

SCHEDULES

SCHEDULE 22

Section 182(4).

FINANCIAL MARKETS AND INSOLVENCY: PROVISIONS APPLYING TO PRE-COMMENCEMENT CASES

Introductory

- 1 The provisions of this Schedule have effect for the purpose of safeguarding the operation of certain financial markets—
- (a) in the event of the insolvency, winding up or default of a person party to transactions in the market (paragraphs 2 to 8), and
 - (b) as regards the effectiveness or enforcement of certain charges given to secure obligations in connection with such transactions (paragraphs 9 to 12).

Recognised investment exchanges and clearing houses

- 2 (1) This Schedule applies to the following descriptions of contract connected with a recognised investment exchange or recognised clearing house.

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

- (2) In relation to a recognised investment exchange, this Schedule applies to—
- (a) contracts entered into by a member or designated non-member of the exchange which are—
 - (i) made on or otherwise subject to the rules of the exchange,
 - (ii) on terms expressed to be as traded on the exchange, or
 - (iii) on the same terms as those on which an equivalent contract would be made on 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 Schedule 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.

This includes contracts effected under or in consequence of action taken by the clearing house under its default rules.

- 3 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 following provisions of this Schedule.

- 4 (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, winding up or sequestration, or in the administration of an insolvent estate—
- (a) a market contract,
 - (b) the rules of a recognised investment exchange or recognised clearing house as to the settlement of market contracts,
 - (c) the default rules of a recognised investment exchange or recognised clearing house.

- (2) The powers of a relevant office-holder in his capacity as such, and the powers of the court under the Insolvency Act 1986 or the Bankruptcy (Scotland) Act 1985, shall not be exercised in such a way as to prevent or interfere with—
- (a) the settlement of a market contract in accordance with the rules of a recognised investment exchange or recognised clearing house,
 - (b) any action taken under the default rules of such an exchange or clearing house.

- (3) Nothing in the following provisions of this Schedule shall be construed as affecting the generality of sub-paragraph (2).

- (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, or in Scotland claimed in a winding up or sequestration, until the completion of the default proceedings.

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

- 5 (1) 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.

- (2) Nothing in section 11(3), 130 or 285 of the Insolvency Act 1986 (which restrict the taking of certain legal proceedings and other steps), and nothing in the Bankruptcy (Scotland) Act 1985, shall affect any action taken by an exchange or clearing house for the purpose of its default proceedings.

- 6 (1) The following provisions apply with respect to the net sum certified by a recognised investment exchange or recognised clearing house, upon the completion of proceedings under its default rules, to be payable by or to a defaulter.
- (2) If, in England and Wales, 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 section 323 of the Insolvency Act 1986 (mutual dealings and set-off) or the corresponding provision applicable in the case of a winding up,

in the same way as a debt due before the commencement of the bankruptcy or winding up.

(3) If, in Scotland, an award of sequestration or a winding-up order has been made, or a resolution for voluntary winding up has been passed, the debt—

- (a) may be claimed in the sequestration or winding up or, as the case may be, is payable to the relevant office-holder, and
- (b) shall be taken into account for the purposes of any rule of law relating to compensation or set-off applicable in sequestration or winding up,

in the same way as a debt due before the date of sequestration (within the meaning of section 73(1) of the Bankruptcy (Scotland) Act 1985) or the commencement of the winding up.

7 (1) Sections 178, 186, 315 and 345 of the Insolvency Act 1986 (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.

In the application of this sub-paragraph in Scotland, the reference to sections 178 and 315 shall be construed as a reference to any rule of law having the like effect as those sections.

(2) Sections 127 and 284 of the Insolvency Act 1986 (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, if a person enters into a market contract knowing that a petition has been presented for the winding up or bankruptcy of the other party to the contract, the value of any profit or benefit to him arising from the contract is recoverable from him by the relevant office-holder unless the court directs otherwise.

(4) Any sum recoverable by virtue of sub-paragraph (3) has the same priority, in the event of the insolvency of the person from whom it is due, as if it were secured by a fixed charge.

8 (1) No order shall be made in relation to a market contract under—

- (a) section 238 or 339 of the Insolvency Act 1986 (transactions at an under-value),
- (b) section 239 or 340 of that Act (preferences), or
- (c) section 423 of that Act (transactions defrauding creditors),

unless the court is satisfied that the person in favour of whom the contract was made knew at the time he entered into it that it was at an under-value (within the meaning of the relevant provision) or, as the case may be, that a preference was being given.

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- (2) As respects Scotland, no decree shall be granted in relation to a market contract—
- (a) under section 34 or 36 of the Bankruptcy (Scotland) Act 1985 or section 242 or 243 of the Insolvency Act 1986 (gratuitous alienations and unfair preferences), or
 - (b) at common law,
- unless the court is satisfied that the person with whom the contract was made knew at the time he entered into it that it was challengeable under any of the provisions mentioned in paragraph (a) or at common law.
- (3) Sub-paragraphs (1) and (2) apply in relation to—
- (a) a disposition of property in pursuance of a market contract,
 - (b) the provision of margin in relation to market contracts,
 - (c) a contract effected by a recognised investment exchange or recognised clearing house for the purpose of realising property provided as margin, or
 - (d) a disposition of property in accordance with the rules of the exchange or clearing house as to the application of property provided as margin,
- as they apply in relation to the making of a market contract.

Market charges

- 9 (1) The charges to which paragraphs 10 to 12 apply are charges, 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 with the payments.
- Those charges are referred to in this Schedule as “market charges”.
- (2) Where a charge is granted partly for purposes specified in sub-paragraph (1)(a), (b) or (c) and partly for other purposes, paragraphs 10 to 12 apply to it so far as it has effect for the specified purposes; and the expression “market charge” shall be construed accordingly.
- (3) In this paragraph and paragraphs 10 to 12—
- “charge” means any form of security, including a mortgage and, in Scotland, a heritable security; and
- “specified securities” means securities for the time being specified in the list in Schedule 1 to the Stock Transfer Act 1982, and includes any right to such securities.
- 10 The general law of insolvency has effect in relation to market charges and action taken in enforcing them subject to the following provisions of this Schedule.

- 11 (1) Sections 10(1)(b) and 11(3)(c) of the Insolvency Act 1986 (no enforcement of security while petition for administration order pending or order in force) do not apply to a market charge.
- (2) Section 11(2) of that Act (receiver to vacate office when so required by administrator) does not apply to a receiver appointed under a market charge.
- (3) Section 15(1) and (2) of that Act (administrator’s power to deal with charged property) do not apply to a market charge.
- (4) Sections 127 and 284 of that Act (avoidance of property dispositions effected after commencement of winding up or presentation of bankruptcy petition) do not apply to—
- (a) 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, or
- (b) any disposition of property made in enforcing a market charge.
- (5) However, if a person (other than the chargee under the market charge) who is a party to a disposition mentioned in sub-paragraph (4)(a) knows 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 or benefit 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 sub-paragraph (5) has the same priority, in the event of the insolvency of the person from whom it is due, as if it were secured by a fixed charge.
- 12 (1) No legal proceedings, execution or other legal process may be commenced or continued, and no distress may be levied against property which is, or becomes, subject to a market charge except with the consent of the person in whose favour the charge was granted or the leave of the court.
- (2) The court may give leave subject to such terms as it thinks fit.
- (3) Sub-paragraph (1) does not apply to proceedings to enforce any security over, or any equitable interest in, the property.
- (4) Sections 10(1)(c), 11(3)(d), 130(3) and 285(3) of the Insolvency Act 1986 (which restrict the taking of certain legal proceedings and other steps) have effect accordingly.
- (5) In the application of this paragraph to Scotland, the reference to execution being commenced or continued includes a reference to diligence being carried out or continued, and the reference to distress being levied shall be omitted.

Supplementary provisions

- 13 (1) In this Schedule “default rules” means—
- (a) in relation to a recognised investment exchange, rules which provide in the event of a member or designated non-member of the exchange appearing to be unable, or likely to become unable, to meet his obligations in respect of one or more market contracts, for the settlement forthwith of all unsettled market contracts to which he is a party as principal, other than those whose performance is ensured by a recognised clearing house;

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- (b) in relation to a recognised clearing house, rules which provide in the event of a member of the clearing house appearing to be unable, or likely to become unable, to meet his obligations in respect of any market contract, for the closing out of his position in relation to all market contracts to which he is a party.
- (2) References in this Schedule 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 Schedule to “default” shall be construed accordingly.
- (3) In this Schedule “default proceedings” means proceedings taken by a recognised investment exchange or recognised clearing house under its default rules.
- 14 (1) The following are relevant office-holders for the purposes of this Schedule—
- (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 (or, in Scotland, a deceased debtor) as his trustee in bankruptcy or interim receiver of his property or as permanent or interim trustee in the sequestration of his estate,
 - (d) any person acting as administrator (or, in Scotland, as judicial factor) of an insolvent estate of a deceased person.
- (2) Sub-paragraph (1)(c) applies in relation to a partnership, and any debtor within the meaning of the Bankruptcy (Scotland) Act 1985, as it applies in relation to an individual.
- (3) In this paragraph—
- “administrative receiver” has the meaning given by section 251 of the Insolvency Act 1986;
- “company” means a company within the meaning of section 735(1) of the Companies Act 1985 or a company which may be wound up under Part V of the Insolvency Act 1986 (unregistered companies); and
- “interim trustee” and “permanent trustee” have the same meaning as in the Bankruptcy (Scotland) Act 1985.
- 15 (1) In this Schedule—
- “clearing house” has the same meaning as in the Financial Services Act 1986;
- “investment” and “investment exchange” have the same meaning as in the Financial Services Act 1986;
- “recognised” means recognised under the Financial Services Act 1986;
- “The Stock Exchange” means The International Stock Exchange of the United Kingdom and the Republic of Ireland Limited.
- (2) References in this Schedule to ensuring the performance of a transaction have the same meaning as in the Financial Services Act 1986.
- (3) References in this Schedule to a market contract to which a person is a party include, unless the contrary intention appears, contracts to which he is party as agent.