

SCHEDULE 3

Regulation 5

PROCEDURAL MATTERS IN SCOTLAND

PART 1

INTERPRETATION

Interpretation

1.—(1) In this Schedule—

“the 1986 Act” means the Insolvency Act 1986⁽¹⁾;

“article 21 remedy application” means an application to the court by a foreign representative under article 21(1) or (2) of the Model Law for remedy;

“business day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday in Scotland under or by virtue of the Banking and Financial Dealings Act 1971⁽²⁾;

“the Gazette” means the Edinburgh Gazette;

“main proceedings” means proceedings opened in accordance with Article 3(1) of the EC Insolvency Regulation and falling within the definition of insolvency proceedings in Article 2(a) of the EC Insolvency Regulation;

“member State liquidator” means a person falling within the definition of liquidator in Article 2(b) of the EC Insolvency Regulation appointed in proceedings to which it applies in a member State other than the United Kingdom;

“the Model Law” means the UNCITRAL Model Law as set out in Schedule 1 to these Regulations;

“modification or termination order” means an order by the court pursuant to its powers under the Model Law modifying or terminating recognition of a foreign proceeding, the sist, restraint or suspension referred to in article 20(1) or any part of it or any remedy granted under article 19 or 21 of the Model Law;

“recognition application” means an application to the court by a foreign representative in accordance with article 15 of the Model Law for an order recognising the foreign proceeding in which he has been appointed;

“recognition order” means an order by the court recognising a proceeding the subject of a recognition application as a foreign main proceeding or foreign non-main proceeding, as appropriate;

“relevant company” means a company within the meaning of section 735(1) of the Companies Act 1985⁽³⁾ or an unregistered company within the meaning of Part 5 of the 1986 Act which is subject to a requirement imposed by virtue of section 690A⁽⁴⁾, 691(1)⁽⁵⁾ or 718⁽⁶⁾ of the Companies Act 1985;

“review application” means an application to the court for a modification or termination order.

(2) Expressions defined in the Model Law have the same meaning when used in this Schedule.

(1) 1986 c. 45.

(2) 1971 c. 80.

(3) 1985 c. 6.

(4) Section 690A was inserted by S.I. 1992/3179.

(5) As amended by S.I. 2000/3373 and 2002/912.

(6) As amended by the Statute Law (Repeals) Act 2004 (c. 14) and S.I. 2001/1228.

Status: This is the original version (as it was originally made).

(3) References in this Schedule to a debtor who is of interest to the Financial Services Authority are references to a debtor who—

- (a) is, or has been, an authorised person within the meaning of section 31 of the Financial Services and Markets Act 2000⁽⁷⁾ (authorised persons);
- (b) is, or has been, an appointed representative within the meaning of section 39 (exemption of appointed representatives) of that Act; or
- (c) is carrying, or has carried on, a regulated activity in contravention of the general prohibition.

(4) In sub-paragraph (3) “the general prohibition” has the meaning given by section 19 of the Financial Services and Markets Act 2000 and the reference to a “regulated activity” must be construed in accordance with—

- (a) section 22 of that Act (classes of regulated activity and categories of investment);
- (b) any relevant order under that section; and
- (c) Schedule 2 to that Act (regulated activities).

(5) References in this Schedule to a numbered form are to the form that bears that number in Schedule 5.

PART 2

THE FOREIGN REPRESENTATIVE

Application for confirmation of status of replacement foreign representative

2.—(1) This paragraph applies where following the making of a recognition order the foreign representative dies or for any other reason ceases to be the foreign representative in the foreign proceedings in relation to the debtor.

(2) In this paragraph “the former foreign representative” means the foreign representative referred to in sub-paragraph (1).

(3) If a person has succeeded the former foreign representative or is otherwise holding office as foreign representative in the foreign proceeding in relation to the debtor, that person may apply to the court for an order confirming his status as replacement foreign representative for the purpose of proceedings under these Regulations.

(4) If the court dismisses an application under sub-paragraph (3) then it may also, if it thinks fit, make an order terminating recognition of the foreign proceeding and—

- (a) such an order may include such provision as the court thinks fit with respect to matters arising in connection with the termination; and
- (b) paragraph 5 shall not apply to such an order.

Misfeasance by a foreign representative

3.—(1) The court may examine the conduct of a person who—

- (a) is or purports to be the foreign representative in relation to a debtor, or
- (b) has been or has purported to be the foreign representative in relation to a debtor.

(2) An examination under this paragraph may be held only on the application of—

(7) 2000 c. 8.

- (a) a British insolvency officeholder acting in relation to the debtor,
 - (b) a creditor of the debtor, or
 - (c) with the permission of the court, any other person who appears to have an interest justifying an application.
- (3) An application under sub-paragraph (2) must allege that the foreign representative—
- (a) has misapplied or retained money or other property of the debtor,
 - (b) has become accountable for money or other property of the debtor,
 - (c) has breached a fiduciary duty or other duty in relation to the debtor, or
 - (d) has been guilty of misfeasance.
- (4) On an examination under this paragraph into a person's conduct the court may order him—
- (a) to repay, restore or account for money or property;
 - (b) to pay interest;
 - (c) to contribute a sum to the debtor's property by way of compensation for breach of duty or misfeasance.
- (5) In sub-paragraph (3), "foreign representative" includes a person who purports or has purported to be a foreign representative in relation to a debtor.

PART 3

COURT PROCEDURE AND PRACTICE

Preliminary and interpretation

- 4.—(1) This Part applies to—
- (a) any of the following applications made to the court under these Regulations—
 - (i) a recognition application;
 - (ii) an article 21 remedy application;
 - (iii) an application under paragraph 2(3) for an order confirming the status of a replacement foreign representative;
 - (iv) a review application; and
 - (b) any of the following orders made by the court under these Regulations—
 - (i) a recognition order;
 - (ii) an order granting interim remedy under article 19 of the Model Law;
 - (iii) an order granting remedy under article 21 of the Model Law;
 - (iv) an order confirming the status of a replacement foreign representative; or
 - (v) a modification or termination order.

Reviews of court orders—where court makes order of its own motion

- 5.—(1) The court shall not of its own motion make a modification or termination order unless the foreign representative and the debtor have either—
- (a) had an opportunity of being heard on the question, or
 - (b) consented in writing to such an order.

Status: This is the original version (as it was originally made).

(2) If the court makes a modification or termination order, the order may include such provision as the court thinks fit with respect to matters arising in connection with the modification or termination.

The hearing

6.—(1) At the hearing of the application, the applicant and any of the following persons (not being the applicant) may appear or be represented—

- (a) the foreign representative;
- (b) the debtor and, in the case of any debtor other than an individual, any one or more directors or other officers of the debtor, including—
 - (i) where applicable, any person registered under Part 23 of the Companies Act 1985⁽⁸⁾ as authorised to represent the debtor in respect of its business in Scotland;
 - (ii) in the case of a debtor which is a partnership, any person who is a member of the partnership;
- (c) if a British insolvency officeholder is acting in relation to the debtor, that person;
- (d) if any person has been appointed an administrative receiver of the debtor or as a receiver or manager of the property of the debtor, that person;
- (e) if a member State liquidator has been appointed in main proceedings in relation to the debtor, that person;
- (f) if a foreign representative has been appointed in any other foreign proceeding regarding the debtor, that person;
- (g) any person who has presented a petition for the winding up or sequestration of the debtor in Scotland;
- (h) any person who is or may be entitled to appoint an administrator of the debtor under paragraph 14 of Schedule B1 to the 1986 Act⁽⁹⁾ (appointment of administrator by holder of qualifying floating charge);
- (i) if the debtor is a debtor who is of interest to the Financial Services Authority, that Authority; and
- (j) with the permission of the court, any other person who appears to have an interest justifying his appearance.

Notification and advertisement of order

7.—(1) This paragraph applies where the court makes any of the orders referred to in paragraph 4(1)(b).

(2) The foreign representative shall send a certified copy of the interlocutor as soon as reasonably practicable to the debtor.

(3) The foreign representative shall, as soon as reasonably practicable after the date of the order, give notice of the making of the order—

- (a) if a British insolvency officeholder is acting in relation to the debtor, to him;
- (b) if any person has been appointed an administrative receiver of the debtor or, to the knowledge of the foreign representative, as a receiver or manager of the property of the debtor, to him;
- (c) if a member State liquidator has been appointed in main proceedings in relation to the debtor, to him;

⁽⁸⁾ 1985 c. 6.

⁽⁹⁾ Schedule B1 was inserted by the Enterprise Act 2002 (c. 40), section 248(2) and Schedule 16.

- (d) if to his knowledge a foreign representative has been appointed in any other foreign proceeding regarding the debtor, that person;
- (e) if there is pending in Scotland a petition for the winding up or sequestration of the debtor, to the petitioner;
- (f) to any person who to his knowledge is or may be entitled to appoint an administrator of the debtor under paragraph 14 of Schedule B1 to the 1986 Act (appointment of administrator by holder of qualifying floating charge);
- (g) if the debtor is a debtor who is of interest to the Financial Services Authority, to that Authority; and
- (h) to such persons as the court may direct.

(4) Where the debtor is a relevant company, the foreign representative shall send notice of the making of the order to the registrar of companies before the end of the period of 5 business days beginning with the date of the order. The notice to the registrar of companies shall be in Form ML 7.

(5) The foreign representative shall advertise the making of the following orders once in the Gazette and once in such newspaper as he thinks most appropriate for ensuring that the making of the order comes to the notice of the debtor's creditors—

- (a) a recognition order,
- (b) an order confirming the status of a replacement foreign representative, and
- (c) a modification or termination order which modifies or terminates recognition of a foreign proceeding,

and the advertisement shall be in Form ML 8.

Registration of court order

8.—(1) Where the court makes a recognition order in respect of a foreign main proceeding or an order suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor being heritable property, the clerk of the court shall send forthwith a certified copy of the order to the keeper of the register of inhibitions and adjudications for recording in that register.

(2) Recording under sub-paragraph (1) or (3) shall have the effect as from the date of the order of an inhibition and of a citation in an adjudication of the debtor's heritable estate at the instance of the foreign representative.

(3) Where the court makes a modification or termination order, the clerk of the court shall send forthwith a certified copy of the order to the keeper of the register of inhibitions and adjudications for recording in that register.

- (4) The effect mentioned in sub-paragraph (2) shall expire—
 - (a) on the recording of a modification or termination order under sub-paragraph (3); or
 - (b) subject to sub-paragraph (5), if the effect has not expired by virtue of paragraph (a), at the end of the period of 3 years beginning with the date of the order.

(5) The foreign representative may, if recognition of the foreign proceeding has not been modified or terminated by the court pursuant to its powers under the Model Law, before the end of the period of 3 years mentioned in sub-paragraph (4)(b), send a memorandum in a form prescribed by the Court of Session by act of sederunt to the keeper of the register of inhibitions and adjudications for recording in that register, and such recording shall renew the effect mentioned in sub-paragraph (2); and thereafter the said effect shall continue to be preserved only if such memorandum is so recorded before the expiry of every subsequent period of 3 years.

Right to inspect court process

9.—(1) In the case of any proceedings under these Regulations, the following have the right, at all reasonable times, to inspect the court process of the proceedings—

- (a) the Secretary of State;
- (b) the person who is the foreign representative in relation to the proceedings;
- (c) if a foreign representative has been appointed in any other foreign proceeding regarding the debtor, that person;
- (d) if a British insolvency officeholder is acting in relation to the debtor, that person;
- (e) any person stating himself in writing to be a creditor of the debtor to which the proceedings under these Regulations relate;
- (f) if a member State liquidator has been appointed in relation to a debtor which is subject to proceedings under these Regulations, that person; and
- (g) the debtor to which the proceedings under these Regulations relate, or, if that debtor is a company, corporation or partnership, every person who is, or at any time has been—
 - (i) a director or officer of the debtor,
 - (ii) a member of the debtor, or
 - (iii) where applicable, a person registered under Part 23 of the Companies Act 1985 as authorised to represent the debtor in respect of its business in Scotland.

(2) The right of inspection conferred as above on any person may be exercised on his behalf by a person properly authorised by him.

Copies of court orders

10.—(1) In any proceedings under these Regulations, any person who under paragraph 9 has a right to inspect documents in the court process also has the right to require the foreign representative in relation to those proceedings to furnish him with a copy of any court order in the proceedings.

(2) Sub-paragraph (1) does not apply if a copy of the court order has been served on that person or notice of the making of the order has been given to that person under other provisions of these Regulations.

Transfer of proceedings—actions to avoid acts detrimental to creditors

11. If, in accordance with article 23(6) of the Model Law, the court grants a foreign representative permission to make an application in accordance with paragraph (1) of that article, it may also order the relevant proceedings under British insolvency law taking place regarding the debtor to be transferred to the Court of Session if those proceedings are taking place in Scotland and are not already in that court.

PART 3

GENERAL

Giving of notices, etc

12.—(1) All notices required or authorised by or under these Regulations to be given, sent or delivered must be in writing, unless it is otherwise provided, or the court allows the notice to be sent or given in some other way.

(2) Any reference in these Regulations to giving, sending or delivering a notice or any such document means, without prejudice to any other way and unless it is otherwise provided, that the notice or document may be sent by post, and that, subject to paragraph 13, any form of post may be used. Personal service of the notice or document is permissible in all cases.

(3) Where under these Regulations a notice or other document is required or authorised to be given, sent or delivered by a person (“the sender”) to another (“the recipient”), it may be given, sent or delivered by any person duly authorised by the sender to do so to any person duly authorised by the recipient to receive or accept it.

(4) Where two or more persons are acting jointly as the British insolvency officeholder in proceedings under British insolvency law, the giving, sending or delivering of a notice or document to one of them is to be treated as the giving, sending or delivering of a notice or document to each or all.

Sending by post

13.—(1) For a document to be properly sent by post, it must be contained in an envelope addressed to the person to whom it is to be sent, and pre-paid for either first or second class post.

(2) Any document to be sent by post may be sent to the last known address of the person to whom the document is to be sent.

(3) Where first class post is used, the document is to be deemed to be received on the second business day after the date of posting, unless the contrary is shown.

(4) Where second class post is used, the document is to be deemed to be received on the fourth business day after the date of posting, unless the contrary is shown.

Certificate of giving notice, etc

14.—(1) Where in any proceedings under these Regulations a notice or document is required to be given, sent or delivered by any person, the date of giving, sending or delivery of it may be proved by means of a certificate by that person that he gave, posted or otherwise sent or delivered the notice or document on the date stated in the certificate, or that he instructed another person (naming him) to do so.

(2) A certificate under this paragraph may be endorsed on a copy of the notice to which it relates.

(3) A certificate purporting to be signed by or on behalf of the person mentioned in subparagraph (1) shall be deemed, unless the contrary is shown, to be sufficient evidence of the matters stated therein.

Forms for use in proceedings under these Regulations

15.—(1) Forms ML 7 and ML 8 contained in Schedule 5 to these Regulations shall be used in, and in connection with, proceedings under these Regulations.

(2) The forms shall be used with such variations, if any, as the circumstances may require.