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STATUTORY INSTRUMENTS

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**1990 No. 1504**

**The Companies (No. 2) (Northern Ireland) Order 1990**

**PART V**

**FINANCIAL MARKETS AND INSOLVENCY**

*Introduction*

**Introduction**

**79.** This Part has effect for the purposes of safeguarding the operation of certain financial markets by provisions with respect to—

- (a) the insolvency, winding up or default of a person party to transactions in the market (Articles 80 to 94),
- (b) the effectiveness or enforcement of certain charges given to secure obligations in connection with such transactions (Articles 95 to 98), and
- (c) rights and remedies in relation to certain property provided as cover for margin in relation to such transactions or subject to such a charge (Articles 99 to 103).

*Recognised investment exchanges and clearing houses*

**Market contracts**

**80.—**(1) This Part applies to the following descriptions of contract connected with a recognised investment exchange or recognised clearing house.

The contracts are referred to in this Part as “market contracts”.

- (2) In relation to a recognised investment exchange, this Part applies to—
  - (a) contracts entered into by a member or designated non-member of the exchange which are made on or otherwise subject to the rules of the exchange; and
  - (b) contracts subject to the rules of the exchange entered into by the exchange for the purposes of or in connection with the provision of clearing services.

A “designated non-member” means a person in respect of whom action may be taken under the default rules of the exchange but who is not a member of the exchange.

(3) In relation to a recognised clearing house, this Part applies to contracts subject to the rules of the clearing house entered into by the clearing house for the purposes of or in connection with the provision of clearing services for a recognised investment exchange.

(4) The Department may by regulations make further provision as to the contracts to be treated as “market contracts”, for the purposes of this Part, in relation to a recognised investment exchange or recognised clearing house.

- (5) The regulations may add to, amend or repeal the provisions of paragraphs (2) and (3).

**Modifications of the law of insolvency**

**81.**—(1) The general law of insolvency has effect in relation to market contracts, and action taken under the rules of a recognised investment exchange or recognised clearing house with respect to such contracts, subject to the provisions of Articles 82 to 88.

(2) So far as those provisions relate to insolvency proceedings in respect of a person other than a defaulter, they apply in relation to—

- (a) proceedings in respect of a member or designated non-member of a recognised investment exchange or a member of a recognised clearing house, and
- (b) proceedings in respect of a party to a market contract begun after a recognised investment exchange or recognised clearing house has taken action under its default rules in relation to a person party to the contract as principal,

but not in relation to any other insolvency proceedings, notwithstanding that rights or liabilities arising from market contracts fall to be dealt with in the proceedings.

(3) The reference in paragraph (2)(b) to the beginning of insolvency proceedings is to—

- (a) the presentation of a bankruptcy petition, or
- (b) the presentation of a petition for an administration order or a winding-up petition or the passing of a resolution for voluntary winding up, or
- (c) the appointment of an administrative receiver.

(4) The Department may make further provision by regulations modifying the law of insolvency in relation to the matters mentioned in paragraph (1).

(5) The regulations may add to, amend or repeal the provisions mentioned in paragraph (1), and any other provision of this Part as it applies for the purposes of those provisions, or provide that those provisions have effect subject to such additions, exceptions or adaptations as are specified in the regulations.

**Proceedings of exchange or clearing house take precedence over insolvency procedures**

**82.**—(1) None of the following shall be regarded as to any extent invalid at law on the ground of inconsistency with the law relating to the distribution of the assets of a person on bankruptcy or winding up or in the administration of an insolvent estate—

- (a) a market contract,
- (b) the default rules of a recognised investment exchange or recognised clearing house,
- (c) the rules of a recognised investment exchange or recognised clearing house as to the settlement of market contracts not dealt with under its default rules.

(2) The powers of a relevant office-holder in his capacity as such, and the powers of the court under the Insolvency Order shall not be exercised in such a way as to prevent or interfere with—

- (a) the settlement in accordance with the rules of a recognised investment exchange or recognised clearing house of a market contract not dealt with under its default rules, or
- (b) any action taken under the default rules of such an exchange or clearing house.

This does not prevent a relevant office-holder from afterwards seeking to recover any amount under Article 86(3) or 87(3) or prevent the court from afterwards making any such order as is mentioned in Article 88(1) (but subject to paragraphs (2) and (3) of that Article).

(3) Nothing in the following provisions of this Part shall be construed as affecting the generality of the above provisions.

(4) A debt or other liability arising out of a market contract which is the subject of default proceedings may not be proved in a winding up or bankruptcy until the completion of the default proceedings.

A debt or other liability which by virtue of this paragraph may not be proved shall not be taken into account for the purposes of any set-off until the completion of the default proceedings.

(5) For the purposes of paragraph (4) the default proceedings shall be taken to be completed in relation to a person when a report is made under Article 85 stating the sum (if any) certified to be due to or from him.

### **Duty to give assistance for purposes of default proceedings**

**83.**—(1) It is the duty of—

- (a) any person who has or had control of any assets of a defaulter, and
- (b) any person who has or had control of any documents of or relating to a defaulter,

to give a recognised investment exchange or recognised clearing house such assistance as it may reasonably require for the purposes of its default proceedings.

This applies notwithstanding any duty of that person under the statutory provisions relating to insolvency.

(2) A person shall not under this Article be required to provide any information or produce any document which he would be entitled to refuse to provide or produce on grounds of legal professional privilege in proceedings in the High Court.

(3) Where original documents are supplied in pursuance of this Article, the exchange or clearing house shall return them forthwith after the completion of the relevant default proceedings, and shall in the meantime allow reasonable access to them to the person by whom they were supplied and to any person who would be entitled to have access to them if they were still in the control of the person by whom they were supplied.

(4) The expenses of a relevant office-holder in giving assistance under this Article are recoverable as part of the expenses incurred by him in the discharge of his duties; and he shall not be required under this Article to take any action which involves expenses which cannot be so recovered, unless the exchange or clearing house undertakes to meet them.

There shall be treated as expenses of his such reasonable sums as he may determine in respect of time spent in giving the assistance.

(5) The Department may by regulations make further provision as to the duties of persons to give assistance to a recognised investment exchange or recognised clearing house for the purposes of its default proceedings.

(6) The Secretary of State may by regulations make further provision as to the duties of an exchange or clearing house with respect to information supplied to it.

(7) Regulations under this Article may add to, amend or repeal the provisions of paragraphs (1) to (4).

(8) In this Article “document” includes information recorded in any form.

### **Supplementary provisions as to default proceedings**

**84.**—(1) If the court is satisfied on an application by a relevant office-holder that a party to a market contract with a defaulter intends to dissipate or apply his assets so as to prevent the office-holder recovering such sums as may become due upon the completion of the default proceedings, the court may grant such interlocutory relief as it thinks fit.

(2) A liquidator or trustee of a defaulter shall not—

- (a) declare or pay any dividend to the creditors, or
- (b) return any capital to contributories,

unless he has retained what he reasonably considers to be an adequate reserve in respect of any claims arising as a result of the default proceedings of the exchange or clearing house concerned.

(3) The court may on an application by a relevant office-holder make such order as it thinks fit altering or dispensing from compliance with such of the duties of his office as are affected by the fact that default proceedings are pending or could be taken, or have been or could have been taken.

(4) Nothing in Article 23(1)(c), 24(3), 106, 108, 110 or 258 of the Insolvency Order (which restrict the taking of certain legal proceedings and other steps), shall affect any action taken by an exchange or clearing house for the purpose of its default proceedings.

### **Duty to report on completion of default proceedings**

**85.**—(1) A recognised investment exchange or recognised clearing house shall, on the completion of proceedings under its default rules, report to the Secretary of State on its proceedings stating in respect of each creditor or debtor the sum certified by it to be payable from or to the defaulter or, as the case may be, the fact that no sum is payable.

(2) The exchange or clearing house may make a single report or may make reports from time to time as proceedings are completed with respect to the transactions affecting particular persons.

(3) The exchange or clearing house shall supply a copy of every report under this Article to the defaulter and to any relevant office-holder acting in relation to him or his estate.

(4) When a report under this Article is received by the Secretary of State he shall publish notice of that fact in such manner as he thinks appropriate for bringing it to the attention of creditors and debtors of the defaulter.

(5) An exchange or clearing house shall make available for inspection by a creditor or debtor of the defaulter so much of any report by it under this Article as relates to the sum (if any) certified to be due to or from him or to the method by which that sum was determined.

(6) Any such person may require the exchange or clearing house, on payment of such reasonable fee as the exchange or clearing house may determine, to provide him with a copy of any part of a report which he is entitled to inspect.

### **Net sum payable on completion of default proceedings**

**86.**—(1) The following provisions apply with respect to the net sum certified by a recognised investment exchange or recognised clearing house, upon proceedings under its default rules being duly completed in accordance with this Part, to be payable by or to a defaulter.

(2) If a bankruptcy or winding-up order has been made, or a resolution for voluntary winding up has been passed, the debt—

- (a) is provable in the bankruptcy or winding up or, as the case may be, is payable to the relevant office-holder, and
- (b) shall be taken into account, where appropriate, under Article 296 of the Insolvency Order (mutual dealings and set-off) or the corresponding provision applicable in the case of winding up,

in the same way as a debt due before the commencement of the bankruptcy, the date on which the body corporate goes into liquidation (within the meaning of Article 6 of the Insolvency Order) or, in the case of a partnership, the date of the winding-up order.

(3) However, where (or to the extent that) a sum is taken into account by virtue of paragraph (2) (b) which arises from a contract entered into at a time when the creditor had notice—

- (a) that a bankruptcy petition was pending, or
- (b) that a meeting of creditors had been summoned under Article 84 of the Insolvency Order or that a winding-up petition was pending,

the value of any profit to him arising from the sum being so taken into account (or being so taken into account to that extent) is recoverable from him by the relevant office-holder unless the court directs otherwise.

(4) Paragraph (3) does not apply in relation to a sum arising from a contract effected under the default rules of a recognised investment exchange or recognised clearing house.

(5) Any sum recoverable by virtue of paragraph (3) ranks for priority, in the event of the insolvency of the person from whom it is due, immediately before preferential debts.

### **Disclaimer of property, rescission of contracts, &c.**

**87.**—(1) Articles 152, 157, 288 and 318 of the Insolvency Order (power to disclaim onerous property and court’s power to order rescission of contracts, &c.) do not apply in relation to—

- (a) a market contract, or
- (b) a contract effected by the exchange or clearing house for the purpose of realising property provided as margin in relation to market contracts.

(2) Articles 107 and 257 of the Insolvency Order (avoidance of property dispositions effected after commencement of winding up or presentation of bankruptcy petition) do not apply to—

- (a) a market contract, or any disposition of property in pursuance of such a contract,
- (b) the provision of margin in relation to market contracts,
- (c) a contract effected by the exchange or clearing house for the purpose of realising property provided as margin in relation to a market contract, or any disposition of property in pursuance of such a contract, or
- (d) any disposition of property in accordance with the rules of the exchange or clearing house as to the application of property provided as margin.

(3) However, where—

- (a) a market contract is entered into by a person who has notice that a petition has been presented for the winding up or bankruptcy of the other party to the contract, or
- (b) margin in relation to a market contract is accepted by a person who has notice that such a petition has been presented in relation to the person by whom or on whose behalf the margin is provided,

the value of any profit to him arising from the contract or, as the case may be, the amount or value of the margin is recoverable from him by the relevant office-holder unless the court directs otherwise.

(4) Paragraph (3)(a) does not apply where the person entering into the contract is a recognised investment exchange or recognised clearing house acting in accordance with its rules, or where the contract is effected under the default rules of such an exchange or clearing house; but paragraph (3) (b) applies in relation to the provision of margin in relation to such a contract.

(5) Any sum recoverable by virtue of paragraph (3) ranks for priority, in the event of the insolvency of the person from whom it is due, immediately before preferential debts.

### **Adjustment of prior transactions**

**88.**—(1) No order shall be made in relation to a transaction to which this Article applies under—

- (a) Article 202 or 312 of the Insolvency Order (transactions at an undervalue),
- (b) Article 203 or 313 of that Order (preferences), or

- (c) Article 367 of that Order (transactions defrauding creditors).
- (2) This Article applies to—
  - (a) a market contract to which a recognised investment exchange or recognised clearing house is a party or which is entered into under its default rules, and
  - (b) a disposition of property in pursuance of such a market contract.
- (3) Where margin is provided in relation to a market contract and (by virtue of paragraph (2)(a) or otherwise) no such order as is mentioned in paragraph (1) has been, or could be, made in relation to that contract, this Article applies to—
  - (a) the provision of the margin,
  - (b) any contract effected by the exchange or clearing house in question for the purpose of realising the property provided as margin, and
  - (c) any disposition of property in accordance with the rules of the exchange or clearing house as to the application of property provided as margin.

#### **Powers of Secretary of State to give directions**

**89.**—(1) The powers conferred by this Article are exercisable in relation to a recognised UK investment exchange or recognised UK clearing house.

(2) Where in any case an exchange or clearing house has not taken action under its default rules—3832/2—O.I.C.[Companies No. 2 (NI) Order 1990]

- (a) if it appears to the Secretary of State that it could take action, he may direct it to do so, and
  - (b) if it appears to the Secretary of State that it is proposing to take or may take action, he may direct it not to do so.
- (3) Before giving such a direction the Secretary of State shall consult the exchange or clearing house in question; and he shall not give a direction unless he is satisfied, in the light of that consultation—
- (a) in the case of a direction to take action, that failure to take action would involve undue risk to investors or other participants in the market, or
  - (b) in the case of a direction not to take action, that the taking of action would be premature or otherwise undesirable in the interests of investors or other participants in the market.
- (4) A direction shall specify the grounds on which it is given.
- (5) A direction not to take action may be expressed to have effect until the giving of a further direction (which may be a direction to take action or simply revoking the earlier direction).
- (6) No direction shall be given not to take action if, in relation to the person in question—
- (a) a bankruptcy order has been made, or
  - (b) a winding up order has been made, a resolution for voluntary winding up has been passed or an administrator, administrative receiver or provisional liquidator has been appointed;
- and any previous direction not to take action shall cease to have effect on the making or passing of any such order, appointment or resolution.

(7) Where an exchange or clearing house has taken or been directed to take action under its default rules, the Secretary of State may direct it to do or not to do such things (being things which it has power to do under its default rules) as are specified in the direction.

The Secretary of State shall not give such a direction unless he is satisfied that it will not impede or frustrate the proper and efficient conduct of the default proceedings.

(8) A direction under this Article is enforceable, on the application of the Secretary of State, by injunction; and where an exchange or clearing house has not complied with a direction, the court

may make such order as it thinks fit for restoring the position to what it would have been if the direction had been complied with.

### **Application to determine whether default proceedings to be taken**

**90.**—(1) Where there has been made or passed in relation to a member or designated non-member of a recognised investment exchange or a member of a recognised clearing house—

- (a) a bankruptcy order, or
- (b) an administration or winding up order, a resolution for voluntary winding up or an order appointing a provisional liquidator,

and the exchange or clearing house has not taken action under its default rules in consequence of the order or resolution or the matters giving rise to it, a relevant office-holder appointed by, or in consequence of or in connection with, the order or resolution may apply to the Secretary of State.

(2) The application shall specify the exchange or clearing house concerned and the grounds on which it is made.

(3) On receipt of the application the Secretary of State shall notify the exchange or clearing house, and unless within three business days after the day on which the notice is received the exchange or clearing house—

- (a) takes action under its default rules, or
- (b) notifies the Secretary of State that it proposes to do so forthwith,

then, subject as follows, the provisions of Articles 81 to 88 do not apply in relation to market contracts to which the member or designated non-member in question is a party or to anything done by the exchange or clearing house for the purposes of, or in connection with, the settlement of any such contract.

For this purpose a “business day” means any day which is not a Saturday or Sunday, Christmas Day, Good Friday or a bank holiday in any part of the United Kingdom under the Banking and Financial Dealings Act 1971(1).

(4) The provisions of Articles 81 to 88 are not disapplied if before the end of the period mentioned in paragraph (3) the Secretary of State gives the exchange or clearing house a direction under Article 89(2)(a) (direction to take action under default rules).

No such direction may be given after the end of that period.

(5) If the exchange or clearing house notifies the Secretary of State that it proposes to take action under its default rules forthwith, it shall do so; and that duty is enforceable, on the application of the Secretary of State, by injunction.

### **Delegation of functions to designated agency**

**91.**—(1) Section 114 of the Financial Services Act 1986(2) (power to transfer functions to designated agency) applies to the functions of the Secretary of State under this Part in relation to a UK investment exchange or clearing house, with the exception of his functions with respect to the making of orders and regulations.

(2) If immediately before the coming into operation of this Article—

- (a) a designated agency is exercising all functions in relation to such bodies which are capable of being transferred under that section, and
- (b) no draft order is lying before Parliament resuming any of those functions,

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(1) 1971 c. 80

(2) 1986 c. 60

the order bringing this Article into operation shall have effect as a delegation order made under that section transferring to that agency all the functions which may be transferred by virtue of this Article.

(3) The Secretary of State may—

- (a) in the circumstances mentioned in subsection (3), (4) or (5) of section 115 of the Financial Services Act 1986, or
- (b) if it appears to him that a designated agency is unable or unwilling to discharge all or any of the functions under this Part which have been transferred to it,

make an order under that section resuming all functions under this Part which have been transferred to the agency.

This does not affect his power to make an order under subsection (1) or (2) of that section with respect to such functions.

#### *Other exchanges and clearing houses*

#### **Certain overseas exchanges and clearing houses**

**92.**—(1) The Department may by regulations provide that this Part applies in relation to contracts connected with an overseas investment exchange or clearing house which is approved by the Secretary of State under section 170 of the Companies Act 1989<sup>(3)</sup> (certain overseas exchanges and clearing houses), as it applies in relation to contracts connected with a recognised investment exchange or clearing house.

(2) The Department may make regulations which, in relation to a body which is so approved, provide that the provisions of this Part apply with such exceptions, additions and adaptations as appear to the Department to be necessary or expedient.

#### **Certain money market institutions**

**93.**—(1) The Department may by regulations provide that this Part applies to contracts to which Part VII of the Companies Act 1989<sup>(4)</sup> applies by virtue of regulations made under section 171(1) of that Act (certain money market institutions), as it applies to contracts connected with a recognised investment exchange or recognised clearing house.

(2) Regulations under this Article may, in relation to a person included in the list mentioned in the said section 171(1), provide that the provisions of this Part apply with such exceptions, additions and adaptations as appear to the Department to be necessary or expedient.

(3) Before making any regulations under this Article, the Department shall consult the Treasury and the Bank of England.

#### **Settlement arrangements provided by the Bank of England**

**94.**—(1) The Department may by regulations provide that this Part applies to contracts to which Part VII of the Companies Act 1989<sup>(5)</sup> applies by virtue of regulations made under section 172(1) of that Act (settlement arrangements provided by the Bank of England), as it applies to contracts connected with a recognised investment exchange or recognised clearing house.

(2) Regulations under this Article may provide that the provisions of this Part apply with such exceptions, additions and adaptations as appear to the Department to be necessary or expedient.

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(3) 1989 c. 40

(4) 1982 c. 41

(5) 1989 c. 40



(3) Before making any regulations under this Article, the Department shall consult the Treasury and the Bank of England.

### *Market charges*

#### **Market charges**

**95.**—(1) In this Part “market charge” means a charge, whether fixed or floating, granted—

- (a) in favour of a recognised investment exchange, for the purpose of securing debts or liabilities arising in connection with the settlement of market contracts,
- (b) in favour of a recognised clearing house, for the purpose of securing debts or liabilities arising in connection with their ensuring the performance of market contracts, or
- (c) in favour of a person who agrees to make payments as a result of the transfer of specified securities made through the medium of a computer-based system established by the Bank of England and The Stock Exchange, for the purpose of securing debts or liabilities of the transferee arising in connection therewith.

(2) Where a charge is granted partly for purposes specified in paragraph (1)(a), (b) or (c) and partly for other purposes, it is a “market charge” so far as it has effect for the specified purposes.

(3) In paragraph (1)(c)—

“specified securities” means securities for the time being specified in the list in Schedule 1 to the Stock Transfer Act 1982<sup>(6)</sup>, and includes any right to such securities; and

“transfer”, in relation to any such securities or right, means a transfer of the beneficial interest.

(4) The Department may by regulations make further provision as to the charges granted in favour of any such person as is mentioned in paragraph (1)(a), (b) or (c) which are to be treated as “market charges” for the purposes of this Part; and the regulations may add to, amend or repeal the provisions of paragraphs (1) to (3).

(5) The regulations may provide that a charge shall or shall not be treated as a market charge if or to the extent that it secures obligations of a specified description, is a charge over property of a specified description or contains provisions of a specified description.

(6) Before making regulations under this Article in relation to charges granted in favour of a person within paragraph (1)(c), the Department shall consult the Treasury and the Bank of England.

#### **Modifications of the law of insolvency**

**96.**—(1) The general law of insolvency has effect in relation to market charges and action taken in enforcing them subject to the provisions of Article 97.

(2) The Department may by regulations make further provision modifying the law of insolvency in relation to the matters mentioned in paragraph (1).

(3) The regulations may add to, amend or repeal the provisions mentioned in paragraph (1), and any other provision of this Part as it applies for the purposes of those provisions, or provide that those provisions have effect with such exceptions, additions or adaptations as are specified in the regulations.

(4) The regulations may make different provision for cases defined by reference to the nature of the charge, the nature of the property subject to it, the circumstances, nature or extent of the obligations secured by it or any other relevant factor.

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(6) 1986 c. 60

(5) Before making regulations under this Article in relation to charges granted in favour of a person within Article 95(1)(c), the Department shall consult the Treasury and the Bank of England.

#### **Administration orders, etc.**

**97.**—(1) The following provisions of the Insolvency Order (which relate to administration orders and administrators) do not apply in relation to a market charge—

(a) Articles 23(1)(b) and 24(3)(c) (restriction on enforcement of security while petition for administration order pending or order in force), and

(b) Article 28(1) and (2) (power of administrator to deal with charged property);

and Article 24(2) of that Order (receiver to vacate office when so required by administrator) does not apply to a receiver appointed under a market charge.

(2) However, where a market charge falls to be enforced after an administration order has been made or a petition for an administration order has been presented, and there exists another charge over some or all of the same property ranking in priority to or *pari passu* with the market charge, the court may order that there shall be taken after enforcement of the market charge such steps as the court may direct for the purpose of ensuring that the chargee under the other charge is not prejudiced by the enforcement of the market charge.

(3) Article 53 of the Insolvency Order (power of administrative receiver to dispose of charged property) does not apply in relation to a market charge.

(4) Articles 107 and 257 of the Insolvency Order (avoidance of property dispositions effected after commencement of winding up or presentation of bankruptcy petition) do not apply to a disposition of property as a result of which the property becomes subject to a market charge or any transaction pursuant to which that disposition is made.

(5) However, if a person (other than the chargee under the market charge) who is party to a disposition mentioned in paragraph (4) has notice at the time of the disposition that a petition has been presented for the winding up or bankruptcy of the party making the disposition, the value of any profit to him arising from the disposition is recoverable from him by the relevant office-holder unless the court directs otherwise.

(6) Any sum recoverable by virtue of paragraph (5) ranks for priority, in the event of the insolvency of the person from whom it is due, immediately before preferential debts.

(7) In a case falling within both paragraph (4) (as a disposition of property as a result of which the property becomes subject to a market charge) and Article 87(2) (as the provision of margin in relation to a market contract), Article 87(3) applies with respect to the recovery of the amount or value of the margin and paragraph (5) does not apply.

#### **Power to make provision about certain other charges**

**98.**—(1) The Department may by regulations provide that the general law of insolvency has effect in relation to charges of such descriptions as may be specified in the regulations, and action taken in enforcing them, subject to such provisions as may be specified in the regulations.

(2) The regulations may specify any description of charge granted in favour of—

(a) a body approved by the Secretary of State under section 170 of the Companies Act 1989<sup>(7)</sup> (certain overseas exchanges and clearing houses),

(b) a person included in the list maintained by the Bank of England for the purposes of section 171 of that Act (certain money market institutions),

(c) the Bank of England,

(7) 1989 c. 40

(d) an authorised person within the meaning of the Financial Services Act 1986<sup>(8)</sup>, or  
(e) an international securities self-regulating organisation within the meaning of that Act,  
for the purpose of securing debts or liabilities arising in connection with or as a result of the settlement of contracts or the transfer of assets, rights or interests on a financial market.

(3) The regulations may specify any description of charge granted for that purpose in favour of any other person in connection with exchange facilities or clearing services provided by a recognised investment exchange or recognised clearing house or by any such body, person, authority or organisation as is mentioned in paragraph (2).

(4) Where a charge is granted partly for the purpose specified in paragraph (2) and partly for other purposes, the power conferred by this Article is exercisable in relation to the charge so far as it has effect for that purpose.

(5) The regulations may—

- (a) make the same or similar provision in relation to the charges to which they apply as is made by or under Articles 96 and 97 in relation to market charges, or
- (b) apply any of those provisions with such exceptions, additions or adaptations as are specified in the regulations.

(6) Before making regulations under this Article relating to a description of charges defined by reference to their being granted—

- (a) in favour of a person included in the list maintained by the Bank of England for the purposes of section 171 of the Companies Act 1989<sup>(9)</sup>, or in connection with exchange facilities or clearing services provided by a person included in that list, or
- (b) in favour of the Bank of England, or in connection with settlement arrangements provided by the Bank,

the Department shall consult the Treasury and the Bank of England.

(7) Regulations under this Article may provide that they apply or do not apply to a charge if or to the extent that it secures obligations of a specified description, is a charge over property of a specified description or contains provisions of a specified description.

#### *Market property*

#### **Application of margin not affected by certain other interests**

**99.**—(1) The following provisions have effect with respect to the application by a recognised investment exchange or recognised clearing house of property (other than land) held by the exchange or clearing house as margin in relation to a market contract.

(2) So far as necessary to enable the property to be applied in accordance with the rules of the exchange or clearing house, it may be so applied notwithstanding any prior equitable interest or right, or any right or remedy arising from a breach of fiduciary duty, unless the exchange or clearing house had notice of the interest, right or breach of duty at the time the property was provided as margin.

(3) No right or remedy arising subsequently to the property being provided as margin may be enforced so as to prevent or interfere with the application of the property by the exchange or clearing house in accordance with its rules.

(4) Where an exchange or clearing house has power by virtue of the above provisions to apply property notwithstanding an interest, right or remedy, a person to whom the exchange or clearing

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<sup>(8)</sup> 1986 c. 45

<sup>(9)</sup> 1982 c. 27

house disposes of the property in accordance with its rules takes free from that interest, right or remedy.

#### **Priority of floating market charge over subsequent charges**

**100.**—(1) The Department may by regulations provide that a market charge which is a floating charge has priority over a charge subsequently created or arising, including a fixed charge.

(2) The regulations may make different provision for cases defined, as regards the market charge or the subsequent charge, by reference to the description of charge, its terms, the circumstances in which it is created or arises, the nature of the charge, the person in favour of whom it is granted or arises or any other relevant factor.

#### **Priority of market charge over unpaid vendor's lien**

**101.** Where property subject to an unpaid vendor's lien becomes subject to a market charge, the charge has priority over the lien unless the chargee had actual notice of the lien at the time the property became subject to the charge.

#### **Proceedings against market property by unsecured creditors**

**102.**—(1) Where property (other than land) is held by a recognised investment exchange or recognised clearing house as margin in relation to market contracts or is subject to a market charge, no execution or other legal process for the enforcement of a judgment or order may be commenced or continued, and no distress may be levied, against the property by a person not seeking to enforce any interest in or security over the property, except with the consent of—

- (a) in the case of property provided as cover for margin, the investment exchange or clearing house in question, or
- (b) in the case of property subject to a market charge, the person in whose favour the charge was granted.

(2) Where consent is given the proceedings may be commenced or continued notwithstanding any provision of the Insolvency Order.

(3) Where by virtue of this Article a person would not be entitled to enforce a judgment or order against any property, any injunction or other remedy granted with a view to facilitating the enforcement of any such judgment or order shall not extend to that property.

#### **Power to apply provisions to other cases**

**103.**—(1) The power of the Department to make provision by regulations under—

- (a) Article 92, 93 or 94 (power to extend provisions relating to market contracts), or
- (b) Article 98 (power to extend provisions relating to market charges),

includes power to apply Articles 99 to 102 to any description of property provided as cover for margin in relation to contracts in relation to which the power is exercised or, as the case may be, property subject to charges in relation to which the power is exercised.

(2) The regulations may provide that those Articles apply with such exceptions, additions and adaptations as may be specified in the regulations.

### *Supplementary provisions*

#### **Insolvency proceedings in other jurisdictions**

**104.**—(1) The references to insolvency law in section 426 of the Insolvency Act 1986<sup>(10)</sup> (co-operation with courts exercising insolvency jurisdiction in other jurisdictions) include, in relation to a part of the United Kingdom, the provisions made by or under this Part and, in relation to a relevant country or territory within the meaning of that section, so much of the law of that country or territory as corresponds to any provisions made by or under this Part.

(2) A court shall not, in pursuance of that section or any other statutory provision or rule of law, recognise or give effect to—

- (a) any order of a court exercising jurisdiction in relation to insolvency law in a country or territory outside the United Kingdom, or
- (b) any act of a person appointed in such a country or territory to discharge any functions under insolvency law,

in so far as the making of the order or the doing of the act would be prohibited in the case of a court in Northern Ireland or a relevant office-holder by provisions made by or under this Part.

(3) Paragraph (2) does not affect the recognition or enforcement of a judgment required to be recognised or enforced under or by virtue of the Civil Jurisdiction and Judgments Act 1982<sup>(11)</sup>.

#### **Indemnity for certain acts, &c.**

**105.**—(1) Where a relevant office-holder takes any action in relation to property of a defaulter which is liable to be dealt with in accordance with the default rules of a recognised investment exchange or recognised clearing house, and believes and has reasonable grounds for believing that he is entitled to take that action, he is not liable to any person in respect of any loss or damage resulting from his action except in so far as the loss or damage is caused by the office-holder's own negligence.

(2) Any failure by a recognised investment exchange or recognised clearing house to comply with its own rules in respect of any matter shall not prevent that matter being treated for the purposes of this Part as done in accordance with those rules so long as the failure does not substantially affect the rights of any person entitled to require compliance with the rules.

(3) No recognised investment exchange or recognised clearing house, nor any officer or servant or member of the governing body of a recognised investment exchange or recognised clearing house, shall be liable in damages for anything done or omitted in the discharge or purported discharge of any functions to which this paragraph applies unless the act or omission is shown to have been in bad faith.

(4) The functions to which paragraph (3) applies are the functions of the exchange or clearing house so far as relating to, or to matters arising out of—

- (a) its default rules, or
- (b) any obligations to which it is subject by virtue of this Part.

(5) No person exercising any functions by virtue of arrangements made pursuant to paragraph 5 or 12 of Schedule 21 to the Companies Act 1989<sup>(12)</sup> (delegation of functions in connection with default procedures), nor any officer or servant of such a person, shall be liable in damages for anything done or omitted in the discharge or purported discharge of those functions unless the act or omission is shown to have been in bad faith.

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<sup>(10)</sup> 1989 c. 40

<sup>(11)</sup> 1946 c. 36

<sup>(12)</sup> 1986 c. 60

### **Power to make further provision by regulations**

**106.**—(1) The Department may by regulations make such further provision as appears to it necessary or expedient for the purposes of this Part and, in particular but without prejudice to the generality of the foregoing, for integrating the provisions of this Part with the general law of insolvency.

(2) The Secretary of State may by regulations make such further provision as appears to him necessary or expedient for the purposes of this Part.

(3) Regulations under this Article may add to, amend or repeal any of the provisions of this Part or provide that those provisions have effect subject to such additions, exceptions or adaptations as are specified in the regulations.

### **Supplementary provisions as to regulations**

**107.**—(1) Regulations under this Part may contain such incidental, transitional and other supplementary provisions as appear to the Department, or as the case may be, to the Secretary of State to be necessary or expedient.

(2) Regulations made by the Department under this Part shall be subject to negative resolution.

(3) Regulations made by the Secretary of State under this Part shall be subject to annulment in pursuance of a resolution of either House of Parliament in like manner as a statutory instrument and section 5 of the Statutory Instruments Act 1946(13) shall apply accordingly.

### **Construction of references to parties to market contracts**

**108.**—(1) Where a person enters into market contracts in more than one capacity, the provisions of this Part apply (subject as follows) as if the contracts entered into in each different capacity were entered into by different persons.

(2) References in this Part to a market contract to which a person is a party include (subject as follows, and unless the context otherwise requires) contracts to which he is party as agent.

(3) The Secretary of State may by regulations—

(a) modify or exclude the operation of paragraphs (1) and (2), and

(b) make provision as to the circumstances in which a person is to be regarded for the purposes of those provisions as acting in different capacities.

### **Meaning of “default rules” and related expressions**

**109.**—(1) In this Part “default rules” means rules of a recognised investment exchange or recognised clearing house which provide for the taking of action in the event of a person appearing to be unable, or likely to become unable, to meet his obligations in respect of one or more market contracts connected with the exchange or clearing house.

(2) References in this Part to a “defaulter” are to a person in respect of whom action has been taken by a recognised investment exchange or recognised clearing house under its default rules, whether by declaring him to be a defaulter or otherwise; and references in this Part to “default” shall be construed accordingly.

(3) In this Part “default proceedings” means proceedings taken by a recognised investment exchange or recognised clearing house under its default rules.

(4) If an exchange or clearing house takes action under its default rules in respect of a person, all subsequent proceedings under its rules for the purposes of or in connection with the settlement of market contracts to which the defaulter is a party shall be treated as done under its default rules.

### Meaning of “relevant office-holder”

**110.**—(1) The following are relevant office-holders for the purposes of this Part—

- (a) the official receiver,
- (b) any person acting in relation to a company as its liquidator, provisional liquidator, administrator or administrative receiver,
- (c) any person acting in relation to an individual as his trustee in bankruptcy,
- (d) any person acting as administrator of an insolvent estate of a deceased person.

(2) In paragraph (1)(b) “company” means any company, society, association, partnership or other body which may be wound up under the Insolvency Order.

### Minor definitions

**111.**—(1) In this Part—

“administrative receiver” has the meaning given by Article 5(1) of the Insolvency Order;

“charge” means any form of security, including a mortgage;

“clearing house” has the same meaning as in the Financial Services Act 1986<sup>(14)</sup>;

“investment” and “investment exchange” have the same meaning as in the Financial Services Act 1986;

“overseas”, in relation to an investment exchange or clearing house, means having its head office outside the United Kingdom;

“recognised” means recognised under the Financial Services Act 1986<sup>(15)</sup>;

“The Stock Exchange” means The International Stock Exchange of the United Kingdom and the Republic of Ireland Limited;

“UK”, in relation to an investment exchange or clearing house, means having its head office in the United Kingdom.

(2) References in this Part to settlement in relation to a market contract are to the discharge of the rights and liabilities of the parties to the contract, whether by performance, compromise or otherwise.

(3) In this Part the expressions “margin” and “cover for margin” have the same meaning.

(4) References in this Part to ensuring the performance of a transaction have the same meaning as in the Financial Services Act 1986.

(5) For the purposes of this Part a person shall be taken to have notice of a matter if he deliberately failed to make enquiries as to that matter in circumstances in which a reasonable and honest person would have done so.

This does not apply for the purposes of a provision requiring “actual notice”.

(6) References in this Part to the law of insolvency include references to every provision made by or under the Insolvency Order, and in relation to a building society references to insolvency law or to any provision of the Insolvency Order are to that law or provision as modified by the Building Societies Act 1986<sup>(16)</sup>.

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<sup>(14)</sup> 1907 c. 24

<sup>(15)</sup> 1907 c. 24

<sup>(16)</sup> 1986 c. 53

**Index of defined expressions**

112. The following Table shows provisions defining or otherwise explaining expressions used in this Part (other than provisions defining or explaining an expression used only in the same Article or paragraph)—

administrative receiver	Article 111(1)
charge	Article 111(1)
clearing house	Article 111(1)
cover for margin	Article 111(3)
default rules (and related expressions)	Article 109
designated non-member	Article 80(2)
ensuring the performance of a transaction	Article 111(4)
insolvency law (and similar expressions)	Article 111(6)
investment	Article 111(1)
investment exchange	Article 111(1)
margin	Article 111(3)
market charge	Article 95
market contract	Article 80
notice	Article 111(5)
overseas (in relation to an investment exchange or clearing house)	Article 111(1)
party (in relation to a market contract)	Article 108
recognised	Article 111(1)
relevant office-holder	Article 110
settlement and related expressions (in relation to a market contract)	Article 111(2)
The Stock Exchange	Article 111(1)
UK (in relation to an investment exchange or clearing house)	Article 111(1)