SCHEDULE 2

FRANCE

COUNTRY ANALYSIS

Draft – September 2000

France

1. General

1.1 Pledge – General Characteristics

Security interests over securities can be created by pledge:

- in the case of securities held in book-entry form, the pledge is governed by Art. 26 of Law n. 83-1 of 3 January 1983, as amended by Art. 102 of the "1996 Financial Act" regardless of its civil or commercial nature and must follow the procedures established in that law;

- in all other cases, there are two types of pledge, the civil pledge (C.C. 2073 etc) and the commercial pledge (C. Com 91 et seq.). Most of the information displayed here concerns the commercial pledge. There are two circumstances in which this type of pledge would need to be used: where securities take form of promissory notes or other instruments negotiable by delivery and where the securities are shares in civil companies.

A distinction should be made between a pledge over shares ("Declaration de gage"), for shares in most types of companies, and a pledge over account for shares in a Societe Anonyme. Shares in certain French Companies (SARL, SNC, GIE and Societe Civile) are not freely transferable and negotiable. A pledge may be taken over them, but enforcement will be very complex. Rights to dividends are automatically pledged and the pledgee is entitled to dividends on default. For other types of shares there is the pledge over account into which financial instruments are credited.

1.2 Transfer of Title – General Characteristics

Notwithstanding the prohibition by Art. 2078 of the Civil Code, of any agreement providing for the automatic transfer of title of the pledged assets to the pledgee upon the occurrence of a default *("pacte commissoire")*, several statutory provisions in the French Law recognise the validity of the transfer of title for security purposes:

- Transfer of title for operating credit granted to undertakings ("Daily bordereau"):

  Act 81-1 of 2 January 1981 ("Daily Act") states that any credit granted by a credit institution to a legal person governed by private or public law, or to a natural person carrying on his business activity, may simply by the delivery of a formal document give rise to an assignment in favour of that institution.

- Transfer of title regarding collateral in regulated markets:

  Art. 49 of the 1996 Financial Act provides that all ownership rights relative to deposits by principals with investment service providers, members of a clearing house, or by such members with a clearing house as margin or collateral for positions taken on a regulated market for financial instruments, give rise to a transfer of title when made to them for payment of any debit balance in the event of an automatic closing of positions and of any other sum due to them.

- Transfer of title by way of security for collateral to transactions in financial instruments:

Art. 52 of the 1996 Financial Act states that parties to a national or international master agreement, organising relations between two parties may provide for transfers conferring full ownership rights by way of security and binding on third parties without formality. This transfer may be in respect of assets, securities, instruments or sums of money in order to cover changes in the value of such transactions. Insolvency laws shall not prevent the application of such a transfer of title.

(Art. 12 of the Act 93-1444 of 31 December 1993 contains similar provision for repos and Art. 31 of Act 87-416 of 17 June 1987 for securities lending).

- Art. 52 (4) creates this new method of collateralisation, permitting the setting off of reciprocal debts, relating to collateral. In order to benefit from this favourable regime, the transactions need to meet some conditions as to nature of the transactions (Art. 1, 1996 Act),(spot transactions not relating to financial instruments if intra-day or settled shortly after their conclusion are not covered), their documentation (transactions governed by a master agreement, complying with the general principles of a domestic or international market master agreement) and the status of the parties (an entity listed in Art. 25 or a non-resident institution having a comparable status). If the conditions are met, then termination of outstanding contracts and close-out netting in insolvency will be allowed, notwithstanding the provisions of Arts. 37 and 56 of the Law on Insolvency of 25 January 1985.

- The new regime is not limited to agreements governed by French Law; so in dealing with foreign investment securities, the regime will apply e.g., to a transfer of title governed by English law.

- Any transfer which does not comply with the conditions applicable to the relevant regime would be recharacterised as an invalid sale or invalid pledge. To avoid any recharacterisation of the collateral it is advisable to refer to the parties' intention to create a transfer of title by way of security.

- Transfer of title by way of security regarding payment and securities settlement systems:

  French law has implemented Art. 9 of the Directive 98/26/EC of 19 May 1998 on settlement finality and Art. 93-2 *of the Banking Act* states that when they organise dealings between more than two parties, the regulations, master agreements or standardised agreements governing any interbank settlement system or financial instrument settlement and delivery system may require direct or indirect participants in such systems to transfer assets, securities, bills, claims or sums of money or to constitute security using the said assets, securities, bills, claims or sums of money, in order to meet the payment obligations stemming from participation in such a system. The above-mentioned transfers shall confer full property rights as security and shall be effective vis-à-vis third parties without formalities. Again Insolvency laws shall not prevent the application of the transfer of title.

1.3 Considerations relevant to collateral arrangements

Pledge

- There is nothing in French law which may prevent the parties from securing fluctuating liabilities, provided that they are determinable in accordance with Art. 1129 of the Civil Code. However, as regards perfection, it is (save in the case of the pledge over securities account) necessary to specify the assets pledged, which in effect renders it almost impossible to take a pledge over a fluctuating pool of assets.

- Pledge over future obligations will be valid under French Law, so long as the means to be used for the later determination of the secured obligations are, as of the date of perfection of the collateral arrangement, provided in the relevant documentation.

- The general rule is that no security interest in future collateral may be perfected, because perfection requirements need to comply with specific items of collateral. However, the pledge over securities account is again the exception as results of creating a security interest in respect of the account where the securities are held; so new securities transferred or deposited in the pledged account will automatically be covered by the security interest for the secured party's with no need to perform any further formality.

- Duty of care: The secured party has responsibility for loss or deterioration, except with the pledge over securities account, where the duty of care is on the main custodian.

- There is no legal stamp duty on the pledge over securities account, which can be validly created and perfected without payment of any tax; the declaration of a securities account pledge may be registered with the tax authorities subject to stamp duty, but only at initiative of the parties to acquire certainty regarding its date.

- Substitution of assets implies the release of the security interest in respect of the assets returned to the pledgor and the subsequent perfection of a new security interest. However with the pledge over securities account transfers to or from the accounts may not require release of the pledge, so substitution has no effect, although in bankruptcy there may be adverse consequences (see below). Also if the substitution took place during the suspect period, the Art.52 (4), will not lead to a successful transfer of title by way of security.

- Nothing in French law prevents overcollateralisation except in the case of insolvency proceedings, where Art. 107 of the Insolvency law provides for an automatic annulment of unbalanced bilateral agreements, for instance when the insolvent party notably exceed the obligations of the other party involved.

- Once the pledgor has surrendered possession of the pledged assets to its secured creditor , there is no possibility to claim repossession of the pledged asset until full payment of the secured obligation. This right of retention is a very important protection for the secured creditor, but gives rise to certain legal difficulties relating to book-entry or other immaterial assets which cannot be

physically possessed and where the person actually possessing the pledged assets or the custodian is not the secured party. In such cases, retention by the creditor appears difficult. Art. 29 provides that the secured party under a pledge over securities account has the right of retention in all circumstances even when it is not the custodian of the account where the collateral is held.

- No contract may be terminated by a contracting party on the sole ground that insolvency proceedings are pending against the debtor (arts. 37 to 56 the Insolvency Act); the case law gives interpretation to this provision: any contractual provision enabling one party to terminate the contract because the other party ceases its payments to its creditors has been held unenforceable (even in the absence of bankruptcy at the time of termination).

- With a pledge, there is no sale, use or disposal of the pledged assets. The pledgor would generally be required to surrender legal possession of the relevant collateral to the secured party or a third party custodian. The pledged assets will remain the pledgor's property, so the pledgee cannot use, sell or dispose of the security investments (object of criminal offence).

- Art. 2078 of the French Civil Code prohibits any agreement purporting to automatically transfer title to the pledged assets to the pledgee in the event of default.

- A filing of a declaration of claims in insolvency should be made by secured and unsecured creditors. Otherwise they will be deemed not to have any rights against the insolvent party; so any security interest provided by the insolvent party to secure its rights will be unenforceable under French law. Further, although Art. 29 of the 1983 provides for retention right for the secured party of a pledge over securities account, this filing of a preliminary claim applies and constitutes condition to the exercise of the right of retention.

- The perfection regime applicable to civil pledges requires stamping (the cost of registering with French Tax authorities is ~EUR 76 plus EUR 6 per recto verso page) while no such formality is required for commercial pledges. Registration with the French Tax authorities must be in French.

Transfer of Title

- Transfer of title effected pursuant to Paragraph 4 of article 52 of the 1996 Financial Act are considered to be effective "without formalities", so each transfer will be effective, provided it has been created in compliance with the conditions set forth by Art. 52 which are neither proceeds, consents, nor government/regulatory approvals.

- Provisions allowing the transferor to substitute or exchange collateral would not affect the effectiveness of the transfer with regard to French law. Substitution in "suspect period" would not create additional risks and would be valid notwithstanding any provision of the Insolvency Act, specially paragraph 6 of the Article 107.

- As regards over collateralisation Art. 52 states that the transfer of title should only reflect a change in value of the outstanding transaction, the overcollateralisation

(substitution of greater value than the replaced assets) will not in itself prevent the parties from benefiting from the favourable regime of Art. 52 of the 1996 Financial Act. However, there is a technical possibility that if excessive, overcollateralisation may be analysed by a French court as resulting in credit support not reflecting the change in value of the outstanding transaction. This excess of the transferred collateral would not benefit from the regime of Art. 52 of the 1996 Financial Act. There is no case law regarding this point so it is difficult to establish what amounts correspond to an exaggerated overcollateralisation.

- The tax regime provided for in Art. 53 of the 1996 Financial Act refers to the tax regime applicable to French securities lending transactions set forth in the 1987 Act which provides tax neutrality for these types of transactions under the following conditions:

  - the transactions must relate to: securities which are listed in a regulated stock exchange (whether French or not) or negotiable debt instruments traded on a regulated market, which may not be listed;

  - the relevant financial instruments should not give rise, during the term of transaction to: payments of dividends or interest which will be subject to the withholding tax provided by articles 119 bis or 1678 of the French General Tax Code; or the tax credit provided for by the Article 220-1-b of the General Tax Code;

  - the transaction should not last longer than a year.

2. Private International Law and Domestic Law Aspects of Collateral

Validity of the Contract/Attachment:

French private international law:

- As regards the constitution of rights on securities it is the *lex contractus* which provides the regulations that determine the nature of the securities rights, subsequently conferred by the debtor to his creditor.

- French Law permits the parties involved to a contract to freely elect the law which will govern their agreement, so long as the agreement is an international contract and such choice is not made with the intention of avoiding application of any mandatory provisions of French Law which would have been applied to the agreement.

- When the agreement is not an international contract (e.g. both parties are French entities and the collateral would only be located in France), the governing law must be French law.

French domestic law:

- The validity of the pledge agreement requires both the pledgor and the pledgee to have the capacity to contract; the pledgor needs to have the

ownership of the securities to be pledged; the existence of a valid debt to be guaranteed and a transferable property state.

- In general, for the creation of a pledge a written agreement is necessary which shall be notified to the debtor by a bailiff or be signed by the debtor before a public notary.

  In addition a pledge implies the dispossession of the items to be pledged and their transfer to either the pledgee or a third party acting on behalf of the pledgee (the term "transfer" is not related to a transfer of ownership, it's rather a "physical transfer").

- With the Law of July 2, 1996, and its provision amending the pledge of securities and creating the new pledge over securities accounts, new technical aspects of the creation of the security interest need to be considered; so it is no longer necessary to undertake the previous formalities of delivery of a declaration of pledge to the account holder; the transfer of the pledged securities to a special account and the issue of an affidavit of pledge by the account holder. The main cornerstone of the new regulation is the delivery of the declaration of pledge to the account holder. The issue of the document is the formality which renders the security interest enforceable in respect of the parties and third parties.

  The format of the declaration of pledge is set out in Art. 1 of the Decree, which includes: the value of the secured obligations or, failing such, any information allowing such valuation; a description and number of financial instruments registered in the pledged account at the date of the issue of the declaration of pledge and the elements which allowed the pledge account to be identified.

  The nature of the declaration of pledge has been changed, in the sense that the collateral is no longer constituted by the financial instruments held in the account, but by the account itself. The transfer of financial instruments must take place on or before the date of issue of the declaration of pledge. In such case it is advisable for the pledgee to ask the account holder to issue a representation and warranty as to the effective registration of the financial instruments in the pledged account.

- It should also be noted that a pledge created during the "suspect period" (as such period may be determined by the judge when insolvency proceedings begin against the pledgor) would be declared invalid (see below).

Perfection:

French private international law:

- The law of the jurisdiction of location of the assets *(lex rei sitae*) governs the aspects regarding perfection; for instance the definition of the rights that may exist over a particular investment security depends on the classification of the asset and rights in rem in respect of such assets which exist in the legal system of the jurisdiction of location of the assets. The case law also

supports for the law of the location of the collateral as the governing this aspect of security interest in collateral located in France. French law will not apply to a security interest in foreign collateral, but it will apply to collateral located in France.

French domestic law:

- Since November 3, 1984, all securities issued on French territory and subject to French Law, whatever the form, registered or bearer, may no longer be materially represented by printed means. The securities must be registered in an account. The Law n. 81-1160 of 1981 regarding dematerialisation provided that all securities issued in France and governed by French Law, whether bearer or registered, whether issued by public or private companies or governmental entities must be represented by book-entries in securities accounts.

- Perfection of civil pledges*:* when the subject of the pledge is a tangible asset, the perfection of the security interest is realised by a notarisation or a registration and stamping of the security.

- Perfection of commercial pledges: (i.e. when the pledgor is a merchant or an individual pledgor acting for trade business purpose) the perfection of the security interest for tangible or intangible assets pledged require no notarisation process, registration or stamping (Art. 91 of the Commercial Code).

- Perfection of a pledge over securities account is carried out by the filing of the "Declaration" document, the form of which is set out in implementing decree No. 97-509, 21st of May, 1997. This states what is needed: the title "Declaration de gage de compte d'instruments financiers"; a reference to Art. 29; the name and address of the pledgor and pledgee; the amount and its identification details of the secured liability; identification details of the pledge account, where it is located and the nature and number of financial instrument initially held in the pledge account. No registration or notarisation of the Declaration is required, being signed by the holder and notified to the account holder of the securities being pledged; finally the pledgee receives a pledge certificate evidencing the pledge. Technically the pledge is perfected as of the date of execution of the Declaration. It is common practice (but not a legal requirement) to have the Declaration registered with the local tax authority because the stamp affixed by the tax authority contains the date of registration and provides certainty as to that date.

- Pursuant to Art. 57 of the Insolvency Act, regarding security interests whose effectiveness vis–a-vis third parties is subject to publicity or registration, no such formality may be effected after the date of the initial judgement. For the pledge over securities account, because the pledge is perfected as of the date of execution of the declaration, registration of the declaration is not necessary to perfect the security interest vis –a –vis third parties; so the registration can be effected after the date of an initial judgement.

Priorities:

French private international law:

- All priority aspects will be governed by *lex rei sitae*.

French domestic law:

- The Insolvency Act, establishes a hierarchy in the priorities between "super senior" creditors to all other creditors: which are :
  - employees who enjoy a so –called "super privilege" which has priority over all other privileges;
  - creditors with legal privilege on the basis that their claims arose during the Observation period (see Insolvency part, below);
  - The Treasury or the social security administration as regards their respective claims.

  Under certain circumstances, secured creditors enjoy a retention right which allows them to defeat the priorities; in this case the retention right will prevent the sale of a pledged asset by another creditor even if such creditor enjoys one of the above privileges or even if the creditor has retained title to the pledged asset pursuant to a retention of title contractual provision.

- During the Observation period and despite the strict prohibition imposed upon the Administrator by Art. 33 of the IA to pay antecedent debt, the Administrator or the insolvent party, may be allowed by the court to pay an antecedent debt to obtain the release of a pledge over assets which may be required for the continuation of the insolvent party's business. This payment is the only exception to the priorities laid down by the Insolvency Act in favour of the Treasury or Art. 40 creditors.

Enforcement:

French private international law:

- The effect of a bankruptcy on the enforceability of the substitution of collateral held outside France will depend on the treatment of such substitution by the *lex rei sitae*. If the *lex rei sitae* requires the perfection of a new security interest over the substituted assets upon each substitution, there is the risk that the new security interest would be deemed by a French Court to have been perfected during the suspect period; as to the date of this perfection , the French Court will refer to the law of the jurisdiction where the relevant assets are located. The French Court would then consider whether that date falls within the suspect period and if so, could declare void and null the security interest perfected at that time.

French domestic law:

- For civil pledges:

Under Art. 2078 of the French Civil Code, the pledgee may, in the case of a default of the pledgor in the payment of the secured obligation, apply to a court in order to:

- obtain title to the pledged assets as partial or full payment for the secure obligation, after appraisal of the assets has been made by an expert; or

- authorise the pledgee to set off his claim with the value of the pledged assets (done by experts); or

- request that the pledged assets be sold in a public auction.

- For commercial pledges:

  If the security interest is granted by an entity incorporated as a Commercial Company or person carrying a commercial activity, including a Bank, the secured Party will benefit, in enforcing its rights, from the favourable regime of the French Commercial Code. Under Art. 93 of the French Commercial Code, the Secured Party may after eight days following a formal notification addressed to the pledgor and the custodian, directly procure the sale by public auction of the pledged securities without being required to first obtain a court decision to approve such sale.

- For pledge over securities account Art. 29 of the 3 January 1983 Act simplifies the realisation process of a securities account pledge, when the pledged securities are traded on a regulated market; for securities outside the regulated market, the pledgee must follow the usual realisation process (court decision). So when pledged securities are:

  - traded in a regulated market: the pledgee may enforce its rights without a court decision, when its claim against the pledgor is certain in its principle, determined in its amount and due and payable. The pledgee must notify to the pledgor and order to pay, by a letter delivered in person or by registered mail. After the notification, after expiry of a waiting period of 8 days (unless otherwise agreed), the pledgee is allowed to sell the securities or appropriate an adequate amount of such securities to cover the secured liability with the last available closing price for securities on the relevant regulated market.

  - not traded in a regulated market : usual realisation process: sell the pledged assets after expiry of eight days following the filing of a formal document to the pledgee; demand a court authorisation to obtain ownership of the pledged assets; set off the mutual claims if the legal conditions are fulfilled.

- Art. 29 contained no provision as to the action to be taken in the event of non-performance of the secured obligations by the pledgor. The new regime of the Decree of May 1997 states the following in the Arts. 2 and 3:

  - the realisation needs the sending of a notice to the debtor, being void where it does not indicate that in the absence of payment the pledge can be enforced by the creditor within eight days or at the expiration of any other deadline previously agreed with the pledgor; and the pledgor may inform the account holder of the

order in which the sums of money or securities are to be fully assigned or sold, as the creditor so chooses.

- the realisation of the pledge shall occur within the limits of the secured obligation and where appropriate, regarding the order indicated by the pledgor:

  - for all sums of money figuring in the pledged account, by direct transfer of ownership title to the pledgee;

  - for both French and non-French securities traded in regulated markets or by allotment of the quantity determined by the pledgee (the quantity is determined by the pledgee on the basis of the last closing price available on a regulated market); and

  - for shares in collective investment undertakings, which the pledgor or, failing it, the pledgee has designated, by presentation for buy-back or by allotment of the quantity determined by the pledgee (quantity is to be determined by the pledgee on the basis of the last valuation available for the said shares).

- Where the pledgee is not the account holder and when it considers the conditions of realisation of the pledge to be fulfilled, it must in writing, request the account holder to proceed with the realisation under the conditions set out above. The account holder shall execute the instructions received, all charges to be met by the pledgee.

  The pledgor shall bear the cost of all charges resulting from the realisation of the pledge. Such charges shall be deducted from the amount resulting from this realisation.

Enforcement Remedies

- General regime of pledge: as already mentioned above the pledgee benefits from the "retention right": once the pledgor has surrendered possession of the pledged assets to the pledgee, there is no possibility to claim repossession of the pledged assets until full payment of the secured obligation. This pledgee's benefit only applies when the pledged assets are material and assimilated to material (e.g. all the registered securities in book-entry accounts; they are excluded ordinary claims and limited liability company shares).

  When the pledgor is subject to insolvency proceedings in the case of:

  (a) Judicial administration*:* the pledgor must file his claim to the administrator and may not take any initiative in order to realise the pledge until the end of the "observation period". If the administrator demands a release of pledge with a retention right, the pledgee may oppose his retention right and obtain judicial authorisation for payment of his claim prior to any other creditor.

  After the "observation period", if the administrator decides a continuation of activity such as a reorganisation plan for the pledgor, the pledgee may not realise the pledge and is held by the terms of the continuation. If the administrator decides a sale of the pledgor's assets, when the sale comprises the pledged asset, the pledgee must oppose his retention right in order to be paid prior to any

other creditor, even privileged. A pledgee without retention right is paid only after the judicial and tax fees, and the so-called "super-privilege" of the employees (see above priority section). If the sale does not comprise the pledged asset, the pledgee has the same rights as in case of liquidation.

(b) In the case of liquidation: the pledgee may realise the pledge after a three months period following the court decision declaring the liquidation. Two types of situations may occur:

(i) the administrator has sold the pledged asset during the three months period: a pledgee with a retention right may oppose his right and be paid prior to any creditor, even privileged. A pledgee without retention right is paid only after the payment of judicial and tax fees, the "super-privilege" of the employees and the privileged claims under Art. 40 of the Insolvency Act (privileged claims contracted after the opening of insolvency proceedings).

(ii) the administrator has not sold the pledged asset during that period: a pledgee with or without the retention right may, as soon as his claim is filed within the liquidation proceedings, demand a court authorisation to obtain the ownership of the pledged assets. He will have priority over all creditors, even privileged.

For pledge over securities account, the pledgee has a retention right over securities and cash located on the pledged account, and the general regime of pledges applies to him. However if the pledgor complies with the conditions exposed above, he may obtain the ownership of the pledged assets or sell them on a regulated market, whether the pledgor is subject or not to insolvency proceedings.

Insolvency:

French private international law:

- In principle French Law applies throughout French territory. Art. 242, of the French Insolvency Law n.85-98, 1985, states that this Law with the exception of articles 130 to 136 is applicable in the French overseas territories and the administrative domain of Mayotte; since no other territories are specified, the law does not apply elsewhere, not having authority on securities held outside the French territory even when the securities belong to a person who is subject to insolvency proceedings in France.

- The approach of French courts is "universal" or but there is an exceptional "territorial" approach.

  Under the general regime, French courts have full jurisdiction to wind up a company when its registered head office is located in France (the location of the head office being determined under French Law); in such situation, French law has a universal approach (i.e. insolvency proceedings encompass all assets of the debtor, even those located abroad). This approach may be limited by laws of the country in which these assets are located. It will also be necessary to obtain an "exequatur" decision in order to enforce the French bankruptcy proceedings in the foreign country.

Furthermore, foreign bankruptcy proceedings can have legal effect in France, when a French court delivers an “exequatur” decision.

Nevertheless, French courts have had a “territorial” approach when secondary branch office of the insolvent debtor is located in France, with opening of an insolvency proceeding except when a foreign insolvency proceeding decision has already received an “exequatur” decision in France. This solution has been recently confirmed by a BCCI related court decision of the Cour de Cassation (Commercial Chamber) dated 11 April 1999.

French domestic law:

- The 1984 Law contains the main provisions of French Law as to voluntary arrangements which aim to solve the financial difficulties between the debtor and its main creditors (French tax authorities, social security administrators, main suppliers and banks) by setting up an agreement negotiated under the control of a conciliator, in order to attack the bankruptcy. If a voluntary arrangement is sought in respect of the debtor, the competent court may temporarily stay individual proceedings against him for a period not exceeding the term of office of the Conciliator, where any enforcement proceedings initiated by a creditor and any individual judicial proceeding initiated by a creditor whose claim originated before the Court’s judgement ordering the stay, will be forbidden.

- The Insolvency Act provides a good protection for the secured creditors’ rights: the insolvency proceedings would be initiated whenever the debtor cannot meet its debts, so an “Initial Judgement” will be rendered by the competent Court, determining the date as of which the debtor is deemed to have ceased its payments (“Date of Stoppage of Payments”) which may be also set on the same date of the ”Initial Judgement” or may be deemed to have take place eighteen months before the date of such judgement. Any period between them will be called “Suspect Period”. The “Initial Judgement” appoints an “Administrator” and “The Creditors’ Representative”, and initiates an “Observation Period”, during which the business of the debtor is continued and certain steps are taken for its recovery and the debtor is managed by, or under the supervision of, the Administrator. If there is no possibility of recovery, the court at any time will appoint a liquidator and proceed with the judicial liquidation of the debtor (which can also be decided by the competent court in the initial Judgement).

- Arts. 37 and 56 of the Insolvency Act confirm that no contract may be terminated by a contracting party on grounds that Insolvency Proceedings are pending against the debtor.

- Art. 47 of the Act states that “individual” proceedings against the debtor are suspended or prohibited as from the “Initial Judgement” date. Regarding proceedings initiated before that date, the Insolvency Act provides for the suspension of the pending claim and its filing; once the filing is effected, such proceedings are resumed for the sole purpose of establishing the reality of the claim of the creditor against the debtor. The application of these provisions is mandatory independently of any contractual provision to the

contrary. The freeze in the proceedings also affects enforcement proceedings with respect to real or personal property of the debtor. Individual creditors will recover their right to obtain enforcement of their claim individually only after a liquidation judgement has rendered against the debtor.

- Art. 107 of the IA: refers to mandatory voidance and states that collateral is not valid if it has been taken by the creditor, on the assets of the debtor in the suspect period, to secure debts relating to agreements signed before the date of the guarantee.

- Art. 108 of the IA refers to optional voidance and states that any payment or action for valuable consideration, taken during the Suspect Period by the insolvent party may be cancelled by the court if the party dealing with the insolvent party knew that the latter was already insolvent; this annulment is not automatic and the court has discretion to take into consideration all circumstances of the case.

- Art. 52 of the 1996 Financial Act: provides that the above Art. 107 and 108 of the IA do not apply to the fiduciary transfer of title in order to create a security.

- The "zero hour rule" exist in France leading to an action for avoidance transactions concluded the day of the order of the court.

- Art. 57 of the IA*:* states that no mortgage or pledge can be registered after the decision of the court admitting the petition filing for bankruptcy.

- Art. 30 of the January 1983 Act: provides that in case of *insolvency of the custodian*, the administrator must check if the quantity of detained securities is enough to fulfil custodian's engagements towards the owners of the securities registered in the book- entry accounts of the latter. If not , the securities will be distributed proportionally among the owners.

3. Miscellaneous

3.1 Cross-border transactions in multi-tiered holding systems

France is one of the fully modern jurisdictions which combines both traditional categories of rights with a new category of property rights in order to bring its legal regime into line with the commercial changes resulting from the modern indirect holding systems of multi-tiered international securities. In France the location of the pledgor's intermediary will be relevant when the *lex rei sitae* applies to modern categories of property rights. As a result of the 1996 law any security interest created would be on the securities account maintained with a French securities intermediary, and not on the individual securities credited to the account, and the *lex rei sitae* of the investment securities pledged should be French Law. The landmark provisions contained in Art. 102 will enable any person to pledge a "financial instrument "account in connecting with any type of transaction; once the account is pledged any financial instruments held in the account will be subject to the pledge. The term "financial instrument" is broadly considered, including domestic or foreign securities as long as they are reflected in a book-entry securities account opened

with a French custodian entity. Compliance with the traditional procedures for pledging individual securities is no longer necessary; nevertheless Art. 102 reflects traditional legal principles governing pledges where the pledgor retains title to the collateral and also it will enable the parties to pledge a portion of a particular securities account by either opening a pledged sub-account into which all the pledged assets would be transferred or by earmarking the relevant assets such that they are deemed to represent the pledged account.

In short, a person who takes a book-entry pledge of such an interest has acquired an interest evidenced by a credit to an account with the pledgor's intermediary and the *lex rei sitae* of the interest is the law of the intermediary's office whose records evidence the interest. This will have also consequences in aspects such as duty of care: with the new Securities Account Pledge, the secured party will not always be given actual possession; now the account in which the securities are held will be deemed to be in the possession of the custodian of such account (Sicovam S.A. as clearing system, a bank acting as *"intermediaire habilite"* for example). Thus the relevant custodian will have the following duties: to preserve the rights of both pledgor and the Secured Party; to comply with the sale and purchase orders given by the Pledgor, provided that they comply with the relevant terms of the security interest; inform the Pledgor of any transactions relating to the investment securities and return the securities to the Pledgor once the underlying liability has been paid.

The broad language and the new direction of the French Laws on this subject should greatly comfort participants, both domestic and foreign, potentially offering a very flexible and new framework for more creative financial engineering in structured financings.

3.2. THE IMPLEMENTATION OF THE FINALITY DIRECTIVE IN FRANCE

The Treasury and the Bank of France worked together on the implementation of the Finality Directive. It was believed that the French authorities were inclined toward the broad view from the very start and this has been strengthened over time with the support for the broad view from the market participants. On June 1999 the European Society for Banking and Financial Law hosted a seminar attended by representatives from the financial, legal and academic communities and various government departments discussed the scope of the Art. 9 (2). The benefits of a broad interpretation were made explicit during the discussion so the French administration has favoured the broad view.

Considering that the purpose of the Art. 9 (2) of the Directive is to protect the beneficiary of collateral against the insolvency of the party which has constituted such securities in its favour, in order to avoid any uncertainty in the event of an insolvency of the debtor, it was advisable in the implementing legislation to expressly make reference to the insolvency law and state that the Directive's insolvency provisions will prevail over those of the French Insolvency law. This has been done twice by the Law n.96-597 as of July 2nd, for the purpose of "close out netting" and also in the event that an intermediary acting as account keeper or custodian settles a transaction in lieu of its defaulting customer, by the delivery of financial instrument referred to against a payment in cash.

Considering the already mentioned Art. 102 which requires that financial instruments be registered to a pledged account held with an authorised intermediary, a central depository or the issuing entity and also that the French International Private law regarding the implementation of the rights over pledged securities is subject to the *lex rei sitae*, it is clear that French law already favoured a PRIMA approach and a broad interpretation of the Art. 9 (2).