

# INSOLVENCY (NORTHERN IRELAND) ORDER 2002

S.I. 2002 No. 3152 (N.I. 6)

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## EXPLANATORY MEMORANDUM

### INTRODUCTION

1. The Insolvency (Northern Ireland) Order 2002 (“the Order”) was made on 17<sup>th</sup> December 2002.
2. This Explanatory Memorandum has been prepared by the Department of Enterprise, Trade and Investment (“the Department”) in order to assist the reader in understanding the Order and to help inform debate on it. It does not form part of the Order.
3. The Memorandum needs to be read in conjunction with the Order. It does not give, and is not meant to be, a comprehensive description of the Order. So where an Article or part of an Article does not seem to require any explanation or comment, none is given.

### PURPOSE OF THE ORDER AND SUMMARY OF ITS MAIN PROVISIONS

4. The primary purpose of the Order is to make available to small companies attempting to enter a voluntary arrangement<sup>1</sup> with their creditors the option of a short moratorium<sup>2</sup> protecting them from legal proceedings (including proceedings for winding-up) while they are convening a meeting of creditors to vote on their proposal for payment. This will provide such companies with the same protection as is available to their counterparts in GB through the enactment of the Insolvency Act 2000 and which under current law is also available to individuals. Small companies are defined by Article 255(3) of the Companies (Northern Ireland) Order 1986 as companies satisfying two out of three criteria, namely having a turnover not exceeding £2.8 million, having a balance sheet total not exceeding £1.4 million, and having 50 or less employees.
  1. *Company Voluntary Arrangements* were introduced by the Insolvency (Northern Ireland) Order 1989 Part II and similarly provide a means for financially troubled companies to reach a legally binding agreement with their creditors in satisfaction of their debts or a scheme of arrangement of their affairs.
  2. *Moratorium* is a temporary stay on certain legal acts and processes from being performed or continued.
5. The Order includes a range of other measures. It: -
  - makes an interim order (moratorium) optional in the case of an individual attempting to enter a voluntary arrangement<sup>1</sup> with his creditors;
  - provides for the Department to recognise bodies to authorise persons to act as nominees or supervisors in company or individual voluntary arrangements not being persons who are currently licensed to act as insolvency practitioners;
  - prohibits a landlord effecting peaceable re-entry to bring a tenant’s lease to an end where an administration order<sup>2</sup> has been applied for or made, except with the leave of the High Court;

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- amends Article 182 of the Insolvency (Northern Ireland) Order 1989 to require liquidators<sup>3</sup> to report alleged criminal misconduct on the part of company officers or members in connection with company liquidations directly to the Department rather than through the Director of Public Prosecutions;
  - amends Article 183 of the Insolvency (Northern Ireland) Order 1989, to ensure that it is compatible with Article 6 of the European Convention on Human Rights (ECHR). Article 183 as it stands would allow answers obtained under powers of compulsion derived from the Companies (Northern Ireland) Order 1986 to be used as evidence in subsequent criminal proceedings against the person who gave the answers. The European Court of Human Rights ruled in the case of Saunders v. UK that this was an infringement of the individual's rights under Article 6;
  - amends Article 365 so that the value of a deceased insolvent's interest in jointly-owned property which would otherwise have been lost to the deceased insolvent's estate through the operation of the survivorship rules will be recoverable for the benefit of the estate and therefore of the creditors<sup>4</sup>;
1. *Individual Voluntary Arrangements* were introduced by the Insolvency (Northern Ireland) Order 1989 Part VIII and provide a means for financially troubled individuals to reach a legally binding agreement with their creditors in satisfaction of their debts or a scheme of arrangement of their affairs.
  2. The *Administration Order Procedure* was introduced by the Insolvency (Northern Ireland) Order 1989 Part III.
  3. A *liquidator* is the insolvency practitioner appointed to realise the assets of a company and distribute the proceeds to creditors in liquidation.
  4. This will counteract the results of a Court of Appeal decision in the case of *In re Palmer Deceased (A Debtor)* 1994 Ch. 316, the effect of which was to place any share which the deceased had in property held on a joint tenancy beyond the reach of his creditors.
    - creates power for the Department with the agreement of the Lord Chancellor to make regulations to give effect with or without modifications to the model law on cross-border insolvency which was adopted by the United Nations Commission on International Trade Law (UNCITRAL)<sup>1</sup> of which the UK is a member state.

## OVERVIEW

6. The Order has 14 Articles and 4 Schedules

## COMMENTARY ON ARTICLES

### ***Article 6: Qualification or authorisation of nominees and supervisors***

This Article amends Article 3 of the Insolvency (Northern Ireland) Order 1989, which deals with acting as an insolvency practitioner<sup>2</sup> and inserts a new Article 348A dealing with arrangements for authorisation of nominees and supervisors.

*Paragraph (1)* extends the meaning of "to act as an insolvency practitioner" to include a person who acts as a nominee in relation to a company or individual voluntary arrangement.

*Paragraph (2)* inserts a new paragraph (1A) in Article 348 of the Insolvency (Northern Ireland) Order 1989. The amendment means that it will not be an offence to act as a nominee or supervisor whilst unauthorised to act as an insolvency practitioner provided that the individual is authorised to act as a nominee or a supervisor under paragraph (1) of Article 348(A).

### ***Article 8: Investigation and prosecution of malpractice***

This Article amends Article 182 of the Insolvency (Northern Ireland) Order 1989. The Article provides that, in a winding up by the High Court, the Court may direct the liquidator to report apparent criminal misconduct by past or present company officers or members of the company to the Department rather than to the Director of Public Prosecutions. The Article also requires

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a liquidator in a voluntary winding up to report suspicions of criminal misconduct by past or present company officers or members to the Department rather than to the Director of Public Prosecutions.

1. The UNCITRAL model law seeks to facilitate the process of obtaining recognition of foreign insolvency proceedings; to introduce a greater degree of certainty as to the assistance the courts can give a foreign officeholder and the stage of the proceedings at which the assistance is given; and to require courts with insolvency jurisdiction to co-operate with each other.
2. *Insolvency practitioner* is a person who has the conduct of an insolvency procedure, e.g. liquidator in the winding up of a company.

**Article 10: Insolvent estates of deceased persons**

This Article inserts a new Article 365A into the Insolvency (Northern Ireland) Order 1989 by addressing the effects of the Court of Appeal decision in the case of *In re Palmer Deceased (A Debtor)* 1994 Ch. 316. In March 1994 the Court of Appeal attributed the ordinary, rather than the technical, meaning to “the estate of a deceased person” used in the context of an order-making power in Section 421 (In Northern Ireland, Article 365). This meant that the debtor’s interest, on the day of his death, in property held on a joint tenancy (usually the matrimonial home) was no longer available to the trustee<sup>1</sup> to distribute among the deceased’s creditors. The Article allows the trustee of a deceased insolvent, if certain conditions are met, to apply to the High Court to recover from the survivor for the benefit of the estate the value of any interest the deceased had in a jointly-owned property.

**Schedule 1: Moratorium where directors propose voluntary arrangement**

*Paragraph 23 Schedule A1:*

**Sub-paragraph 2**

Where a petition (other than an excepted petition<sup>2</sup>) for the winding up of the company has been presented before the beginning of the moratorium, Article 1073 of the Insolvency (Northern Ireland) Order 1989 will not apply during the moratorium or in the 28 day period referred to in paragraph 36(5)(a) of Schedule A1.

**Sub-paragraph 3**

Where an excepted petition for the winding up of the company has been presented to the High Court before the beginning of a moratorium it can continue unaffected by the coming into force of the moratorium.

*Paragraph 13 Schedule A1:* The moratorium, whilst in force, prevents a floating charge from crystallising, or restrictions being imposed on the disposal of any of the company’s property.

1. *The trustee* is the person appointed to realise the assets of a deceased individual and distribute the proceeds to the creditors.
2. An *excepted petition* is a petition presented by the Department pursuant to Article 104A of the Insolvency (Northern Ireland) Order 1989 on the grounds that it is in the public interest to wind up a company or pursuant to Section 367 of the Financial Services and Markets Act 2000 on the grounds that it is just and equitable that the company be wound up.
3. **Article 107** Insolvency (Northern Ireland) Order 1989 provides that any disposal of a company’s property, and transfer of any shares, or alteration in the status of the company’s members made after the presentation to the High Court of a winding-up petition is invalid unless the Court orders otherwise. Because of the disapplication of Article 107, disposals will be governed by the moratorium provisions instead of by that Article.

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***Schedule 2: Company voluntary arrangements***

**Part I – Amendments of the Insolvency (Northern Ireland) Order 1989**

This Schedule makes amendments to the provisions of the Insolvency (Northern Ireland) Order 1989 relating to company voluntary arrangements where there is no moratorium.

**Part II: Amendments of the Building Societies Act 1986**

*Paragraphs 13 and 14 of Schedule 2:* Part II of the schedule deal with the interaction of the company voluntary arrangement procedure with the Building Societies Act 1986. Principally it prevents a building society from using the company voluntary arrangement moratorium procedure.

***Schedule 3: Individual voluntary arrangements***

This Schedule makes amendments to the provisions of the Insolvency (Northern Ireland) Order 1989 relating to individual voluntary arrangements.

**COMMENCEMENT**

7. A power is included in the Order to bring its provisions into force by way of statutory instrument rather than bringing it into force on Royal Assent or on a date (or dates) specified in the Order.