
STATUTORY INSTRUMENTS

1990 No. 1504

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

PART V

FINANCIAL MARKETS AND INSOLVENCY

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,

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.

(1) 1971 c. 80

(2) 1986 c. 60

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