STATUTORY INSTRUMENTS

2018 No. 174

CONSTITUTIONAL LAW
DEVOLUTION, SCOTLAND
INSOLVENCY

The Scotland Act 1998 (Insolvency Functions) Order 2018

Made - - - - 8th February 2018

Coming into force in accordance with article 1(1)

At the Court at Buckingham Palace, the 8th day of February 2018

Present,

The Queen's Most Excellent Majesty in Council

This Order is made by Her Majesty in Council in exercise of the powers conferred upon Her by sections 63(1)(b) and (3), 108(1)(b) and (3), 113(3) and (4) and 124(2) of the Scotland Act 1998(**1**).

In accordance with paragraphs 1 and 2 of Schedule 7 to that Act(**2**), a draft of this Order has been—

(a) laid before and approved by a resolution of each House of Parliament; and

(b) laid before and approved by a resolution of the Scottish Parliament.

Accordingly, Her Majesty, by and with the advice of Her Privy Council, makes the following Order:

Citation, commencement, extent and interpretation

1.—(1) This Order may be cited as the Scotland Act 1998 (Insolvency Functions) Order 2018 and comes into force on the day after the day on which it is made.

(2) This Order does not extend to Northern Ireland.

(3) In this Order—

"the 1986 Act" means the Insolvency Act 1986(**3**);

"the 1992 Act" means the Friendly Societies Act 1992(**4**);

(**1**) 1998 c.46. Section 108(1) was amended by section 12(2)(a) of the Scotland Act 2012 (c.11).

(**2**) Paragraphs 1 and 2 of Schedule 7 have been modified by paragraph 3(2) of schedule 4 to the Interpretation and Legislative Reform (Scotland) Act 2010 (asp 10).

(**3**) 1986 c.45.

(**4**) 1992 c.40.

"the 1998 Act" means the Scotland Act 1998(**5**);

"the 2000 Act" means the Limited Liability Partnerships Act 2000(**6**);

"the 2010 Act" means the Interpretation and Legislative Reform (Scotland) Act 2010(**7**);

"incorporated friendly society" has the same meaning as in section 116 of the 1992 Act;

"limited liability partnership" has the same meaning as section 1(2) of the 2000 Act;

"oversea limited liability partnership" has the same meaning as in section 14(3) of the 2000 Act(**8**);

"the EU Regulation" has the same meaning as in section 436(1) of the 1986 Act(**9**); and

"winding up" in relation to companies, incorporated friendly societies and limited liability partnerships, includes winding up of solvent, as well as insolvent companies, incorporated friendly societies and limited liability partnerships.

Reserved functions shared by a Minister of the Crown and the Scottish Ministers

2.—(1) Subject to paragraph (2), the functions described in paragraph (3) are exercisable by the Scottish Ministers concurrently with a Minister of the Crown, so far as they are exercisable by the Minister of the Crown in or as regards Scotland.

(2) The Scottish Ministers may exercise a function under paragraph (1) only with the agreement of a Minister of the Crown.

(3) The functions are those conferred by—

(a) section 411(1)(b) and (2) of the 1986 Act(**10**) (company insolvency rules) for the purpose of making rules which give effect to any provision about winding up in the Parts of the 1986 Act described in paragraph (4) or the EU Regulation;

(b) section 411(1)(b) and (2) of the 1986 Act as applied by section 23, paragraph 69(1)(a) of Schedule 10 to the 1992 Act(**11**) (insolvency rules and fees) for the purpose of making rules, in relation to incorporated friendly societies, which give effect to any provision about winding up in the Parts of the 1986 Act described in paragraph (5);

(c) sections 14(2)(a), 16 and 17(1), (2) and (3) of the 2000 Act (insolvency and winding up) for the purpose of making provision by regulations about the winding up of—

(i) limited liability partnerships; and

(ii) oversea limited liability partnerships,

by applying or incorporating, with such modifications as appear appropriate, rules made under section 411(1)(b) and (2) of the 1986 Act which give effect to any provision

(**5**) 1998 c.46.
(**6**) 2000 c.12.
(**7**) 2010 asp 10.
(**8**) Section 14(3) was amended by S.I. 2009/1804, Schedule 3, paragraph 6(3).
(**9**) A definition of "EU Regulation" was inserted into section 436(1) by S.I. 2017/702, regulation 2 and the Schedule, Part 1, paragraph 28(b) and means Regulation (EU) 2015/848 of the European Parliament and of the Council of 20th May 2015 on insolvency proceedings (OJEU L. 141, 5.6.2015, p.19).
(**10**) Section 411(1) was amended by S.I. 2002/1037, regulation 3(1); S.I. 2017/702, regulation 2 and the Schedule, Part 1, paragraph 24 and the Constitutional Reform Act 2005 (c.4), Schedule 4, Part 1, paragraph 188.
(**11**) Paragraph 69(1) of Schedule 10 provides that rules may be made under section 411 of the Insolvency Act 1986 (c.45) ("the 1986 Act") for the purpose of giving effect, in relation to incorporated friendly societies, to the provisions of the applicable winding up legislation. A definition of "the applicable winding up legislation" is contained in section 23(3) of the Friendly Societies Act 1992 (c.40) ("the 1992 Act") and means "the companies winding up legislation" (as defined in section 23(1) of that Act) and includes, so far as relevant to this Order, Parts 4, 6 and 7 of the 1986 Act, modified as described in section 23(2) of that Act (ie modified as set out in Parts 1 to 3 of Schedule 10 to that Act).

about winding up in the Parts of the 1986 Act described in paragraph (5)(**12**) or the EU Regulation.

(4) The Parts of the 1986 Act are—

(a) Part 4 (winding up of companies registered under the Companies Acts);

(b) Part 5 (winding up of unregistered companies);

(c) Part 6 (miscellaneous provisions applying to companies which are insolvent or in liquidation); and

(d) Part 7 (interpretation for First Group of Parts), so far as it relates to Parts 4, 5 or 6.

(5) The Parts of the 1986 Act are—

(a) Part 4 (winding up of companies registered under the Companies Acts);

(b) Part 6 (miscellaneous provisions applying to companies which are insolvent or in liquidation); and

(c) Part 7 (interpretation for First Group of Parts), so far as it relates to Part 4 or Part 6.

General modifications of enactments

3.—(1) Section 117 of the 1998 Act(**13**) (general modification of enactments: Ministers of the Crown) applies in relation to the exercise of functions by the Scottish Ministers by virtue of article 2 as it applies in relation to the exercise of functions by the Scottish Ministers within devolved competence.

(2) In the application of that section by virtue of this article, the reference in it to any pre-commencement enactment is to be read as if it were a reference to any enactment.

Rules and regulations made by the Scottish Ministers

4.—(1) Section 411(4) of the 1986 Act does not apply in relation to rules made by the Scottish Ministers by virtue of article 2(3)(a) or (b).

(2) Rules made by the Scottish Ministers by virtue of article 2(3)(a) or (b) are subject to the negative procedure (see section 28 of the 2010 Act).

(3) Section 411(5) of the 1986 Act does not apply in relation to regulations made under rules made by the Scottish Ministers by virtue of paragraph 27 of Schedule 8 to the 1986 Act(**14**) and article 2(3)(a) or (b) (but see section 30(2) of the 2010 Act(**15**)).

(4) Section 17(1), (4) and (6) of the 2000 Act do not apply in relation to regulations made by the Scottish Ministers by virtue of article 2(3)(c).

(5) Subject to paragraph (6), regulations made by the Scottish Ministers by virtue of article 2(3)(c) are subject to the negative procedure (see section 28 of the 2010 Act).

(**12**) Parts 4, 6 and 7 of the 1986 Act were applied to limited liability partnerships, with modifications, by S.I. 2001/1090, regulation 5 and Schedules 3 and 4 (as amended by S.I. 2004/355, S.I. 2005/1989, S.I. 2009/1941, S.I. 2015/989 and S.I. 2015/1641 and prospectively amended by S.S.I. 2016/141); for application to Scotland see in particular regulation 5(3) and Schedule 4, in relation to aspects of Parts 4, 6 and 7 of the 1986 Act reserved under Section C2 of Schedule 5 to the Scotland Act 1998 (c.45) ("the 1998 Act"); S.I. 1986/1915 (as amended by S.I. 1987/1921, S.I. 1999/1820, S.I. 2002/2709, S.I. 2003/2108, S.I. 2003/2109, S.I. 2003/2111, S.I. 2006/734, S.I. 2006/735, S.I. 2007/2537, S.S.I. 2008/393, S.I. 2008/662, S.I. 2009/662, S.I. 2010/688, S.I. 2012/2404, S.S.I. 2014/114, S.I. 2015/575, S.I. 2016/1034 and S.I. 2017/702) so far as relating to aspects of winding up reserved under Section C2 of Schedule 5 to the 1998 Act was applied to limited liability partnerships, with modifications by S.I. 2001/1090, regulation 10 and Schedule 6, Part 2, paragraph 3 (as amended by S.I. 2009/1804).

(**13**) Section 117 was amended by the Scotland Act 2012 (c.11), section 12(2)(a).

(**14**) Paragraph 27 of Schedule 8 was amended by the Banking Act 2009 (c.1), section 125(7).

(**15**) Section 30(2) provides that a Scottish statutory instrument which is not subject to either the negative procedure or the affirmative procedure must be laid in the Scottish Parliament as soon as practicable after the instrument is made and before it comes into force.

(6) Regulations made by the Scottish Ministers under section 14(2)(a) and 16 of the 2000 Act in the circumstances set out in section 17(5) of that 2000 Act(**16**) are subject to the affirmative procedure (see section 29 of the 2010 Act).

Devolved functions shared by the Scottish Ministers and a Minister of the Crown

5.—(1) Subject to paragraph (2), the functions of the Scottish Ministers described in paragraph (3) are exercisable by a Minister of the Crown concurrently with the Scottish Ministers.

(2) A Minister of the Crown may exercise a function mentioned in paragraph (1) only with the agreement of the Scottish Ministers.

(3) The functions are those conferred by—

(a) section 411(1)(b) and (2) of the 1986 Act(**17**) (company insolvency rules) for the purpose of making rules which give effect to any provision about winding up in the Parts of the 1986 Act described in paragraph (4) or the EU Regulation;

(b) section 411(1)(b) and (2) of the 1986 Act as applied by section 23, paragraph 69(1)(a) of Schedule 10 to the 1992 Act(**18**) (insolvency rules and fees) for the purpose of making rules, in relation to incorporated friendly societies, which give effect to any provision about winding up in the Parts of the 1986 Act described in paragraph (5);

(c) sections 14(2)(a), 16 and 17(1), (2) and (3) of the 2000 Act (insolvency and winding up) for the purpose of making provision by regulations about the winding up of—

(i) limited liability partnerships; and

(ii) oversea limited liability partnerships,

by applying or incorporating, with such modifications as appear appropriate, rules made under section 411(1)(b) and (2) of the 1986 Act which give effect to any provision about winding up in the Parts of the 1986 Act described in paragraph (5)(**19**) or the EU Regulation.

(4) The Parts of the 1986 Act are—

(a) Part 4 (winding up of companies registered under the Companies Acts);

(b) Part 5 (winding up of unregistered companies);

(c) Part 6 (miscellaneous provisions applying to companies which are insolvent or in liquidation); and

(d) Part 7 (interpretation for First Group of Parts), so far as it relates to Parts 4, 5 or 6.

(5) The Parts of the 1986 Act are—

(a) Part 4 (winding up of companies registered under the Companies Acts);

(b) Part 6 (miscellaneous provisions applying to companies which are insolvent or in liquidation); and

(**16**) Amendments were made to section 17(5) of the 2000 Act which are not relevant for the purpose of this Order.

(**17**) 1986 c.45. The functions of the Secretary of State were, so far as exercisable within devolved competence, transferred to the Scottish Ministers by virtue of section 53 of the 1998 Act.

(**18**) 1992 c.40. The functions of the Secretary of State were, so far as exercisable within devolved competence, transferred to the Scottish Ministers by virtue of section 53 of the 1998 Act.

(**19**) Parts 4, 6 and 7 of the 1986 Act so far as relating to aspects of winding up falling within the exceptions to Section C2 of Schedule 5 to the 1998 Act were, for Scotland, applied to limited liability partnerships, with modifications, by S.S.I. 2001/128, regulation 4 and schedule 2 (as amended by S.S.I. 2009/310 and S.S.I. 2015/989 and prospectively amended by S.S.I. 2016/141); S.I. 1986/1915 (as amended by S.I. 1987/1921, S.I. 1999/1820, S.I. 2002/2709, S.I. 2003/2108, S.I. 2003/2109, S.I. 2003/2111, S.I. 2006/734, S.I. 2006/735, S.I. 2007/2537, S.S.I. 2008/393, S.I. 2008/662, S.I. 2009/662, S.I. 2010/688, S.I. 2012/2404, S.S.I. 2014/114, S.I. 2015/575 and S.I. 2016/1034) so far as relating to aspects of winding up falling within the exceptions to Section C2 of Schedule 5 to the 1998 Act was, for Scotland, applied to limited liability partnerships, with modifications by S.S.I. 2001/128, regulation 6.

(c) Part 7 (interpretation for First Group of Parts), so far as it relates to Part 4 or Part 6.

Transitional provision for functions conferred on a Minister of the Crown and the Scottish Ministers

6.—(1) Anything done (or having effect as if done) by or in relation to a Minister of the Crown for the purposes of or in connection with the functions conferred on the Scottish Ministers by virtue of article 2, if in force at the time when that conferral takes effect, is to have effect as if done by or in relation to the Scottish Ministers (as well as the Minister of the Crown) in so far as that is required for continuing its effect after that time.

(2) Anything done (or having effect as if done) by or in relation to the Scottish Ministers for the purposes of or in connection with the functions conferred on a Minister of the Crown by virtue of article 5, if in force at the time when that conferral takes effect, is to have effect as if done by or in relation to a Minister of the Crown (as well as the Scottish Ministers) in so far as that is required for continuing its effect after that time.

Richard Tilbrook
Clerk of the Privy Council

EXPLANATORY NOTE

(This note is not part of the Order)

This Order is made under section 63 and section 108 of the Scotland Act 1998 (c.46) ("the 1998 Act").

Article 2 of this Order provides that specific insolvency functions which relate to reserved matters under Schedule 5 to the 1998 Act, that are exercised by a Minister of the Crown in or as regards Scotland, are to be exercisable by both the Scottish Ministers and a Minister of the Crown. The specific insolvency functions to which this article applies are the making of winding up rules for Scotland in relation to companies under section 411(1)(b) and (2) of the Insolvency Act 1986 (c.45) ("the 1986 Act"), the making of winding up rules for Scotland which apply to incorporated friendly societies under section 411(1)(b) and (2) of the 1986 Act (as applied by paragraph 69 of Schedule 10 to the Friendly Societies Act 1992 (c.40) ("the 1992 Act")) and the making of regulations for Scotland under section 14(2)(a), 16 and 17(1), (2) and (3) of the Limited Liability Partnerships Act 2000 (c.12) ("the 2000 Act") for the purpose of applying winding up rules made under section 411(1)(b) and (2) of the 1986 Act in relation to winding up of limited liability partnerships and oversea limited liability partnerships. The agreement of a Minister of the Crown is required for the exercise of the concurrent powers so conferred on the Scottish Ministers.

Article 3 provides for the general modification of enactments in connection with article 2 of this Order.

Article 4 provides for the parliamentary procedure or laying arrangements which apply to any rules or regulations made by the Scottish Ministers under the powers conferred by article 2. The effect of section 27(2)(a) of the Interpretation and Legislative Reform (Scotland) Act 2010 is that any instrument which is made by the Scottish Ministers by virtue of the powers conferred on them under article 2 will be a Scottish statutory instrument (as opposed to a statutory instrument).

Article 5 of this Order provides for specific insolvency functions within the devolved competence of the Scottish Ministers to be exercised by both the Scottish Ministers and a Minister of the Crown. The specific insolvency functions to which this article applies are the making of winding up rules for Scotland in relation to companies under section 411(1)(b) and (2) of the 1986 Act, the making of winding up rules for Scotland which apply to incorporated friendly societies under section 411(1)(b) and (2) of the 1986 Act (as applied by paragraph 69 of Schedule 10 to the 1992 Act) and the making of regulations for Scotland under section 14(2)(a), 16 and 17(1), (2) and (3) of the 2000 Act for the purpose of applying winding up rules made under section 411(1)(b) and (2) of the 1986 Act in relation to winding up of limited liability partnerships and oversea limited liability partnerships. The agreement of the Scottish Ministers is required for the exercise of the concurrent powers so conferred on a Minister of the Crown.

Article 6 makes transitional provision in relation to the transfer of functions under articles 2 and 5.