

## รายการอ้างอิง

### ภาษาไทย

- คณะกรรมการการวิสามัญพิจารณาร่างพระราชบัญญัติล้มละลาย (ฉบับที่..) พ.ศ. .... สภาผู้แทนราษฎร. "รายงานตัวเลขของการประชุมคณะกรรมการการวิสามัญพิจารณาร่างพระราชบัญญัติล้มละลาย (ฉบับที่..) พ.ศ. ....," 9 ตุลาคม 2540.
- คณะกรรมการการวิสามัญพิจารณาร่างพระราชบัญญัติล้มละลาย (ฉบับที่..) พ.ศ. .... , "รายงานการประชุมคณะกรรมการการวิสามัญพิจารณาร่างพระราชบัญญัติล้มละลาย (ฉบับที่..) พ.ศ. .... , ครั้งที่ 5/2541," 9 มกราคม 2541.
- นิพนธ์ พัวพงศกร และ เกวลิน หวังพิชญสุข. "การปรับโครงสร้างหนี้ของภาคธุรกิจ: การสร้างสถาบันที่มีประสิทธิภาพ." เอกสารในการสัมมนาทางวิชาการประจำปี 2543 ครั้งที่ 23 เรื่องเศรษฐกิจไทยแลไปข้างหน้า จัดโดยคณะเศรษฐศาสตร์ มหาวิทยาลัยธรรมศาสตร์ เสนอที่ โรงแรมรอยัลริเวอร์ 24 มีนาคม 2543 : 2.1-2.61. (เอกสารไม่ตีพิมพ์เผยแพร่)
- ภูมิวุฒิ พุทธสุ์ธัตตา. "บทคัดย่อกฎหมายฟื้นฟูกิจการของสหรัฐอเมริกา." ดุลพาน ปีที่ 43 เล่มที่ 2 (เมษายน-มิถุนายน 2539) : 38-48.
- พิชัย นิลทองคำ และนิพิฏฐ์ อินทรสมบัติ. หลักคิด เจตนารมณ์ สาระ ลักษณะสำคัญเชิงทฤษฎี และปฏิบัติพระราชบัญญัติจัดตั้งศาลล้มละลายและวิธีพิจารณาคดีล้มละลาย พ.ศ. 2542. กรุงเทพมหานคร : บริษัทอทธยา จำกัด, 2542.
- สุนทร มณีสวัสดิ์. คำอธิบายกฎหมายฟื้นฟูกิจการ. กรุงเทพมหานคร : บริษัทสำนักพิมพ์วิญญูชน จำกัด, 2542.
- วรารภรณ์ อาษาพร. "แนวคิดทางกฎหมายในการฟื้นฟูกิจการของลูกหนี้ : ศึกษาร่างพระราชบัญญัติล้มละลาย (ฉบับที่..) พ.ศ. .... ." วิทยานิพนธ์ปริญญาโทมหาบัณฑิต ภาควิชานิติศาสตร์ บัณฑิตวิทยาลัย จุฬาลงกรณ์มหาวิทยาลัย, 2539.
- วิศิษฎ์ วิศิษฎ์สรอรรถ. กฎหมายฟื้นฟูกิจการ. พิมพ์ครั้งที่ 1. กรุงเทพมหานคร : บริษัทวิศิษฎ์สรอรรถ (ฝ่ายการพิมพ์) , 2543.
- วีรวุฒินัน จันทโชติ. "ข้อพิจารณาทางกฎหมายในมาตรการการปรับปรุงโครงสร้างหนี้." เอกสารในการสัมมนาทางวิชาการประจำปี 2543 ครั้งที่ 23 เรื่องเศรษฐกิจไทยแลไปข้างหน้า จัดโดยคณะเศรษฐศาสตร์ มหาวิทยาลัยธรรมศาสตร์ เสนอที่ โรงแรมรอยัลริเวอร์ 24 มีนาคม 2543 : 3.1-3.26. (เอกสารไม่ตีพิมพ์เผยแพร่)

สภาอุตสาหกรรมแห่งประเทศไทย, The Recovery Group. “การปรับโครงสร้างหนี้.” เอกสาร  
ในการสัมมนาเรื่อง การปรับโครงสร้างบริษัท จัดขึ้นโดยสภาอุตสาหกรรมแห่งประเทศไทย  
ธันวาคม 2541. (เอกสารไม่ตีพิมพ์เผยแพร่)

### ภาษาอังกฤษ

Asian Development Bank." Insolvency Law Reforms in the Asian and Pacific Region."

Law and Policy Reform at the Asian Development Bank, 1 (April 2000) : 10-86.

Baird, Douglas G. The Element of Bankruptcy. 2<sup>nd</sup>ed. New York : The Foundation  
Press, Inc, 1993.

Blum, Brian A. Bankruptcy and debtor/creditor : example and explanations. 2<sup>nd</sup> ed.  
New York : Aspen Publishers, Inc., 1999.

Buchbinder, David L. Basic Bankruptcy Law for Paralegals. 2<sup>nd</sup>ed. Canada : Little  
Brown and Company, 1994.

Fletcher, Ian F. The law of insolvency. (London : Sweet & Maxwell, 1996)

Garner, Bryan A. "ed" Black's Law Dictionary. 7<sup>th</sup> ed. Minnesota : West Group, 1999.

Legal Department, International Monetary Fund. Orderly & Effective Insolvency  
Procedures. Washington, D.C.: International Monetary Fund, Publication  
Services, 1999.

Mayson, Stephen W. French, Derek and Ryan, Christopher L., Company Law. London :  
Blackstone Press Limited, 2001.

Sealy, L S and Milman, David . Annotated guide to the insolvency legislation. 4<sup>th</sup> ed.  
(n.p.: CCH Editions Limited, n.d.)

The World Bank . The Principles and Guidelines for Effective Insolvency and Creditor  
Rights Systems. (n.p., 2001)

Wood, Philip R. Principles of International Insolvency. London : Sweet & Maxwell, 1995.

Working Group on Insolvency Law, United Nations Commission on International Trade  
Law. Report of the Working Group on Insolvency Law on the work of its twenty-  
fourth session. New York , 23 July-3 August 2001.



## บรรณานุกรม

### ภาษาไทย

- กฤษยานี รัตนชาญชัย. "บทบาทของบุคคลต่าง ๆ ในการฟื้นฟูกิจการของลูกหนี้." วารสารกฎหมาย คณะนิติศาสตร์ จุฬาลงกรณ์มหาวิทยาลัย. ปีที่ 8 ฉบับที่ 3 (กันยายน 2541) : 53-73.
- ไกรสร บารมีอวยชัย. "การฟื้นฟูกิจการของลูกหนี้ตามกฎหมายล้มละลาย." เอกสารประกอบการเสวนาโต๊ะกลม เรื่อง "การวิพากษ์การปรับโครงสร้างหนี้เพื่อการฟื้นฟูกิจการ" คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์, 18 มกราคม 2544. ( เนื่องในโอกาสงานรำลึกถึงศาสตราจารย์ ดร.จิต เศรษฐบุตร) (เอกสารอัดสำเนา).
- ธเนศ ไชยหมาน. การขอรับชำระหนี้ในคดีล้มละลาย. วิทยานิพนธ์ปริญญาโทมหาบัณฑิต คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์, 2539.
- ปรีชา พานิชวงศ์. คำอธิบายกฎหมายล้มละลาย. กรุงเทพมหานคร : สำนักพิมพ์นิติบรรณาการ, 2543.
- พิชัย นิลทองคำ. หลักเกณฑ์วิธีการร้องขอฟื้นฟูกิจการ. พิมพ์ครั้งที่ 1. กรุงเทพมหานคร : บริษัทสำนักพิมพ์อศตยา จำกัด, 2541.
- พิพัฒน์ จักรางกูร. คำอธิบายประมวลกฎหมายวิธีพิจารณาความแพ่ง วิธีการชั่วคราวก่อนพิพากษาและการบังคับคดีตามคำพิพากษาหรือคำสั่ง. กรุงเทพมหานคร : สำนักพิมพ์นิติบรรณาการ, 2543.
- ไพจิตร ปุญญพันธุ์. คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ลักษณะละเมิด. พิมพ์ครั้งที่ 8. กรุงเทพมหานคร : สำนักพิมพ์นิติบรรณาการ, 2541.
- วิชา มหาคุณ. "การวิเคราะห์กฎหมายฟื้นฟูกิจการของไทย." วารสารกฎหมาย คณะนิติศาสตร์ จุฬาลงกรณ์มหาวิทยาลัย. ปีที่ 8 ฉบับที่ 3 (กันยายน 2541) : 49-57.
- , คำอธิบายกฎหมายล้มละลาย. พิมพ์ครั้งที่ 7. กรุงเทพมหานคร : สำนักพิมพ์นิติบรรณาการ, 2542.
- วิศิษฎ์ วิศิษฎ์สรอรรถ. "การฟื้นฟูกิจการ : แนวโน้มตามความเป็นจริง." เอกสารประกอบการเสวนาโต๊ะกลม เรื่อง "การวิพากษ์การปรับโครงสร้างหนี้เพื่อการฟื้นฟูกิจการ" คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์, 18 มกราคม 2544. ( เนื่องในโอกาสงานรำลึกถึงศาสตราจารย์ ดร.จิต เศรษฐบุตร) (เอกสารอัดสำเนา)

วิศิษฐ์ วิศิษฐ์สรอรรถ. “การฟื้นฟูกิจการในคดีล้มละลาย (Reorganization).” ดูลพาน ปีที่ 43 เล่มที่ 2 (เมษายน-มิถุนายน 2539) : 42-57.

----- . “สรุปการแก้ไขกฎหมายเกี่ยวกับการดำเนินคดีล้มละลาย.” เอกสารประกอบการเสวนาโต๊ะกลม เรื่อง “การวิพากษ์การปรับโครงสร้างหนี้เพื่อการฟื้นฟูกิจการ” คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์, 18 มกราคม 2544. ( เนื่องในโอกาสงานรำลึกถึงศาสตราจารย์ ดร.จิต เศรษฐบุตร) (เอกสารอัดสำเนา).

สภานโยบายสังคมและเศรษฐกิจ. กฎหมายฟื้นฟูเศรษฐกิจกับอนาคตของประเทศ. พิมพ์ครั้งที่ 1. กรุงเทพมหานคร : สำนักพิมพ์ร่วมด้วยช่วยกัน, 2542.

สุทธิ อยู่สถาพร. “การทำข้อตกลง “Amicable Settlement” ในกรณีที่บริษัทลูกหนี้ประสบภาวะปัญหาทางการเงินในระบบกฎหมายล้มละลายฝรั่งเศส. วารสารกฎหมาย คณะนิติศาสตร์ จุฬาลงกรณ์มหาวิทยาลัย. ปีที่ 8 ฉบับที่ 3 (กันยายน 2541) : 160-172.

สุธีร์ ศุภนิตย์. หลักกฎหมายล้มละลายและฟื้นฟูกิจการ. พิมพ์ครั้งที่ 1. กรุงเทพมหานคร : สำนักพิมพ์วิญญูชน, 2542.

สุขุม ศุภนิตย์. คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ว่าด้วยละเมิด. พิมพ์ครั้งที่ 3. กรุงเทพมหานคร : สำนักพิมพ์นิติบรรณการ, 2543.

อุรสา รัตนสมบัติ. การบอกปิดสัญญาที่มีภาระในการฟื้นฟูกิจการของลูกหนี้. วิทยานิพนธ์ปริญญา มหาบัณฑิต บัณฑิตวิทยาลัย จุฬาลงกรณ์มหาวิทยาลัย, 2542.

## ภาษาอังกฤษ

Bankruptcy Chapter 11- Reorganization of Personal or Business Debts.(online).

Available from : <http://filing-bankruptcyform.com/bankruptcy/chapter-11.htm>.

[2001, Sep 4].

Bufford, Samuel L. “United States Reorganization Law.” ดูลพาน ปีที่ 43 เล่มที่ 2 (เมษายน-มิถุนายน 2539) : 22 – 37.

Chobot, John C. Some bankruptcy stay metes and bounds. Commercial Law Journal. (Online). 2000. Available from : [www.car.chula.ac.th](http://www.car.chula.ac.th) ABI/Inform.

Kelakos, George M. and Others. A Successful Reorganization – A case study. Paper presented at the conference on Joint Bankruptcy and Business Reorganization Educational Program, Bangkok, Thailand, 1-11 November 1999. (Mimeographed)

Lifland, Burton R. "Overview of the United States Bankruptcy Law." ดูเฉพาะ ปีที่ 43 เล่มที่ 2 (เมษายน-มิถุนายน 2539) : 5 – 21.

Mixon, James G. Case studies in bankruptcy: Ten lessons for lenders. Commercial Lending Review. 1993. Available from : [www.car.chula.ac.th](http://www.car.chula.ac.th) ABI/Inform.

Rajak Harry, Rajini Shashi Davies Iwan and Others. Insolvency law theory and practice. (London : Sweet and Maxwell Limited, 1993)

Tatellbaum, Charles M. The automatic stay in bankruptcy: How long is it effective? Business Credit. (Online). 2000. Available from : [www.car.chula.ac.th](http://www.car.chula.ac.th) ABI/Inform.

What is Bankruptcy? .(online). Available from : [http://www.mauilaw.com/article\\_1.htm](http://www.mauilaw.com/article_1.htm) [2001, Sep 3].

Wicdham, Dennis J. Automatic Stay Litigation. (online). Available from : [http://www.scmv.com/Resources/publication\\_detail.asp?articleid=23](http://www.scmv.com/Resources/publication_detail.asp?articleid=23). [2001, Sep 4].

ภาคผนวก

## 11 U.S.C. Bankruptcy Code

## Chapter 3 Case Administration

## Subchapter IV. Administration Powers

## Section 361. Adequate protection

When adequate protection is required under section 362, 363, or 364 of this title of an interest of an entity in property, such adequate protection may be provided by-

(1) requiring the trustee to make a cash payment or periodic cash payments to such entity, to the extent that the stay under section 362 of this title, use, sale, or lease under section 363 of this title, or any grant of a lien under section 364 of this title results in a decrease in the value of such entity's interest in such property;

(2) providing to such entity an additional or replacement lien to the extent that such stay, use, sale, lease, or grant results in a decrease in the value of such entity's interest in such property; or

(3) granting such other relief, other than entitling such entity to compensation allowable under section 503(b)(1) of this title as an administrative expense, as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property.

## Section 362. Automatic stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of -

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement

of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay -

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

(2) under subsection (a) of this section -

(A) of the commencement or continuation of an action or proceeding for -

(i) the establishment of paternity; or

(ii) the establishment or modification of an order for alimony, maintenance, or support; or

(B) of the collection of alimony, maintenance, or support from property that is not property of the estate;



(3) under subsection (a) of this section, of any act to perfect, or to maintain or continue the perfection of, an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title;

(4) under paragraph (1), (2), (3), or (6) of subsection (a) of this section, of the commencement or continuation of an action or proceeding by a governmental unit or any organization exercising authority under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, opened for signature on January 13, 1993, to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power;

((5) Repealed. Pub. L. 105-277, div. I, title VI, Sec. 603(1), Oct. 21, 1998, 112 Stat. 2681-866;)

(6) under subsection (a) of this section, of the setoff by a commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency of any mutual debt and claim under or in connection with commodity contracts, as defined in section 761 of this title, forward contracts, or securities contracts, as defined in section 741 of this title, that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, arising out of commodity contracts, forward contracts, or securities contracts against cash, securities, or other property held by or due from such commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency to margin, guarantee, secure, or settle commodity contracts, forward contracts, or securities contracts;

(7) under subsection (a) of this section, of the setoff by a repo participant, of any mutual debt and claim under or in connection with repurchase agreements that constitutes the setoff of a claim against the debtor for a margin

payment, as defined in section 741 or 761 of this title, or settlement payment, as defined in section 741 of this title, arising out of repurchase agreements against cash, securities, or other property held by or due from such repo participant to margin, guarantee, secure or settle repurchase agreements;

(8) under subsection (a) of this section, of the commencement of any action by the Secretary of Housing and Urban Development to foreclose a mortgage or deed of trust in any case in which the mortgage or deed of trust held by the Secretary is insured or was formerly insured under the National Housing Act and covers property, or combinations of property, consisting of five or more living units;

(9) under subsection (a), of -

(A) an audit by a governmental unit to determine tax liability;

(B) the issuance to the debtor by a governmental unit of a notice of tax deficiency;

(C) a demand for tax returns; or

(D) the making of an assessment for any tax and issuance of a notice and demand for payment of such an assessment (but any tax lien that would otherwise attach to property of the estate by reason of such an assessment shall not take effect unless such tax is a debt of the debtor that will not be discharged in the case and such property or its proceeds are transferred out of the estate to, or otherwise revested in, the debtor).

(10) under subsection (a) of this section, of any act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case under this title to obtain possession of such property;

(11) under subsection (a) of this section, of the presentment of a negotiable instrument and the giving of notice of and protesting dishonor of such an instrument;

(12) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization

pursuant to chapter 11 of this title and which was brought by the Secretary of Transportation under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage, or a security interest in or relating to a vessel or vessel under construction, held by the Secretary of Transportation under section 207 or title XI of the Merchant Marine Act, 1936, or under applicable State law;

(13) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Commerce under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage in a vessel or a mortgage, deed of trust, or other security interest in a fishing facility held by the Secretary of Commerce under section 207 or title XI of the Merchant Marine Act, 1936;

(14) under subsection (a) of this section, of any action by an accrediting agency regarding the accreditation status of the debtor as an educational institution;

(15) under subsection (a) of this section, of any action by a State licensing body regarding the licensure of the debtor as an educational institution;

(16) under subsection (a) of this section, of any action by a guaranty agency, as defined in section 435(j) of the Higher Education Act of 1965 or the Secretary of Education regarding the eligibility of the debtor to participate in programs authorized under such Act;

(17) under subsection (a) of this section, of the setoff by a swap participant, of any mutual debt and claim under or in connection with any swap agreement that constitutes the setoff of a claim against the debtor for any payment due from the debtor under or in connection with any swap agreement against any payment due to the debtor from the swap participant under or in connection with any swap agreement or against cash, securities, or other property of the debtor held by or due from such swap participant to guarantee, secure or settle any swap agreement; or

(18) under subsection (a) of the creation or perfection of a statutory lien for an ad valorem property tax imposed by the District of Columbia, or a political subdivision of a State, if such tax comes due after the filing of the petition. The provisions

of paragraphs (12) and (13) of this subsection shall apply with respect to any such petition filed on or before December 31, 1989.

(c) Except as provided in subsections (d), (e), and (f) of this section -

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate; and

(2) the stay of any other act under subsection (a) of this section continues until the earliest of -

(A) the time the case is closed;

(B) the time the case is dismissed; or

(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied.

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay -

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

(2) with respect to a stay of an act against property under subsection (a) of this section, if -

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization;

or

(3) with respect to a stay of an act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date as the court may determine for cause by order entered within that 90-day period) -

(A) the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or

(B) the debtor has commenced monthly payments to each creditor whose claim is secured by such real estate (other than a claim secured by a

judgment lien or by an unmatured statutory lien), which payments are in an amount equal to interest at a current fair market rate on the value of the creditor's interest in the real estate.

(e) Thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection (d) of this section. A hearing under this subsection may be a preliminary hearing, or may be consolidated with the final hearing under subsection (d) of this section. The court shall order such stay continued in effect pending the conclusion of the final hearing under subsection (d) of this section if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the conclusion of such final hearing. If the hearing under this subsection is a preliminary hearing, then such final hearing shall be concluded not later than thirty days after the conclusion of such preliminary hearing, unless the 30-day period is extended with the consent of the parties in interest or for a specific time which the court finds is required by compelling circumstances.

(f) Upon request of a party in interest, the court, with or without a hearing, shall grant such relief from the stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under subsection (d) or (e) of this section.

(g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section -

(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues.

(h) An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

### Section 363. Use, sale, or lease of property

(a) In this section, "cash collateral" means cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offspring, rents, or profits of property and the fees, charges, accounts or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties subject to a security interest as provided in section 552(b) of this title, whether existing before or after the commencement of a case under this title.

(b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.

(2) If notification is required under subsection (a) of section 7A of the Clayton Act in the case of a transaction under this subsection, then -

(A) notwithstanding subsection (a) of such section, the notification required by such subsection to be given by the debtor shall be given by the trustee; and

(B) notwithstanding subsection (b) of such section, the required waiting period shall end on the 15th day after the date of the receipt, by the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, of the notification required under such subsection (a), unless such waiting period is extended -

(i) pursuant to subsection (e)(2) of such section, in the same manner as such subsection (e)(2) applies to a cash tender offer;

(ii) pursuant to subsection (g)(2) of such section; or

(iii) by the court after notice and a hearing.

(c)(1) If the business of the debtor is authorized to be operated under section 721, 1108, 1203, 1204, or 1304 of this title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

(2) The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless -

(A) each entity that has an interest in such cash collateral consents; or

(B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.

(3) Any hearing under paragraph (2)(B) of this subsection may be a preliminary hearing or may be consolidated with a hearing under subsection (e) of this section, but shall be scheduled in accordance with the needs of the debtor. If the hearing under paragraph (2)(B) of this subsection is a preliminary hearing, the court may authorize such use, sale, or lease only if there is a reasonable likelihood that the trustee will prevail at the final hearing under subsection (e) of this section. The court shall act promptly on any request for authorization under paragraph (2)(B) of this subsection.

(4) Except as provided in paragraph (2) of this subsection, the trustee shall segregate and account for any cash collateral in the trustee's possession, custody, or control.

(d) The trustee may use, sell, or lease property under subsection (b) or (c) of this section only to the extent not inconsistent with any relief granted under section 362(c), 362(d), 362(e), or 362(f) of this title.

(e) Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest. This subsection also applies to property that is subject to any unexpired lease of personal property (to the exclusion of such property being subject to an order to grant relief from the stay under section 362).

(f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if -

(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;

(2) such entity consents;

(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

(4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

(g) Notwithstanding subsection (f) of this section, the trustee may sell property under subsection (b) or (c) of this section free and clear of any vested or contingent right in the nature of dower or curtesy.

(h) Notwithstanding subsection (f) of this section, the trustee may sell both the estate's interest, under subsection (b) or (c) of this section, and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if -

(1) partition in kind of such property among the estate and such co-owners is impracticable;

(2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners;

(3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and

(4) such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

(i) Before the consummation of a sale of property to which subsection (g) or (h) of this section applies, or of property of the estate that was community property of the debtor and the debtor's spouse immediately before the commencement of the case, the debtor's spouse, or a co-owner of such property, as the case may be, may purchase such property at the price at which such sale is to be consummated.

(j) After a sale of property to which subsection (g) or (h) of this section applies, the trustee shall distribute to the debtor's spouse or the co-owners of such property, as the case may be, and to the estate, the proceeds of such sale, less the costs and



expenses, not including any compensation of the trustee, of such sale, according to the interests of such spouse or co-owners, and of the estate.

(k) At a sale under subsection (b) of this section of property that is subject to a lien that secures an allowed claim, unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property.

(l) Subject to the provisions of section 365, trustee may use, sell, or lease property under subsection (b) or (c) of this section, or a plan under chapter 11, 12, or 13 of this title may provide for the use, sale, or lease of property, notwithstanding any provision in a contract, a lease, or applicable law that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title concerning the debtor, or on the appointment of or the taking possession by a trustee in a case under this title or a custodian, and that effects, or gives an option to effect, a forfeiture, modification, or termination of the debtor's interest in such property.

(m) The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

(n) The trustee may avoid a sale under this section if the sale price was controlled by an agreement among potential bidders at such sale, or may recover from a party to such agreement any amount by which the value of the property sold exceeds the price at which such sale was consummated, and may recover any costs, attorneys' fees, or expenses incurred in avoiding such sale or recovering such amount. In addition to any recovery under the preceding sentence, the court may grant judgment for punitive damages in favor of the estate and against any such party that entered into such an agreement in willful disregard of this subsection.

(o) In any hearing under this section -

(1) the trustee has the burden of proof on the issue of adequate protection; and

(2) the entity asserting an interest in property has the burden of proof on the issue of the validity, priority, or extent of such interest.

#### Section 364. Obtaining credit

(a) If the trustee is authorized to operate the business of the debtor under section 721, 1108, 1203, 1204, or 1304 of this title, unless the court orders otherwise, the trustee may obtain unsecured credit and incur unsecured debt in the ordinary course of business allowable under section 503(b)(1) of this title as an administrative expense.

(b) The court, after notice and a hearing, may authorize the trustee to obtain unsecured credit or to incur unsecured debt other than under subsection (a) of this section, allowable under section 503(b)(1) of this title as an administrative expense.

(c) If the trustee is unable to obtain unsecured credit allowable under section 503(b)(1) of this title as an administrative expense, the court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt -

(1) with priority over any or all administrative expenses of the kind specified in section 503(b) or 507(b) of this title;

(2) secured by a lien on property of the estate that is not otherwise subject to a lien; or

(3) secured by a junior lien on property of the estate that is subject to a lien.

(d)(1) The court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt secured by a senior or equal lien on property of the estate that is subject to a lien only if -

(A) the trustee is unable to obtain such credit otherwise; and

(B) there is adequate protection of the interest of the holder of the lien on the property of the estate on which such senior or equal lien is proposed to be granted.

(2) In any hearing under this subsection, the trustee has the burden of proof on the issue of adequate protection.

(e) The reversal or modification on appeal of an authorization under this section to obtain credit or incur debt, or of a grant under this section of a priority or a lien, does not affect the validity of any debt so incurred, or any priority or lien so granted, to an entity that extended such credit in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and the incurring of such debt, or the granting of such priority or lien, were stayed pending appeal.

(f) Except with respect to an entity that is an underwriter as defined in section 1145(b) of this title, section 5 of the Securities Act of 1933, the Trust Indenture Act of 1939, and any State or local law requiring registration for offer or sale of a security or registration or licensing of an issuer of, underwriter of, or broker or dealer in, a security does not apply to the offer or sale under this section of a security that is not an equity security.

## Chapter 5 Creditor, The Debtor, and The Estate

### Subchapter I. Creditors and Claims

#### Section 507. Priorities

(a) The following expenses and claims have priority in the following order:

(1) First, administrative expenses allowed under section 503(b) of this title, and any fees and charges assessed against the estate under chapter 123 of title 28.

(2) Second, unsecured claims allowed under section 502(f) of this title.

(3) Third, allowed unsecured claims, but only to the extent of \$4,000 for each individual or corporation, as the case may be, earned within 90 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first, for -

(A) wages, salaries, or commissions, including vacation, severance, and sick leave pay earned by an individual; or

(B) sales commissions earned by an individual or by a corporation with only 1 employee, acting as an independent contractor in the sale of goods or services for the debtor in the ordinary course of the debtor's business if, and

only if, during the 12 months preceding that date, at least 75 percent of the amount that the individual or corporation earned by acting as an independent contractor in the sale of goods or services was earned from the debtor; (FOOTNOTE 1)

(FOOTNOTE 1) So in original. The semicolon probably should be a period.

(4) Fourth, allowed unsecured claims for contributions to an employee benefit plan -

(A) arising from services rendered within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first; but only

(B) for each such plan, to the extent of -

(i) the number of employees covered by each such plan multiplied by \$4,000; less

(ii) the aggregate amount paid to such employees under paragraph (3) of this subsection, plus the aggregate amount paid by the estate on behalf of such employees to any other employee benefit plan.

(5) Fifth, allowed unsecured claims of persons -

(A) engaged in the production or raising of grain, as defined in section 557(b) of this title, against a debtor who owns or operates a grain storage facility, as defined in section 557(b) of this title, for grain or the proceeds of grain, or

(B) engaged as a United States fisherman against a debtor who has acquired fish or fish produce from a fisherman through a sale or conversion, and who is engaged in operating a fish produce storage or processing facility - but only to the extent of \$4,000 for each such individual.

(6) Sixth, allowed unsecured claims of individuals, to the extent of \$1,800 for each such individual, arising from the deposit, before the commencement of the case, of money in connection with the purchase, lease, or rental of property, or the purchase of services, for the personal, family, or household use of such individuals, that were not delivered or provided.

(7) Seventh, allowed claims for debts to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of

record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that such debt -

(A) is assigned to another entity, voluntarily, by operation of law, or otherwise; or

(B) includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance or support.

(8) Eighth, allowed unsecured claims of governmental units, only to the extent that such claims are for -

(A) a tax on or measured by income or gross receipts -

(i) for a taxable year ending on or before the date of the filing of the petition for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition;

(ii) assessed within 240 days, plus any time plus 30 days during which an offer in compromise with respect to such tax that was made within 240 days after such assessment was pending, before the date of the filing of the petition; or

(iii) other than a tax of a kind specified in section 523(a)(1)(B) or 523(a)(1)(C) of this title, not assessed before, but assessable, under applicable law or by agreement, after, the commencement of the case;

(B) a property tax assessed before the commencement of the case and last payable without penalty after one year before the date of the filing of the petition;

(C) a tax required to be collected or withheld and for which the debtor is liable in whatever capacity;

(D) an employment tax on a wage, salary, or commission of a kind specified in paragraph (3) of this subsection earned from the debtor before the date of the filing of the petition, whether or not actually paid before such date, for which a return is last due, under applicable law or under any extension, after three years before the date of the filing of the petition;

(E) an excise tax on -

(i) a transaction occurring before the date of the filing of the petition for which a return, if required, is last due, under applicable law or under any extension, after three years before the date of the filing of the petition; or

(ii) if a return is not required, a transaction occurring during the three years immediately preceding the date of the filing of the petition;

(F) a customs duty arising out of the importation of merchandise -

(i) entered for consumption within one year before the date of the filing of the petition;

(ii) covered by an entry liquidated or reliquidated within one year before the date of the filing of the petition; or

(iii) entered for consumption within four years before the date of the filing of the petition but unliquidated on such date, if the Secretary of the Treasury certifies that failure to liquidate such entry was due to an investigation pending on such date into assessment of antidumping or countervailing duties or fraud, or if information needed for the proper appraisalment or classification of such merchandise was not available to the appropriate customs officer before such date; or

(G) a penalty related to a claim of a kind specified in this paragraph and in compensation for actual pecuniary loss.

(9) Ninth, allowed unsecured claims based upon 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.

(b) If the trustee, under section 362, 363, or 364 of this title, provides adequate protection of the interest of a holder of a claim secured by a lien on property of the debtor and if, notwithstanding such protection, such creditor has a claim allowable under subsection (a)(1) of this section arising from the stay of action against such property under section 362 of this title, from the use, sale, or lease of such property under section 363 of this title, or from the granting of a lien under section 364(d) of this title, then such creditor's claim under such subsection shall have priority over every other claim allowable under such subsection.

(c) For the purpose of subsection (a) of this section, a claim of a governmental unit arising from an erroneous refund or credit of a tax has the same priority as a claim for the tax to which such refund or credit relates.

(d) An entity that is subrogated to the rights of a holder of a claim of a kind specified in subsection (a)(3), (a)(4), (a)(5), (a)(6), (a)(7), (a)(8), or (a)(9) of this section is not subrogated to the right of the holder of such claim to priority under such subsection.

## The Insolvency Act 1986

### Part II. Administration Orders

#### Making etc. of Administration Order

#### Section 8. Power of court to make order

(1) Subject to this section, if the court-

(a) is satisfied that a company is or is likely to become unable to pay its debts (within the meaning given to that expression by section 123 of this Act), and

(b) considers that the making of an order under this section would be likely to achieve one or more of the purposes mentioned below, the court may make an administration order in relation to the company.

(1A) For the purposes of a petition presented by the Bank of England alone or together with any other party an authorised institution or former authorised institution within the meaning of the Banking Act 1987 which defaults in an obligation to pay any sum due and payable in respect of a deposit within the meaning of section 92 of that Act shall be deemed to be unable to pay its debts as mentioned in subsection (1) above

(2) An administration order is an order directing that, during the period for which the order is in force, the affairs, business and property of the company shall be managed by a person (" the administrator ") appointed for the purpose by the court.

(3) The purposes for whose achievement an administration order may be made are-

(a) the survival of the company, and the whole or any part of its undertaking, as a going concern;

(b) the approval of a voluntary arrangement under Part 1;

(c) the sanctioning under section 425 of the Companies Act of compromise and any such persons as are mentioned in that section; and

(d) a more advantageous realisation of the company's assets than would be effected on a winding up; and the order shall specify the purpose or purposes for which it is made.



(4) An administration order shall not be made in relation to a company after it has gone into liquidation, nor where it is-

(a) an insurance company within the meaning of the Insurance Companies Act 1982,

#### Section 9. Application for order

(1) An application to the court for an administration order shall be by petition presented either by the company or the directors, or by the Bank of England or by a creditor or creditors (including any contingent or prospective creditor or creditors), or by the clerk of a magistrates' court in exercise of the power conferred by section 87A of the Magistrates' Courts Act 1980 (enforcement of fines imposed on a companies) or by all or any of these parties, together or separately.

(2) Where a petition is presented to the court-

(a) notice of the petition shall be given forthwith to any person who has appointed, or is or may be entitled to appoint, an administrative receiver of the company to the Bank of England (unless it is a petitioner), and to such other persons as may be prescribed, and

(b) the petition shall not be withdrawn except with the leave of the court.

(3) Where the court is satisfied that there is an administrative receiver of the company, the court shall dismiss the petition unless it is also satisfied either-

(a) that the person by whom or on whose behalf the receiver was appointed has consented to the making of the order, or

(b) that, if an administration order were made, any security by virtue of which the receiver was appointed would-

(i) be void against the administrator to any extent by virtue of the provisions of Part XII of the Companies Act 1985 (registration of company charges),

(ii) be liable to be released or discharged under sections 238 to 240 in part VI (transactions at an undervalue and preferences),

(iii) be avoided under section 245 in that Part (avoidance of floating charges), or

(iv) be challengeable under section 242 (gratuitous alienations) or 243 (unfair preferences) in that Part, or under any rule of law in Scotland.

(4) Subject to subsection (3), on hearing any petition the court may dismiss it, or adjourn the hearing conditionally or unconditionally, or make an interim order that it thinks fit.

(5) Without prejudice to the generality of subsection (4), an interim order under that subsection may restrict the exercise of any powers of the directors of the company (whether by reference to the consent of the court or of a person qualified to act as an insolvency practitioner in relation to the company, or otherwise).

#### Section 10. Effect of application

(1) During the period beginning with the presentation of a petition for an administration order and ending with the making of such an order or the dismissal of the petition-

(a) no resolution may be passed or order made for the winding up of the company;

(b) no steps may be taken to enforce any security over the company's property, or to repossess goods in the company's possession under any hire-purchase agreement, except with the leave of the court and subject to such terms as the court may impose; and

(c) no other proceedings and no execution or other legal process may be commenced or continued, and no distress may be levied, against the company and its property except with the leave of the court and subject to such terms as aforesaid.

(2) Nothing in subsection (1) requires the leave of the court -

(a) for the presentation of a petition for the winding up of the company,

(b) for the appointment of an administrative receiver of the company, or

(c) for the carrying out by such a receiver (whenever appointed) of any of his functions.

(3) Where-

(a) a petition for an administration order is presented at a time when there is an administrative receiver of the company, and

(b) that person by or on whose behalf the receiver was appointed has not consented to the making of the order, the period mentioned in subsection (1) is deemed not to begin unless and until that person so consents.

(4) References in this section and the next hire-purchase agreements include conditional sale agreements, chattel leasing agreements and retention of title agreements.

(5) In the application of this section and the next to Scotland, references to execution being commenced or continued include references to diligence being carried out or continued, and references to distress being levied or omitted.

#### Section 11. Effect of order

(1) On the making of an administrative order-

(a) any petition for the winding up of the company shall be dismissed, and

(b) any administrative receiver of the company shall vacate office.

(2) Where an administration order has been made, any receiver of part of the company's property shall vacate office on being required to do so by the administrator.

(3) During the period for which an administration order is in force-

(a) no resolution may be passed or order made for the winding up of the company;

(b) no administrative receiver of the company may be appointed;

(c) no other steps may be taken to enforce any security over the company's possession under any hire-purchase agreement, except with the consent of the administrator or with leave of the court and the subject (where the court gives leave) to such terms as the courts may impose; and

(d) no other proceedings and no execution or other legal process may be commenced or continued, and no distress may be levied, against the company or its

property except with the consent of the administrator or the leave of the court and subject (where the court gives leave) to terms as aforesaid.

(4) Where at any time an administrative receiver of the company has vacated office under subsection (1)(b), or a receiver or part of the company's property has vacated office under subsection (2)-

(a) his remuneration and any expenses properly incurred by him, and

(b) any indemnity to which he is entitled out of the assets of the company, shall be charged on and (subject to subsection (3) above) paid out of any property of the company which was in his custody or under his control at that time in priority to any security held by the person by or on whose behalf he was appointed.

(5) Neither an administrative receiver who vacates office under subsection (1)(b) nor a receiver who vacates office under subsection (2) is required on or after so vacating office to take any steps for the purpose of complying with any duty imposed on him by section 40 or 59 of this Act (duty to pay preferential creditors.)

## Administrators

### Section 14. General powers

(1) The administrator of a company-

(a) may do all such things as may be necessary for the management of the affairs, business and property of the company, and

(b) without prejudice to the generality of paragraph (a), has the powers specified in Schedule 1 to this Act; and in the application of that Schedule to the administrator of a company the words "he" and "him" refer to the administrator.

(2) The administrator also has the power-

(a) to remove directors of the company and to appoint any person to be director of it, whether to fill a vacancy or otherwise, and

(b) to call any meeting of the members or creditors of the company.

(3) The administrator may apply to the court for directions in relation to any particular matter arising in connection with the carrying out of his functions.

(4) Any power conferred on the company or its officers, whether by this Act or the Companies Act or by the memorandum or articles of association, which could be exercised in such a way as to interfere with the exercise by the administrator of his powers is not exercisable except with the consent of the administrator, which may be given either generally or in relation to particular cases.

(5) In exercising his powers the administrator is deemed to act as the company's agent.

(6) A person dealing with the administrator in good faith and for value is not concerned to inquire whether the administrator is acting within his powers.

#### Section 15. Power to deal with charged property, etc.

(1) The administrator of a company may dispose of or otherwise exercise his powers in relation to any property of the company which is subject to a security to which this subsection applies as if the property were not subject to the security.

(2) Where, on an application by the administrator, the court is satisfied that the disposal (with or without other assets) of-

(a) any property of the company subject to a security to which this subsection applies, or

(b) any goods in the possession of the company under a hire-purchase agreement, would be likely to promote the purpose or one or more of the purposes specified in the administration order, the court may by order authorise the administrator to dispose of the property as if it were not subject to the security or to dispose of the goods as if all rights of the owner under the hire-purchase agreement were vested in the company.

(3) Subsection (1) applies to any security which, as created, was a floating charge; and subsection (2) applies to any other security.

(4) Where property is disposed of under subsection (1), the holder of the security has the same priority in respect of any property of the company directly in respect of any property of the company directly or indirectly representing the property disposed of as he would have had in respect of the property subject to the security.

(5) It shall be a condition of an order under subsection (2) that-

(a) the net proceeds of the disposal, and

(b) where those proceeds are less than such amount as may be determined by the court to be the net amount which would be realised on a sale of the property or goods in the open market by a willing vendor, such sums as may be required to make good the deficiency, shall be applied towards discharging the sums secured by the security or payable under the hire-purchase agreement.

(6) Where a condition imposed in pursuance of subsection (5) relates to two or more securities, that condition requires the net proceeds of the disposal and, where paragraph (b) of that subsection applies, the sums mentioned in that paragraph to be applied towards discharging the sums secured by those securities in the order of their priorities.

(7) An office copy of an order under subsection (2) shall, within 14 days after the making of the order, be sent by the administrator to the registrar of companies.

(8) If the administrator without reasonable excuse fails to comply with subsection (7), he is liable to a fine and, for continued contravention, to a daily default fine.

(9) References in this section to hire-purchase agreements and include conditional sale agreements, chattel leasing agreements and retention of title agreements.

## ประวัติผู้เขียนวิทยานิพนธ์



นางสาวศศิอนงค์ จงกลนี้ เกิดวันที่ 11 กุมภาพันธ์ 2518

นิติศาสตร์บัณฑิต(เกียรตินิยมอันดับสอง) จุฬาลงกรณ์มหาวิทยาลัย ปีการศึกษา 2538

เนติบัณฑิตไทย สมัยที่ 50 ปีการศึกษา 2540 สำนักอบรมศึกษากฎหมายแห่งเนติบัณฑิตยสภา

เข้าศึกษาในหลักสูตรนิติศาสตรมหาบัณฑิต สาขาวิชานิติศาสตร์ แขนงวิชากฎหมายเอกชนและกฎหมายธุรกิจ คณะนิติศาสตร์ จุฬาลงกรณ์มหาวิทยาลัย เมื่อปีการศึกษา 2541

ปัจจุบันรับราชการในตำแหน่งนิติกร 5 (เจ้าพนักงานพิทักษ์ทรัพย์) สำนักฟื้นฟูกิจการของลูกหนี้ ปฏิบัติหน้าที่ในสำนักงานเลขานุการกรม กรมบังคับคดี