

No. 25114

FEDERAL REPUBLIC OF GERMANY
and
AUSTRIA

Treaty concerning bankruptcy and composition law. Signed
at Vienna on 25 May 1979

Authentic text: German.

Registered by the Federal Republic of Germany on 24 July 1987.

RÉPUBLIQUE FÉDÉRALE D'ALLEMAGNE
et
AUTRICHE

Traité relatif au droit de la faillite et du règlement judiciaire
(concordat). Signé à Vienne le 25 mai 1979

Texte authentique : allemand.

Enregistré par la République fédérale d'Allemagne le 24 juillet 1987.

[TRANSLATION — TRADUCTION]

**TREATY¹ BETWEEN THE FEDERAL REPUBLIC OF GERMANY
AND THE REPUBLIC OF AUSTRIA CONCERNING BANK-
RUPTCY AND COMPOSITION LAW**

The President of the Federal Republic of Germany and the Federal President of the Republic of Austria,

Desiring to regulate relations between their countries concerning bankruptcy and composition law,

Seeking to ensure that, so far as possible, uniform bankruptcy or composition proceedings are applied to the assets of a debtor, together with the effects thereof, in both Contracting States,

Have agreed to conclude a Treaty thereon and for this purpose have appointed as their Plenipotentiaries:

The President of the Federal Republic of Germany: Count Maximilian von Podewils-Dürniz, Ambassador of the Federal Republic of Germany in Vienna; and Dr. Hans-Jochen Vogel, Federal Minister of Justice;

The Federal President of the Republic of Austria: Dr. Christian Broda, Federal Minister of Justice;

After having exchanged their full powers, found in good and due form, the Plenipotentiaries have agreed as follows:

Section I. BANKRUPTCY PROCEEDINGS

Article 1. If bankruptcy is declared in a Contracting State, and its courts have jurisdiction under this Treaty, the effects of the bankruptcy shall, in accordance with the provisions of this Treaty, extend to the territory of the other Contracting State.

Article 2. (1) The courts of the Contracting State in which the bankrupt has his principal place of business shall have jurisdiction for declaring bankruptcy.

(2) If the bankrupt does not have such a principal place of business in either of the Contracting States, the courts of the Contracting State in which he has his head office or habitual residence shall have jurisdiction.

(3) If jurisdiction is not given to the courts of the Contracting States by virtue of paragraphs (1) and (2), the courts of the Contracting State in which the bankrupt has an establishment shall have jurisdiction. However, such jurisdiction shall not be recognized in the other Contracting State if the latter is party to an international convention stipulating the jurisdiction of the courts of a third State. Jurisdiction of the courts of the Contracting States shall, however, be recognized if the courts of the third State have jurisdiction only because the bankrupt has an establishment in that State and if bankruptcy or equivalent proceedings have not yet been instituted in that State.

¹ Came into force on 1 July 1985, i.e., the first day of the third month following the exchange of the instruments of ratification, which took place at Bonn on 26 April 1985, in accordance with article 34 (2).

(4) The connecting factors referred to in this article shall apply to the testator in the case of bankruptcy proceedings concerning an estate, and to the deceased spouse in the case of bankruptcy proceedings concerning the joint marital property covered by a continued community of property.

Article 3. (1) If the courts of both Contracting States have jurisdiction by virtue of article 2, and the court in one of them has declared a bankruptcy, the courts of the other Contracting State, so long as the bankruptcy proceedings are pending, shall neither institute similar proceedings concerning the assets of the debtor held in abeyance nor continue such proceedings if reinstated later.

(2) If the court of one of the Contracting States has based its assumption of jurisdiction on legal considerations or fact-findings which, by virtue of article 2, give rise to jurisdiction for that State, the courts of the other Contracting State shall be bound to these considerations or fact-findings when examining whether the courts of the first Contracting State have jurisdiction by virtue of article 2.

(3) If a court in one of the Contracting States has declined to declare a bankruptcy because the courts of the other Contracting State by virtue of article 2 have jurisdiction, and if this decision is final, a court in the other Contracting State shall not decline to declare a bankruptcy on the grounds that the courts of the first State have jurisdiction by virtue of article 2.

Article 4. If a court in one of the Contracting States, whose courts have jurisdiction by virtue of article 2, has declared a bankruptcy, the preconditions for that declaration, the bankruptcy proceedings and the effects of the bankruptcy shall be evaluated in accordance with the law of that State, unless otherwise provided for in the following articles.

Article 5. (1) The declaration of bankruptcy in one of the Contracting States shall be announced in the other Contracting State upon request of the bankruptcy court, if it may be assumed that the bankrupt has an establishment, a head office, or habitual residence in that State, or that there are creditors or assets of the bankrupt in that State. In the Federal Republic of Germany, the announcement shall be published in the *Bundesanzeiger*, and in the Republic of Austria in the *Amtsblatt zur Wiener Zeitung*. If the declaration of bankruptcy has been announced in the other Contracting State, the termination thereof shall be announced in the same manner. The same shall apply if an order has been given to publish the announcement of the bankruptcy proceedings in other papers also.

(2) Entries in public records and registers, which must be made available under the law of the Contracting State in which the bankruptcy court is situated, shall be provided free of charge at the direct request of the bankruptcy court in the other Contracting State, unless such entries are not feasible or are explicitly in contravention of the law. If, under the law of the Contracting State in which the bankruptcy court is situated, a court other than the bankruptcy court shall arrange for these entries, the request may also emanate from this court.

Article 6. (1) So long as the bankruptcy proceedings have not been announced in the other Contracting State in accordance with article 5, paragraph 1, first sentence, a debtor who has an establishment, head office or habitual residence in this State and makes a payment to the bankrupt on the grounds of a commitment to the bankrupt's assets shall be exonerated, unless the debtor knew of the bankruptcy, or should have known of it. He shall, however, be exonerated if the payment made accrues to the bankrupt's assets.

(2) Paragraph 1, first sentence shall not apply if the debtor has also an establishment, a head office or a habitual residence in the Contracting State in which the bankruptcy court is situated.

Article 7. With regard to rights which are or should be entered in a land register or in some other record implying an irrebuttable presumption of the accuracy of the contents, the effects of restraints on the bankrupt's freedom of disposal shall be governed by the law of the Contracting State in which the register or similar record is kept.

Article 8. (1) The receiver shall have the same authority in the other Contracting State as in the State in which the bankruptcy court is situated.

(2) The receiver shall also be authorized to realize any assets of the bankrupt that are situated in the other Contracting State; for this purpose he must be in possession of a copy of the bankruptcy order accompanied by a confirmation of its finality, which replaces the executory title.

(3) If the laws of one Contracting State impose on the receiver, in his capacity as such, particular obligations in terms of co-operation, information or similar duties, the receiver appointed by the courts of the other Contracting State shall carry out these duties in that State.

Article 9. The bankruptcy court may appoint a special receiver to exercise the powers of the receiver in the other Contracting State.

Article 10. (1) If requested by the bankruptcy court of the other Contracting State, enforcement action for recording, securing and seizing the assets, shall be ordered by the local court in whose areas such action is to be taken. The receiver may also apply directly to this court for such action to be ordered. Such an application must be accompanied by a copy of the bankruptcy order.

(2) If the bankrupt has his residence, temporary residence, an establishment or a mailing address in the other Contracting State, the postal administration of that State must deliver to the receiver any mail addressed to the bankrupt, if requested to do so by the receiver or the bankruptcy court. Such a request by the receiver must be accompanied by a copy of the bankruptcy decree. If the bankruptcy was declared in the Federal Republic of Germany and the bankruptcy decree itself does not include a provision for suspension of mail delivery, the receiver must also submit a copy of the authorization of suspension of mail delivery.

(3) Only the bankruptcy court is empowered to request imprisonment of the bankrupt. A request to that effect may be made only to induce the bankrupt to make the statutory declaration of assets.

Article 11. The question as to whether a particular property item belongs to the bankrupt's assets, depending on whether or not it is covered by the enforcement order, shall be determined by the law of the Contracting State in which the article is situated at the time at which bankruptcy is declared. Claims and other rights against a third party shall be deemed to be asserted in the Contracting State where the third party has his head office or habitual residence. Rental and leasing rights relating to immovable property, and limited rights, *in rem*, shall be determined on the basis of the place where the onerous property is situated.

Article 12. Where under the law of one Contracting State, the joint marital property in a community property agreement forms part of the bankrupt's assets,

or where, under the law of one Contracting State, declaration of bankruptcy causes the community property agreement to be annulled, this shall apply also if the bankruptcy is declared by a court of the other Contracting State.

Article 13. (1) If the bankrupt had an establishment from which business was transacted directly, or a head office or habitual residence, in the Contracting State in which the bankruptcy court is not situated, the law of that State shall be applied to determine:

1. The effect of the bankruptcy on a legal transaction which was conducted from such establishment but was not yet, or not completely carried out, unless the person with whom the bankrupt concluded the legal transaction had his head office or habitual residence in the Contracting State where the bankruptcy court is situated;
2. The extent to which such a legal act carried out from that source can be challenged under bankruptcy law, unless the act was performed with respect to a person having a head office or habitual residence in the Contracting State where the bankruptcy court is situated.

(2) The effect of the bankruptcy on employment relationships shall be governed by the law of the Contracting State in which the work is normally carried out.

(3) The effects of the bankruptcy on rental and lease arrangements relating to immovable property shall be governed by the law of the Contracting State in which the property is situated.

(4) The effects of the bankruptcy on rental and leasing arrangements relating to recorded or registered movable property shall be governed by the law of the Contracting State in which the property is recorded or registered. The same shall apply to licensing agreements concerning rights to industrial property.

Article 14. Suspension of litigation and authorization to initiate litigation shall be governed by the law of the Contracting State in which the bankruptcy court is situated. The manner in which litigation is to be initiated shall be governed by the law of the Contracting State in which the relevant court is situated.

Article 15. The effects of bankruptcy on a judgement enforced in the other Contracting State shall be governed by the law of that State.

Article 16. Under bankruptcy law, challenges to the acquisition of rights to immovable property for which an entry in a land register is required shall be governed by the law of the Contracting State in which the land register is kept.

Article 17. (1) Bankruptcy declared in one Contracting State shall subject the bankrupt to such restrictions in the other Contracting State as the law of this State imposes, in the event of the declaration of bankruptcy by its own courts, on the exercise of a profession, a trade, or on the bankrupt's civil rights, as well as on the legal authorization to manage a third party's estate. The same shall apply, *mutatis mutandis*, to restrictions arising out of a dismissal of bankruptcy proceedings for reasons of inadequate assets.

(2) If, at the time when bankruptcy is declared in one Contracting State with regard to the assets of a legal person or an association, that legal person or association has its headquarters in the other Contracting State, the bankruptcy, or the dismissal of bankruptcy proceedings owing to inadequate assets, shall have the same effect on the continued existence of the legal person or association as are

provided for by the law of this latter State in the event of a declaration of bankruptcy by its own courts.

Article 18. (1) Where individual items of property or certain estates are situated in one of the two Contracting States at the time when bankruptcy is declared, it shall be the law of this State that determines which rights of separate satisfaction or separation of property, or other special rights, apply to these assets. Article 11, second and third sentences shall apply, *mutatis mutandis*.

(2) Rights, as specified in paragraph 1, to vessels, vessels under construction and aircraft, which are registered in one of the Contracting States, shall be governed by the law of that State. Non-registered rights of separation of property, and other special rights with regard to sea-going vessels, shall be governed by the law of the State in which the vessel is situated at the time of realization. This law shall also determine the precedence between registered rights as specified in the first sentence, on the one hand, and rights as specified in the second sentence, on the other.

(3) Where goods have been sent out from the establishment of the seller or buying agent situated in one Contracting State, the right of stoppage *in transitu* shall be governed by the law of that State. If the sender does not have an establishment but does have a head office or habitual domicile in one Contracting State, the law of that State shall apply.

Article 19. (1) The question as to which claims are to be settled as claims against the bankrupt's assets and which are to be settled as proved debts, and in what order this is to be done, shall be governed by the law of the Contracting State in which the bankruptcy court is situated.

(2) In the event of claims arising out of an employment relationship, the determination as to whether they are claims against the bankrupt's assets or proved debts, and the priority to be given to them, shall be governed by the law of the country in which the work was normally carried out. This determination shall not apply to claims for work performed in maintaining, administering, evaluating and disposing of the assets. For the purpose of settling claims subject to the law of one of the Contracting States, as referred to in the previous sentence, the bankrupt's assets, up to the value of the assets which were situated in this State at the time the bankruptcy was declared, shall be used first. If this portion of the bankrupt's assets is not sufficient for settling the claims subject to the law of the Contracting State, as mentioned in the previous sentence, they shall be settled from the rest of the bankrupt's assets in accordance with the law of the other Contracting State, priority being given to claims from employees who were regularly employed in the other Contracting State.

(3) Taxes, duties, fees and other claims in public law shall be preferentially settled in accordance with the law of the Contracting State in which they were incurred, up to the value of the bankrupt's assets situated in that State. If such claims cannot be fully settled in this manner, the claim for the remainder shall be treated as a non-preferential proved debt when the rest of the bankrupt's assets are distributed. In the case of fines or penalties or similar claims owed to the State or other legal person in public law, this provision shall not apply if they can be enforced in the bankruptcy proceedings under the law of the Contracting State in which they were incurred. Article 36, paragraph 4, first sentence, of the Con-

vention of 22 December 1966 between the Federal Republic of Germany and the Republic of Austria on social security¹ shall be unaffected.

(4) Where paragraphs 2 and 3 are applied, claims preceding those listed in those paragraphs shall be assigned to both portions of the bankrupt's assets in the ratio of the value of the assets situated in one Contracting State to the value of the assets in the other State at the time bankruptcy was declared.

(5) Where paragraphs 2 to 4 are applied, any assets seized in a third State shall be added to the assets in the Contracting State in which the bankruptcy court is situated.

Article 20. (1) The jurisdiction of the court for litigation on the determination of an unresolved proved debt shall be governed by the law of the Contracting State in which the bankruptcy court is situated.

(2) If litigation on this claim has already begun in the other Contracting State by the time that bankruptcy is declared, the proceedings may be continued only in that State. If recognition of the decision taken by the court in the other Contracting State has been finally declined, the litigation may be referred to the courts of that State.

(3) In the case of claims arising out of employment relationships, jurisdiction shall rest with the courts of the Contracting State in which the work was normally to be carried out.

(4) The jurisdiction for taxes, duties, fees, contributions to social security and other claims in public law shall be governed by the law of the Contracting State on whose regulations such claims are based.

Article 21. (1) The jurisdiction for litigation on treatment of a claim as a claim against the bankrupt's assets or as a proved debt, or the priority of such claims, shall be governed by the law of the Contracting State in which the bankruptcy court is situated. Where such questions are governed by the law of the other Contracting State, by virtue of article 19, the courts of the latter State shall have jurisdiction for such litigation. If recognition of the decision taken by the court in the other Contracting State has been finally declined in the Contracting State where the bankruptcy court is situated, the dispute may be referred to the courts of the latter State.

(2) Where, in accordance with paragraph 1, the courts of a Contracting State exercise jurisdiction, this shall apply also to administrative authorities provided that, under the law of the Contracting State to which they belong, they have to decide on the dispute referred to in paragraph 1.

Article 22. (1) Without prejudice to the foregoing provisions, the decisions and instructions issued in one Contracting State in the course of bankruptcy proceedings shall be recognized in the other Contracting State, even if they are not yet final. Decisions in proceedings to determine unresolved proved debts and to determine the priority of a proved debt shall be recognized if they are final. Administrative acts of a public authority, which cannot be challenged (decisions of an administrative authority, subject to no further legal process), shall be deemed equivalent to a final decision.

¹ United Nations, *Treaty Series*, vol. 703, p. 2.

(2) Recognition may be refused only if:

1. The decision or instruction refers to bankruptcy proceedings to which this Treaty does not apply, or
2. Recognition conflicts with the public order of the Contracting State in which the decision or instruction is applied, or
3. The rights of the defence have not been protected.

(3) Paragraphs 1 and 2 shall apply *mutatis mutandis* for extracts from the schedule of creditors and claims for declarations by third parties stating that they, in addition to the bankrupt, have assumed obligations enabling the compulsory composition to be carried out.

Article 23. Decisions, instructions and the deeds equivalent thereto under article 22, paragraph 3, if enforceable in one Contracting State and admissible in the other, shall be enforced in the latter State in accordance with its law, once a writ of enforcement has shown that enforcement is allowed.

Article 24. The application for the writ of enforcement referred to in article 23 shall be accompanied by a copy of the deed bearing the official seal or stamp, together with proof that the deed is enforceable. Enforceability shall be evidenced by the writ of enforcement provided for internal deeds, to be attached by the bankruptcy court to the documentary items referred to in article 22, paragraph 3.

Section II. COMPOSITION PROCEEDINGS

Article 25. (1) The provisions in section I shall apply also to composition proceedings, including the subsequent agreement on supervision of the debtor's transactions and the decisions of the composition court following confirmation of the composition on the presumable value of a disputed claim or the shortfall of a partially covered claim. Articles 5 and 6 shall apply *mutatis mutandis* to the specially ordered restrictions on disposal which have to be announced in accordance with the law of the Contracting State where the composition court is situated.

(2) The provisions of article 3 shall apply also to the interrelationship of bankruptcy and composition proceedings.

Section III. JOINT PROVISIONS

Article 26. This Treaty shall not apply to bankruptcy and composition proceedings dealing with the assets of insurance enterprises and credit institutions which are subject to official supervision in either Contracting State.

Article 27. In the event of a final sentence for a criminal act in either Contracting State, the same consequences shall apply to bankruptcy or composition proceedings, or the actual composition decided upon in such proceedings, in the other Contracting State as are provided for by the law of this latter State in the event of a sentence for such a criminal act committed in its own territory. This shall not apply if the criminal act was committed before this Treaty came into force.

Article 28. If, under the law of either Contracting State, a decision emanating from proceedings under the Bankruptcy Act or Composition Act has the

effect that a petition to institute composition proceedings or an application to conclude or confirm a compulsory composition is to be or can be rejected in the bankruptcy, this effect shall also occur if a corresponding decision has been taken in the other Contracting State.

*Article 29**. For the purposes of this Treaty, "bankruptcy court" or "composition court" shall include the Austrian bankruptcy or composition commissioner.

Section IV. FINAL PROVISIONS

Article 30. (1) This Treaty shall apply to bankruptcies and compositions declared subsequent to its entry into force. In the case of an *ex officio* declaration of bankruptcy, the timing of the petition to institute the composition proceedings shall be decisive.

(2) The effect described in article 28 shall occur only if the decision in the earlier proceedings was taken after this Treaty came into force.

(3) The provisions of the Treaty on challenges to legal acts shall be applied only if the legal act occurred after the entry into force of this Treaty.

Article 31. (1) This Treaty shall not affect obligations vis-à-vis third States arising from other treaties and applying to either or both of the Contracting States at the time of entry into force of this Treaty. This Treaty shall also not affect obligations arising from a treaty entering into force at a later date, provided that either Contracting State has already ratified such other treaty at the time the present Treaty enters into force.

(2) Declaration of bankruptcy or institution of composition proceedings in either of the two Contracting States shall not affect the progress of proceedings for the distribution of assets already pending in the other Contracting State under the Law of the Sea or internal waterways legislation.

Article 32. Difficulties which may arise between the two Contracting States concerning the interpretation or implementation of this Treaty shall be resolved through the diplomatic channel.

Article 33. This Treaty shall also apply to *Land Berlin* provided that the Government of the Federal Republic of Germany does not make a declaration to the contrary to the Government of the Republic of Austria within the three months following the entry into force of this Treaty.

Article 34. (1) This Treaty shall be ratified. The instruments of ratification shall be exchanged as soon as possible at Bonn.

(2) The Treaty shall enter into force on the first day of the third month following the month in which the instruments of ratification are exchanged.

(3) Either Contracting State may denounce the Treaty by notification in writing to be transmitted through the diplomatic channel. Denunciation shall take effect six months after the date on which the other State was notified thereof. The provisions of this Treaty shall continue to apply to bankruptcy and composition proceedings already instituted at this time.

* This article was cancelled by the Insolvency Act, 1982 (Austrian Civil Law Gazette No. 370).

IN WITNESS WHEREOF the Plenipotentiaries have signed this Treaty.
DONE at Vienna, on 25 May 1979, in two originals.

For the Federal Republic of Germany:

Count MAXIMILIAN VON PODEWILS-DÜRNIZ

Dr. HANS-JOCHEN VOGEL

For the Republic of Austria:

Dr. CHRISTIAN BRODA
