing Directive 2009/44/EC, but is settled thereafter shall be deemed to be a transfer order for the purposes of this Directive.

Article 11

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 11 December 1999. They shall forthwith inform the Commission thereof.

When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.

2. Member States shall communicate to the Commission the text of the provisions of domestic law which they adopt in the field governed by this Directive. In this Communication, Member States shall provide a table of correspondence showing the national provisions which exist or are introduced in respect of each Article of this Directive.

Article 12

No later than three years after the date mentioned in Article 11(1), the Commission shall present a report to the European Parliament and the Council on the application of this Directive, accompanied where appropriate by proposals for its revision.

Article 13

This Directive shall enter into force on the day of its publication in the Official Journal of the European Communities.

Article 14

This Directive is addressed to the Member States.

Done at Brussels, 19 May 1998.

For the European Parliament

The President

J.M. GIL-ROBLES

For the Council

The President

G. BROWN



ประวัติผู้เขียนวิทยานิพนธ์

นางสาวศศิวิมล กังวาลไกล เกิดเมื่อวันที่ 8 เมษายน 2526 ที่กรุงเทพมหานคร สำเร็จการศึกษาปริญญาตรีนิติศาสตรบัณฑิต คณะนิติศาสตร์ จุฬาลงกรณ์มหาวิทยาลัย ปีการศึกษา 2547 และเข้าศึกษาหลักสูตรนิติศาสตรมหาบัณฑิต คณะนิติศาสตร์ จุฬาลงกรณ์มหาวิทยาลัย เมื่อพุทธศักราช 2550 ปัจจุบันทำงานตำแหน่งเจ้าหน้าที่ฝ่ายกฎหมายของ บริษัท เอ็มเอสไอจี เซอร์วิส แอนด์ แอดจัสติ้ง (ประเทศไทย) จำกัด

