Financial Services (Banking Reform) Bill

Government annotated amendments: Payment and Settlement Systems Special Administration Regime

After Clause 12

LORD DEIGHTON

1

Insert the following new Clause—

"PART 6

SPECIAL ADMINISTRATION FOR OPERATORS OF CERTAIN INFRASTRUCTURE SYSTEMS

Financial market infrastructure administration

This Part—

(a) provides for a procedure to be known as FMI administration, and

(b) restricts the powers of persons other than the Bank of England in relation to the insolvency of infrastructure companies."

This amendment introduces a new Part of the Bill, the purpose of which is to establish a special administration regime, called "FMI administration".

The purpose of FMI administration is to ensure that the insolvency of an operator of a recognised inter – bank payments system or a securities settlement system, or the insolvency of a key service provider to any such system, will not result in that system ceasing to operate as an efficient and effective system.

There are currently four inter – bank payment systems in the UK: Bacs, CHAPS, Continuous Linked Settlement and Faster Payment Service. Bacs is used for direct debits, salaries, pensions and benefit payments. The CHAPS payment system is one of the most commonly used systems for large transfers such as a house purchase. Continuous Linked Settlement provides settles foreign exchange transactions and the Faster Payment Service is used for telephone and internet banking. The only securities settlement system in the UK is CREST which settles gilts, equities, corporate bonds and money market instruments.

After Clause 12

LORD DEIGHTON

2

Insert the following new Clause—

"Interpretation: infrastructure companies

(1) In this Part "infrastructure company" has the meaning given by this section.

(2) "Infrastructure company" means a company which is—

(b) the operator of a recognised inter-bank payment system, other than an operator excluded by subsection (3),

(b) approved under regulations under section 785 of the Companies Act 2006 (provision enabling procedures for evidencing and transferring title) as the operator of a securities settlement system, or

(c) a company designated by the Treasury under subsection (4).

(3) But a company is not an infrastructure company if it is a recognised central counterparty, as defined by section 285 of FSMA 2000.

(4) The Treasury may by order designate a company for the purposes of subsection (2)(c) if—

(a) the company provides services to a person falling within subsection (2)(a) or (b), and

(b) the Treasury are satisfied that an interruption in the provision of those services would have a serious adverse effect on the effective operation of the inter-bank payment system or securities settlement system in question.

(5) An order under subsection (4) must specify the recognised inter-bank payment system or securities settlement system in connection with which the company is designated.

(6) Before designating a company under subsection (4), the Treasury must consult—

(a) the company to be designated,

(b) the person within (2)(a) or (b) to whom the company provides services,

(c) the Bank of England,

(d) if the company is a PRA-authorised person, the PRA and the FCA, and

(e) if the company is an authorised person other than a PRA-authorised person, the FCA."

The purpose of this amendment is to define which companies will be within scope of the FMI administration regime in the event that they become insolvent.

FMI administration will be capable of being applied to "infrastructure companies". Infrastructure companies are (1) companies that have responsibility for running the relevant systems and (2) companies that provide key services to the relevant systems.

After Clause 12

LORD DEIGHTON

3

Insert the following new Clause—

"Interpretation: other expressions

(1) In this Part—

"company" means a company registered under the Companies Act 2006;

"operator", in relation to a recognised inter-bank payment system, is to be read in accordance with section 183 of the Banking Act 2009;

"recognised inter-bank payment system" means an inter-bank payment system, as defined by section 182 of the Banking Act 2009, in respect of which a recognition order under section 184 of that Act is in force;

"the relevant system" means—

(a) in relation to an infrastructure company falling within subsection (2)(a) of section (*Interpretation: infrastructure companies*), the recognised inter-bank payment system,

(b) in relation to an infrastructure company falling within subsection (2)(b) of that section, the securities settlement system,

(c) in relation to a company designated under subsection (4) of that section, the recognised inter-bank payment system or securities settlement system falling within paragraph (b) of that subsection.

"securities settlement system" means a computer-based system, and procedures, which enable title to units of a security to be evidenced and transferred without a written instrument, and which facilitate supplementary and incidental matters.

(2) Expressions used in the definition of "securities settlement system" in subsection (1) are to be read in accordance with section 783 of the Companies Act 2006."

This amendment gives the interpretation of "other expression" in this part. The effect is to give clarity to terms used in this part.

After Clause 12

LORD DEIGHTON

4

Insert the following new Clause—

"FMI administration orders

(1) In this Part "FMI administration order" means an order which—

(a) is made by the court in relation to an infrastructure company, and

(b) directs that, while the order is in force, the affairs, business and property of the company are to be managed by a person appointed by the court.

(2) A person appointed as mentioned in subsection (1)(b) is referred to in this Part as an FMI administrator.

(3) The FMI administrator of a company must manage its affairs, business and property, and exercise and perform the FMI administrator's functions, so as to achieve the objective in section *(Objective of FMI administration)*."

FMI administration in respect of an infrastructure company will commence when the court appoints an "FMI administrator". The FMI administrator's role is to manage the affairs of the infrastructure company in order to achieve the objective of FMI administration, which is different to that in an "ordinary" administration (see amendment 5 for details of the objective of FMI administration).

After Clause 12

LORD DEIGHTON

5

Insert the following new Clause—

"Objective of FMI administration

(1) Where an FMI administrator is appointed in relation to the operator of a recognised inter-bank payment system or a securities settlement system, the objective of the FMI administration is—

(a) to ensure that the system is and continues to be maintained and operated as an efficient and effective system,

(b) where the operator of the system is also a clearing house falling within section 285(1)(b)(ii) of FSMA 2000 (recognised clearing house that is not a recognised central counterparty), to ensure that the protected activities continue to be carried on, and

(c) to ensure by one or both of the specified means that it becomes unnecessary for the FMI administration order to remain in force for that purpose or those purposes.

In cases where a FMI administration order is made that relates to an infrastructure company that is an operator of a recognised inter – bank payment system or a securities settlement system, the FMI administrator's primary objective will be to ensure that the system continues to operate effectively and supply critical services.

Where the operator of either category of system is also a clearing house that does not act as a recognised central counterparty, the FMI administrator will also be under an additional duty to ensure that certain other "protected activities" that it carries on in that capacity continue to be carried on. These "protected activities" are regulated activities that the clearing house carries on for the purposes of its provision of clearing services or for the facilitation of the provision of clearing services by a third party.

The FMI administrator will also be required to work toward the objective of ensuring that it is no longer necessary for the FMI administration order to remain in place in order to achieve the objectives outlined above.

(2) Where an FMI administrator is appointed in relation to a company designated under subsection (4) of section (*Interpretation: infrastructure companies*), the the objective of the FMI administration is—

(a) to ensure that services falling within that subsection continue to be provided, and

(b) to ensure by one or both of the specified means that it becomes unnecessary for the FMI administration order to remain in force for that purpose.

In cases where an FMI administration order is made in respect of an infrastructure company that has been designated by the Treasury as a key service provider to a relevant system, the objective will be to ensure that those key services continue to be maintained. The FMI administrator will also be required to work toward the objective of ensuring that it is no longer necessary for the FMI administration order to remain in place in order achieve this objective.

(3) The protected activities referred to in subsection (1)(b) are such activities as the Bank of England may from time to time direct, which must be—

(a) regulated activities falling within section 285(3)(a) or (b) of FSMA 2000, or

(b) related activities which are necessary for the efficient carrying on of any of those regulated activities.

This subsection sets out what will constitute the "protected activities" carried on by an infrastructure company that is a recognised clearing house that does not act as a central counterparty (under subsection 1(b), the FMI administrator will be under a duty to ensure that these activities continue to be carried on). It will be for the Bank of England to specify the extent of these activities, within certain clearly defined parameters.

(4) The specified means are—

(a) the rescue as a going concern of the company subject to the FMI administration order, and

(b) transfers falling within subsection (5).

This subsection in effect sets out the circumstances in which the FMI administration order will no longer be required to have effect. These are (1) where the FMI administrator has been able to rescue the infrastructure company as a going concern, or (2) where the FMI administrator has transferred the company to another company as going concern, or has transferred different parts of the infrastructure company's business to other companies. In either case, it will also be a requirement that the relevant system continues to function effectively.

(5) A transfer falls within this subsection if it is a transfer as a going concern—

(a) to another company, or

(b) as respects different parts of the undertaking of the company subject to the FMI administration order, to two or more different companies,

of so much of that undertaking as it is appropriate to transfer for the purpose of achieving the objective of the FMI administration.

(6) The means by which transfers falling within subsection (5) may be effected include, in particular—

(a) a transfer of the undertaking of the company subject to the FMI administration order, or of part of its undertaking, to a wholly-owned subsidiary of that company, and

(b) the transfer to a company of securities of a wholly-owned subsidiary to which there has been a transfer falling within paragraph (a).

This provision makes it clear that it is permissible for the FMI administrator to make transfers to a subsidiary of the infrastructure company for the purposes of achieving the objective of FMI administration.

(7) The objective of the FMI administration may be achieved by transfers falling within subsection (5) only to the extent that—

(a) the rescue as a going concern of the company subject to the FMI administration order is not reasonably practicable or is not reasonably practicable without such transfers,

(b) the rescue of that company as a going concern will not achieve that objective or will not do so without such transfers, or

(c) such transfers would produce a result for the company's creditors as a whole that is better than the result that would be produced without them."

The effect of this provision is to restrict the circumstances in which an FMI administrator may make transfers of the infrastructure company's property, rights or liabilities. If the FMI administrator can rescue the infrastructure company as going concern without making transfers (whilst ensuring that crucial services continue to be maintained), then the FMI administrator must do so. FMI administrators must also not make transfers unless on balance the transfer results in a better result for the infrastructure company's creditors than would be the case if the transfer were not made.

After Clause 12

LORD DEIGHTON

6

Insert the following new Clause—

"Application for FMI administration order

(1) An application for an FMI administration order may be made to the court by the Bank of England.

(2) An application must nominate a person to be appointed as the FMI administrator.

(3) The infrastructure company must be given notice of an application, in accordance with rules under section 411 of the 1986 Act (as applied in relation to FMI administration)."

Only the Bank of England will be able to apply to put an infrastructure company in FMI administration. It is for the Bank of England to nominate who is to act as the FMI administrator.

After Clause 12

LORD DEIGHTON

7

Insert the following new Clause—

"Powers of court

(1) The court may make an FMI administration order in relation to an infrastructure company if satisfied—

(a) that the company is unable to pay its debts,

(b) that the company is likely to be unable to pay its debts, or

(c) that, on a petition presented by the Secretary of State under section 124A of the 1986 Act (petition for winding up on grounds of public interest), it would be just and equitable (disregarding the objective of the FMI administration) to wind up the company.

The court may make a FMI administration order where the infrastructure company is insolvent, is likely to become insolvent or where the Secretary of State (BIS) could apply to the court for the company to be wound up on the grounds that to do so would be expedient in the public interest.

(2) The court may not make an FMI administration order on the ground set out in subsection (1)(c) unless the Secretary of State has certified to the court that the case is one in which the Secretary of State considers (disregarding the objective of the FMI administration) that it would be appropriate to petition under section 124A of the 1986 Act.

(3) On an application for an FMI administration order, the court may—

(a) grant the application;

(b) dismiss the application;

(c) adjourn the application (generally or to a specified date);

(d) make an interim order;

(e) treat the application as a winding-up petition and make any order which the court could make under section 125 of the 1986 Act;

(f) make any other order which the court thinks appropriate.

(4) An interim order under subsection (3)(d) may, in particular—

(a) restrict the exercise of a power of the directors or the company;

(b) make provision conferring a discretion on the court or on a person qualified to act as an insolvency practitioner in relation to the company.

(5) For the purposes of this section a company is unable to pay its debts if it is treated as being so unable under section 123 of the 1986 Act (definition of inability to pay debts)."

After Clause 12

LORD DEIGHTON

8

Insert the following new Clause—

"Continuity of supply

(1) This section applies where, before the commencement of FMI administration, the infrastructure company had entered into arrangements with a supplier for the provision of a supply to the infrastructure company.

(2) After the commencement of FMI administration, the supplier—

(a) must not terminate a supply unless—

(i) any charges in respect of the supply which relate to a supply given after the commencement of FMI administration remain unpaid for more than 28 days,

(ii) the FMI administrator consents to the termination, or

(iii) the supplier has the permission of the court, which may be given if the supplier can show that the continued provision of the supply would cause the supplier to suffer hardship,

(b) must not make it a condition of a supply that any charges in respect of the supply which relate to a supply given before the commencement of FMI administration, are paid, and

(c) must not do anything which has the effect of making in a condition of the giving of a supply that any charges within paragraph (b) are paid.

(3) Where, before the commencement of FMI administration, a contractual right to terminate a supply has arisen but has not been exercised, then, for the purposes of this section, the commencement of FMI administration causes that right to lapse and the supply is only to be terminated if a ground in subsection (2)(a) applies.

(4) Any provision in a contract between the infrastructure company and the supplier that purports to terminate the agreement if any action is taken to put the infrastructure company in FMI administration is void.

(5) Any expenses incurred by the infrastructure company on the provision of a supply after the commencement of FMI administration are to be treated as necessary disbursements in the course of the FMI administration.

(6) In this section—

"commencement of FMI administration" means the making of the FMI administration order;

"supplier" means the person controlling the provision of a supply to the infrastructure company, and includes a company that is a group undertaking (as defined by section 1161(5) of the Companies Act 2006) in respect of the infrastructure company;

"supply" means a supply of any of the following—

(a) computer hardware or software used by the infrastructure company in connection with the operation of the relevant system;

(b) financial data;

(c) infrastructure permitting electronic communication services,

(d) data processing;

(e) access to secure data networks used by the infrastructure company in connection with the operation of the relevant system;

This amendment operates to prevent the suppliers of certain specified goods and services from withdrawing supply to an infrastructure company just because the infrastructure company is, or is likely to become, the subject of a FMI administration order. When taken together with the provision made in section 233 of the Insolvency Act 1986 (a provision that is applied by amendment 20), this will ensure that the infrastructure company will continue to be supplied with what it needs in order to function effectively.

After Clause 12

LORD DEIGHTON

9

Insert the following new Clause—

"FMI administrators

(1) The FMI administrator of a company—

(a) is an officer of the court, and

(b) in exercising and performing powers and duties in relation to the company, is the company's agent.

(2) The management by the FMI administrator of a company of any of its affairs, business or property must be carried out for the purpose of achieving the objective of the FMI administration as quickly and efficiently as is reasonably practicable.

(3) The FMI administrator of a company must exercise and perform powers and duties in the way which, so far as it is consistent with the objective of the FMI administration to do so, best protects—

(a) the interests of the company's creditors as a whole, and

(b) subject to those interests, the interests of the company's members as a whole."

Amendment 9 prescribes the role of the FMI administrator. It operates to give the FMI administrator the management powers over the infrastructure company that the FMI

administrator will need in order to achieve the objective of FMI administration. Subsection (3) requires that insofar as it is not inconsistent with the objective of FMI administration to do so, the FMI administrator should try and protect the interests of (1) the infrastructure company's creditors, and (2) the infrastructure company's shareholders (in that order of priority).

After Clause 12

LORD DEIGHTON

10

Insert the following new Clause—

"Power to direct FMI administrator

(1) If the Bank of England considers it necessary to do so for the purpose of achieving the objective of an FMI administration, the Bank may direct the FMI administrator to take, or refrain from taking, specified action.

(2) In deciding whether to give a direction under this section, the Bank of England must have regard to the public interest in—

(a) the protection and enhancement of the stability of the financial system of the United Kingdom, and

(b) the maintenance of public confidence in that system.

(3) A direction under this section must not be incompatible with a direction of the court that is in force under Schedule B1 to the 1986 Act.

(4) The Bank of England must, within a reasonable time of giving the direction, give the FMI administrator a statement of its reasons for giving the direction.

(5) A person listed in subsection (6) has immunity from liability in damages in respect of action or action or inaction in accordance with a direction under this section.

(6) Those persons are—

(a) the FMI administrator;

(b) the company in FMI administration;

(c) the officers or staff of the company.

(7) Immunity conferred by this section does not extend to action or inaction—

(a) in bad faith, or

(b) in contravention of section 6(1) of the Human Rights Act 1998.

(8) This section does not limit the powers conferred on the Bank of England by section 191 of the Banking Act 2009 (directions) in relation to a recognised inter-bank payment system."

This amendment confers power on the Bank of England to direct the FMI administrator. This will enable the Bank of England to exercise a degree of control over FMI administration and to clarify how best the FMI administrator can ensure that the objectives of FMI

administration are met. The Bank of England is the regulator of operators of recognised inter – bank payment systems under Part 5 of the Banking Act 2009, and is also the regulator of operators of securities settlement systems under the Uncertificated Securities Regulations 2001, so is best placed have such oversight of the conduct of FMI administration.

After Clause 12

LORD DEIGHTON

11

Insert the following new Clause—

"Conduct of administration, transfer schemes etc.

(1) Schedule (*Conduct of FMI administration*) (which applies the provisions of Schedule B1 to the 1986 Act about ordinary administration orders and certain other enactments to FMI administration orders) has effect.

(2) Schedule (*Financial market infrastructure transfer schemes*) (which makes provision for transfer schemes to achieve the objective of an FMI administration) has effect.

(3) The power to make rules conferred by section 411(1B) of the 1986 Act (rules relating to bank administration) is to apply for the purpose of giving effect to this Part as it applies for the purposes of giving effect to Part 3 of the Banking Act 2009 (and, accordingly, as if the reference in section 411(1B) to that Part included a reference to this Part)."

Subsection (1) introduces Schedule [X] (conduct of FMI administration). Schedule X applies a number of provisions made in the Insolvency Act 1986 that apply in the case of a "normal" company administration to FMI administration (in certain cases with appropriate modifications).

Subsection (2) introduces Schedule [X] (financial market infrastructure transfer schemes) which sets out the detail as to how an infrastructure company that is subject to a FMI administration order may (at the direction of its FMI administrator) transfer property, rights and liabilities to another company or companies.

Subsection (3) allows for rules to be made under powers provided for in section 411 of the Insolvency Act 1986 for the purpose of giving effect to FMI administration. These rules will set out details regarding the procedure for applying to the court for FMI administration orders and requirements applicable to the conduct of FMI administration.

After Clause 12

LORD DEIGHTON

12

Insert the following new Clause—

"Restriction on winding-up orders and voluntary winding up

(1) A petition by a person other than the Bank of England for a winding up order in respect of an infrastructure company may not be determined unless—

(a) the petitioner has notified the Bank of England that the petition has been presented, and

(b) the period of 14 days beginning with the day on which the notice is received by the Bank has ended.

(2) A resolution for the voluntary winding up of an infrastructure company may not be made unless—

(a) the infrastructure company has applied to the court under this section,

(b) the company has notified the Bank of England that the application has been made, and

(c) after the end of the period of 14 days beginning with the day on which the notice is received by the Bank, the court gives permission for the resolution to be made."

Amendment 12 places restrictions on the winding up of infrastructure companies. The Bank of England is to be given prior notice of any petition to wind up an infrastructure company or any resolution to voluntarily wind up an infrastructure company. This is to allow the Bank sufficient time in which to apply to the court for a FMI administration order if it considers it appropriate to do so.

After Clause 12

LORD DEIGHTON

13

Insert the following new Clause—

"Restriction on making of ordinary administration orders

(1) This section applies where an ordinary administration application is made in relation to an infrastructure company by a person other than the Bank of England.

(2) The court must dismiss the application if—

(a) an FMI administration order is in force in relation to the company, or

(b) an FMI administration order has been made in relation to the company but is not yet in force.

(3) Where subsection (2) does not apply, the court, on hearing the application, must not exercise its powers under paragraph 13 of Schedule B1 to the 1986 Act (other than its power of adjournment) unless—

(a) the applicant has notified the Bank of England that the application has been made, and

(b) the period of 14 days beginning with the day on which the notice is received by the Bank has ended.

(4) On the making of an FMI administration order in relation to an infrastructure company, the court must dismiss any ordinary administration application made in relation to the company which is outstanding.

(5) "Ordinary administration application" means an application under paragraph 12 of Schedule B1 to the 1986 Act."

Amendment 13 prescribes certain requirements that must be met before an "ordinary" administration order can be made in respect of an infrastructure company. In particular, the Bank of England is to be given prior notice of any application to put an infrastructure company into ordinary administration. Again, this is to allow the Bank sufficient time in which to apply to the court for a FMI administration order if it considers it appropriate to do so.

After Clause 12

LORD DEIGHTON

14

Insert the following new Clause—

"Restriction on enforcement of security

A person may not take any step to enforce a security over property of an infrastructure company unless—

(a) notice of the intention to do so has been given to the Bank of England, and

(b) the period of 14 days beginning with the day on which the notice was received has ended."

Amendment 14 requires that the Bank of England be given prior notice by a secured creditor of any intention on the part of the secured creditor to enforce their security. As a result, the Bank of England will have sufficient time in which to consider whether the enforcement of the security might put the infrastructure company in jeopardy of insolvency, and whether an application for FMI administration will be appropriate in the circumstances.

After Clause 12

LORD DEIGHTON

15

Insert the following new Clause—

"Loans

(1) This section applies where an FMI administration order has been made in relation to an infrastructure company.

(2) The Treasury may, out of money provided by Parliament, make loans to the company for achieving the objective in section (*Objective of FMI administration*).

(3) A loan under this section may be made on such terms as the Treasury think fit.

(4) The Treasury must pay into the Consolidated Fund sums received by them as a result of this section."

The purpose of amendment 15 is to allow HM Treasury to use money provided by Parliament to make loans to the infrastructure company to ensure the continuity of crucial service provision.

After Clause 12

LORD DEIGHTON

16

Insert the following new Clause—

"Indemnities

(1) This section applies where an FMI administration order has been made in relation to an infrastructure company.

(2) The Treasury may agree to indemnify persons in respect of one or both of the following—

(a) liabilities incurred in connection with the exercise of powers and duties by the FMI administrator;

(b) loss or damage sustained in that connection.

(3) The agreement may be made in whatever manner, and on whatever terms, the Treasury think fit.

(4) As soon as practicable after agreeing to indemnify persons under this section, the Treasury must lay before Parliament a statement of the agreement.

(5) If sums are paid by the Treasury in consequence of an indemnity agreed to under this section, the infrastructure company must pay the Treasury—

(a) such amounts in or towards the repayment to them of those sums as the Treasury may direct, and

(b) interest, at such rates as they may direct, on amounts outstanding under this subsection.

(6) Subsection (5) does not apply in the case of a sum paid by the Treasury for indemnifying a person in respect of a liability to the infrastructure company.

(7) Where a sum has been paid out by the Treasury in consequence of an indemnity agreed to under this section, the Treasury must lay a statement relating to that sum before Parliament—

(a) as soon as practicable after the end of the financial year in which that sum is paid out, and

(b) (except where subsection (5) does not apply in the case of the sum) as soon as practicable after the end of each subsequent relevant financial year.

(8) In relation to a sum paid out in consequence of an indemnity, a financial year is a relevant financial year for the purposes of subsection**Error! Reference source not found.** (7) unless—

(a) before the beginning of that year, the whole of that sum has been repaid to the Treasury under subsection (5) and

(b) the infrastructure company is not at any time during that year subject to liability to pay interest on amounts that became due under that subsection in respect of that sum.

(9) The power of the Treasury to agree to indemnify persons—

(a) is confined to a power to agree to indemnify persons in respect of liabilities, loss and damage incurred or sustained by them as relevant persons, but

(b)

(b) includes power to agree to indemnify persons (whether or not they are identified or identifiable at the time of the agreement) who subsequently become relevant persons.

(10) For the purposes of this section each of the following is a relevant person—

(a) the FMI administrator;

(b) an employee of the FMI administrator;

(c) a member or employee of a firm of which the FMI administrator is a member;

(d) a member or employee of a firm of which the FMI administrator is an employee;

(e) a member or employee of a firm of which the FMI administrator was an employee or member at a time when the order was in force;

(f) a body corporate which is the employer of the FMI administrator;

(g) an officer, employee or member of such a body corporate.

(11) For the purposes of subsection (10) **Error! Reference source not found.**—

(a) the references to the FMI administrator are to be read, where two or more persons are appointed to act as the FMI administrator, as references to any one or more of them, and

(b) the references to a firm of which a person was a member or employee at a particular time include references to a firm which holds itself out to be the successor of a firm of which he was a member or employee at that time.

(12) The Treasury must pay into the Consolidated Fund sums received by them as a result of subsection (5)."

The purpose of this new clause is to allow the Treasury to indemnify the FMI administrator and various related persons in respect of liabilities incurred or loss or damage sustained in connection with the carrying out of the FMI administrator's duties. The sums paid by HM Treasury are in the form of loans and would be repaid in full by the company except where the indemnity is given in respect of a liability to the company.

After Clause 12

LORD DEIGHTON

17

Insert the following new Clause—

"Interpretation: general

(1) In this Part—

"the 1986 Act" means the Insolvency Act 1986;

"business", "member", "property" and "security" have the same meaning as in the 1986 Act;

"company" has the meaning given by section (*Interpretation: other expressions*);

"the court" means—

(a) in England and Wales and Northern Ireland, the High Court;

(b) in Scotland, the Court of Session;

"FMI administration order", "FMI administration" and "FMI administrator" are to be read in accordance with section (*FMI administration orders*);

"infrastructure company" has the meaning given by section (*Interpretation: infrastructure companies*);

"operator", in relation to a recognised inter-bank payment system, has the meaning given by section (*Interpretation: other expressions*);

"recognised inter-bank payment system" has the meaning given by section (*Interpretation: other expressions*);

"regulated activity" has the same meaning as in FSMA 2000;

"the relevant system" has the meaning given by section (*Interpretation: other expressions*);

"securities settlement system" has the meaning given by section (*Interpretation: other expressions*).

(2) In this Part references to the FMI administrator of a company include a person appointed under paragraph 91 or 103 of Schedule B1 to the 1986 Act, as applied by Schedule (*Conduct of FMI administration*) to this Act, to be the FMI administrator of a company.

(3) In this Part references to a person qualified to act as an insolvency practitioner in relation to a company are to be read in accordance with Part 13 of the 1986 Act, but as if references in that Part to a company included a company registered under the Companies Act 2006 in Northern Ireland."

This amendment interprets general terms used in this Part.

After Clause 12

LORD DEIGHTON

18

Insert the following new Clause—

"Northern Ireland

(1) This section makes provision about this Part in its application to Northern Ireland.

(2) Any reference to any provision of the 1986 Act is to have effect as a reference to the corresponding provision of the Insolvency (Northern Ireland) Order 1989.

(3) Section (*Interpretation: general*)(3) is to have effect as if the reference to Northern Ireland were a reference to England and Wales or Scotland."

The purpose of this amendment is to facilitate the application of the FMI administration regime to Northern Ireland.

After Schedule 1

LORD DEIGHTON

19

Insert the following new Schedule—

"CONDUCT OF FMI ADMINISTRATION

1 The following provisions of this Schedule provide for—

(a) the general powers and duties of FMI administrators (by application of provisions about administrators), and

(b) the general process and effects of FMI administration (by application of provisions about administration).

2 The provisions set out in the Tables apply in relation to FMI administration as in relation to administration, with—

(a) the modifications set out in paragraph 3,

(b) any other modification specified in the Tables, and

(c) any other necessary modification.

3 The modifications are that—

(a) a reference to the administrator is a reference to the FMI administrator,

(b) a reference to administration is a reference to FMI administration,

(c) a reference to an administration application is a reference to an FMI administration application,

(d) a reference to an administration order is a reference to an FMI administration order,

(e) a reference to a company is a reference to the infrastructure company, and

(f) a reference to the purpose of administration (other than the reference in paragraph 111(1) of Schedule B1) is a reference to the objective in section (*Objective of FMI administration*).

4 Powers conferred by this Act and by the 1986 Act (as applied) are in addition to, and not in restriction of, any existing powers of instituting proceedings against any contributory or debtor of an infrastructure company, or the estate of any contributory or debtor, for the recovery of any call or other sum.

5 A reference in an enactment or other document to anything done under a provision applied by this Part of this Act includes a reference to the provision as applied.

TABLE 1 OF APPLIED PROVISIONS

SCHEDULE B1 TO THE INSOLVENCY ACT 1986

Provision of Schedule B1	*Subject*	*Modification*
Para. 40(1)(a)	Dismissal of pending winding-up petition	
Para. 41	Dismissal of administrative or other receiver	
Para. 42	Moratorium on insolvency proceedings	Ignore sub-paras. (4) and (5).
Para. 43	Moratorium on other legal process	
Para. 44(1)(a) and (5)	Interim moratorium	
Para. 46	Announcement of appointment	Ignore sub-para. (6)(b) and (c).
Paras. 47 & 48	Statement of affairs	
Para. 49	Administrator's proposals	(a) The administrator must obtain the approval of the Bank of England to any proposals under sub-para. (1). (b) Treat the reference in sub-para. (2)(b) to the objective mentioned in para. 3(1)(a) or (b) as a reference to the objective in section (*Objective of FMI administration*) of this Act.

		(c) Ignore sub-para. (3)(b).
Para. 59	General powers	
Para. 60 and Schedule 1	General powers	The exercise of powers under Schedule 1 is subject to section (*Objective of FMI administration*) of this Act.
Para. 61	Directors	
Para. 62	Power to call meetings of creditors	
Para. 63	Application to court for directions	(a) Before making an application in reliance on this paragraph the FMI administrator must give notice to the Bank of England, which is to be entitled to participate in the proceedings. (b) In making directions the court must have regard to the objective in section (*Objective of FMI administration*) of this Act.
Para. 64.	Management powers.	
Para. 65	Distribution to creditors	
Para. 66	Payments	
Para. 67	Taking custody of property	
Para. 68	Management	(a) Ignore sub-paras. (1) and (3). (b) The Bank of England may apply to the court for the variation or revocation of any directions given by the court.
Para. 69	Agency	

Para. 70	Floating charges	
Para. 71	Fixed charges	
Para. 72	Hire-purchase property	
Para. 73	Protection for secured and preferential creditors	
Para. 74	Challenge to administrator's conduct	For sub-para. (2) there is to be taken to be substituted— "(2) Where a company is in FMI administration, a creditor or member of the company may apply to the court claiming that the FMI administrator is conducting himself or herself in a manner preventing the achievement of the objective of the FMI administration as quickly and efficiently as is reasonably practicable."
Para. 75	Misfeasance	In addition to applications that may anyway be made under para. 75, an application may be made by the FMI administrator or the Bank of England.
Para. 79	Court ending administration on application of administrator	For sub-paras. (1) to (3) there are to be taken to be substituted— "(1) On an application made by a person mentioned in sub-paragraph (2), the court may provide for the appointment of an FMI administrator of a company to cease to have effect from a specified time. (2) The persons who may apply to the court under sub-paragraph (1) are— (a) the Bank of England; (b) with the consent of the Bank, the FMI administrator.""

Para. 84	Termination: no more assets for distribution	
Para. 85	Discharge of administration order	
Para. 86	Notice to Companies Registrar of end of administration	
Para. 87	Resignation	An FMI administrator may not resign under para. 87 without giving 28 days' notice of the intention to do so to the Bank of England.
Para. 88	Removal	An application for an order removing an FMI administrator from office may be made only by or with the consent of the Bank of England.
Para. 89	Disqualification	The notice under sub-para. (2) must be given to the Bank of England.
Paras. 90 & 91	Replacement	(a) Para. 91(1) applies as if the only person who could make an application were the Bank of England. (b) Ignore para. 91(2).
Para. 98	Discharge	Ignore sub-paras. (2)(b) and (3).
Para. 99	Vacation of office: charges and liabilities	In the application of sub-para. (3), payments may be made only— (a) in accordance with directions of the Bank of England, and (b) if the Bank is satisfied that they will not prejudice the objective in section (*Objective of FMI administration)* of this Act.
Paras. 100-103	Joint administrators	An application under para. 103 may be made only by the Bank of England.
Para. 104	Validity	
Para. 106 (and section	Fines	

430 and Schedule 10)		
Paras. 107 - 109	Extension of time limits	
Para. 110	Amendment of provisions about time	An order under para. 110 may amend a provision of the Schedule as it applies by virtue of this Act (whether or not in the same way as it amends the provision as it applies otherwise).
Para. 111	Interpretation	
Paras. 112 - 116	Scotland	

TABLE 2 OF APPLIED PROVISIONS

OTHER PROVISIONS OF THE INSOLVENCY ACT 1986

Section	*Subject*	*Modification or comment*
Section 233	Utilities	
Section 234	Getting in company's property	
Section 235	Duty to co-operate with office-holder	
Section 236	Inquiry into company's dealings	
Section 237	Section 236: enforcement by court	
Section 238	Transactions at an undervalue (England and Wales)	
Section 239	Preferences (England and Wales)	
Section 240	Ss. 238 & 239: relevant time	

Section 241	Orders under ss. 238 & 239	(a) In considering making an order in reliance on section 241 the court must have regard to the objective in section (*Objective of FMI administration) of this Act.* (b) Ignore subsections (2A)(a) and (3) to (3C).
Section 242	Gratuitous alienations (Scotland)	
Section 243	Unfair preferences (Scotland)	In considering the grant of a decree under subsection (5) the court must have regard to the objective in section (*Objective of FMI administration).*
Section 244	Extortionate credit transactions	
Section 245	Avoidance of floating charges	
Section 246	Unenforceability of liens	
Sections 386 & 387, and Schedule 6 (and Schedule 4 to the Pension Schemes Act 1993)	Preferential debts	
Section 389	Offence of acting without being qualified	Treat references to acting as an insolvency practitioner as references to acting as an FMI administrator.
Section 390	Persons not qualified to act	Treat references to acting as an insolvency practitioner as references to acting as an FMI administrator.
Section 391	Recognised professional bodies	An order under section 391 has effect in relation to any provision applied for the purposes of FMI administration.

Sections 423 - 425	Transactions defrauding creditors	In considering granting leave under section 424(1) or making an order in reliance on section 425, the court must have regard to the objective in section (*Objective of FMI administration)* of this Act.
Sections 430 - 432 & Schedule 10	Offences	

6(1) The Treasury may by order amend this Schedule as to to add further modifications.

(2) The further modifications that may be made are confined to such modifications of—

(a) the 1986 Act, or

(b) other enactments passed or made before this Act that relate to insolvency or make provision by reference to anything that is or may be done under the 1986 Act,

as the Treasury consider appropriate in relation to any provision made by or under this Part of this Act.

(3) An order under this paragraph may also make modifications of the provisions of this Schedule."

This amendment provides for a new Schedule [X] which makes provision regarding the powers and duties of FMI administrators and the general process and effect of FMI administration. This provision is principally made by way of applying provision in the Insolvency Act 1986 that covers "ordinary" administration to FMI administration with modifications where appropriate. Schedule [x] includes provision that gives the FMI administrator the powers he or she will need in order to effectively manage the affairs of the company and ensure that critical services continue to be maintained. It sets out details as to the removal and replacement of FMI administrators and includes provision as to the discharge of FMI administration orders.
It is possible in the future to suggest further modifications will be appropriate, so provision has been included that empowers the Treasury to make orders allowing for Schedule [X] to be amended for this purpose.

After Schedule 1

LORD DEIGHTON

20
Insert the following new Schedule—

"FINANCIAL MARKET INFRASTRUCTURE TRANSFER SCHEMES

Application of Schedule

1 This Schedule applies where—

(a) the court has made an FMI administration order in relation to a company ("the old company"), and

(b) it is proposed that a transfer within section (*Objective of FMI administration*)(5) be made to another company ("the new company").

This schedule applies where a special administration order has been made to transfer some or all of the infrastructure company to another company in order to achieve the objective of FMI administration.

Interpretation of Schedule

2 In this Schedule—

"FMI transfer scheme" has the meaning given by paragraph 4(1);

"the new company" and "the old company" are to be read in accordance with paragraph 1;

"third party", in relation to an FMI transfer scheme or a modification of such a scheme, means a person other than the old company or the new company.

FMI administrator to act on behalf of old company

3 It is for the FMI administrator, while the FMI administration order is in force, to act on behalf of the old company in the doing of anything that it is authorised or required to do by or under this Schedule.

Making of FMI transfer schemes

4(1) The old company may—

(a) with the consent of the new company, and

(b) for the purpose of giving effect to the proposed transfer,

make a scheme under this Schedule for the transfer of property, rights and liabilities from the old company to the new company (an "FMI transfer scheme").

(2) Such a scheme may be made only at a time when the FMI administration order is in force in relation to the old company.

(3) An FMI transfer scheme may set out the property, rights and liabilities to be transferred in one or more of the following ways—

(a) by specifying or describing them in particular,

(b) by identifying them generally by reference to, or to a specified part of, the undertaking of the old company, or

(c) by specifying the manner in which they are to be determined.

(4) An FMI transfer scheme is to take effect in accordance with paragraph 7 at the time appointed by the court.

(5) But the court must not appoint a time for a scheme to take effect unless that scheme has been approved by the Bank of England

(6) The Bank of England may modify an FMI transfer scheme before approving it, but only modifications to which both the old company and the new company have consented may be made.

(7) In deciding whether to approve an FMI transfer scheme, the Bank of England must have regard, in particular, to—

(a) the public interest, and

(b) any effect that the scheme is likely to have on the interests of third parties.

(8) Before approving an FMI transfer scheme, the Bank of England must consult the Treasury.

(9) The old company and the new company each have a duty to provide the Bank of England with all information and other assistance that the Bank may reasonably require for the purposes of, or in connection with, the exercise of the powers conferred on it by this paragraph.

This provision sets out the requirements that will apply to transfers of property, rights and liabilities from the failing infrastructure company to another company. Transfers will be made pursuant to a transfer scheme. The Bank of England must approve the terms of any scheme in advance, and the Bank of England can also modify the terms of the scheme with the consent of the transferor and transferee companies.

Provision that may be made by a scheme

5(1) An FMI transfer scheme may contain provision—

(a) for the creation, in favour of the old company or the new company, of an interest or right in or in relation to property transferred in accordance with the scheme;

(b) for giving effect to a transfer to the new company by the creation, in favour of that company, of an interest or right in or in relation to property retained by the old company;

(c) for the creation of new rights and liabilities (including rights of indemnity and duties to indemnify) as between the old company and the new company;

(d) in connection with any provision made under this sub-paragraph, provision making incidental provision as to the interests, rights and liabilities of other persons with respect to the property, rights and liabilities to which the scheme relates.

(2) The property, rights and liabilities of the old company that may be transferred in accordance with an FMI transfer scheme include—

(a) property, rights and liabilities that would not otherwise be capable of being transferred or assigned by the old company;

(b) property acquired, and rights and liabilities arising, in the period after the making of the scheme but before it takes effect;

(c) rights and liabilities arising after it takes effect in respect of matters occurring before it takes effect;

(d) property situated anywhere in United Kingdom or elsewhere;

(e) rights and liabilities under the law of a part of United Kingdom or of a place outside United Kingdom;

(f) rights and liabilities under an enactment, EU instrument or subordinate legislation.

(3) The transfers to which effect may be given by an FMI transfer scheme include transfers of interests and rights that are to take effect in accordance with the scheme as if there were—

(a) no such requirement to obtain a person's consent or concurrence,

(b) no such liability in respect of a contravention of any other requirement, and

(c) no such interference with any interest or right,

as there would be, in the case of a transaction apart from this Act, by reason of a provision falling within sub-paragraph (4).

(4) A provision falls within this sub-paragraph to the extent that it has effect (whether under an enactment or agreement or otherwise) in relation to the terms on which the old company is entitled, or subject, to anything to which the transfer relates.

(5) Sub-paragraph (6) applies where (apart from that sub-paragraph) a person would be entitled, in consequence of anything done or likely to be done by or under this Act in connection with an FMI transfer scheme—

(a) to terminate, modify, acquire or claim an interest or right; or

(b) to treat an interest or right as modified or terminated.

(6) That entitlement—

(a) shall not be enforceable in relation to that interest or right until after the transfer of the interest or right by the scheme, and

(b) shall then be enforceable in relation to the interest or right only in so far as the scheme contains provision for the interest or right to be transferred subject to whatever confers that entitlement.

(7) Sub-paragraphs (3) to (6) have effect where shares in a subsidiary of the old company are transferred—

(a) as if the reference in sub-paragraph (4) to the terms on which the old company is entitled or subject to anything to which the transfer relates included a reference to the terms on which the subsidiary is entitled or subject to anything immediately before the transfer takes effect, and

(b) in relation to an interest or right of the subsidiary, as if the references in sub-paragraph (6) to the transfer of the interest or right included a reference to the transfer of the shares.

(8) Sub-paragraphs (3) and (4) apply to the creation of an interest or right by an FMI transfer scheme as they apply to the transfer of an interest or right.

Further provision about transfers

6(1) An FMI transfer scheme may make incidental, supplemental, consequential and transitional provision in connection with the other provisions of the scheme.

(2) An FMI transfer scheme may in particular make provision, in relation to a provision of the scheme—

(a) for the new company to be treated as the same person in law as the old company;

(b) for agreements made, transactions effected or other things done by or in relation to the old company to be treated, so far as may be necessary for the purposes of or in connection with a transfer in accordance with the scheme, as made, effected or done by or in relation to the new company;

(c) for references in an agreement, instrument or other document to the old company or to an employee or office holder with the old company to have effect, so far as may be necessary for the purposes of or in connection with a transfer in accordance with the scheme, with such modifications as are specified in the scheme;

(d) that the effect of any transfer in accordance with the scheme in relation to contracts of employment with the old company is not to terminate any of those contracts but is to be that periods of employment with that company are to count for all purposes as periods of employment with the new company;

(e) for proceedings commenced by or against the old company to be continued by or against the new company

(3) Sub-paragraph (2)(c) does not apply to references in an enactment or in subordinate legislation.

(4) An FMI transfer scheme may make provision for disputes between the old company and the new company as to the effect of the scheme to be referred to such arbitration as may be specified in or determined under the scheme.

(5) Where a person is entitled, in consequence of an FMI transfer scheme, to possession of a document relating in part to the title to land or other property in England and Wales, or to the management of such land or other property—

(a) the scheme may provide for that person to be treated as having given another person an acknowledgement in writing of the right of that other person to production of the document and to delivery of copies of it, and

(b) section 64 of the Law of Property Act 1925 (production and safe custody of documents) is to have effect accordingly, and on the basis that the acknowledgement did not contain an expression of contrary intention.

(6) Where a person is entitled, in consequence of an FMI transfer scheme, to possession of a document relating in part to the title to land or other property in Scotland or to the management of such land or other property, subsections (1) and (2) of section 16 of the Land Registration (Scotland) Act 1979 (omission of certain clauses in deeds) is to have effect in relation to the transfer—

(a) as if the transfer had been effected by deed, and

(b) as if the words "unless specially qualified" were omitted from each of those subsections.

(7) Where a person is entitled, in consequence of an FMI transfer scheme, to possession of a document relating in part to the title to land or other property in Northern Ireland or to the management of such land or other property—

(a) the scheme may provide for that person to be treated as having given another person an acknowledgement in writing of the right of that other person to production of the document and to delivery of copies of it, and

(b) section 9 of the Conveyancing Act 1881 is to have effect accordingly, and on the basis that the acknowledgement does not contain an expression of contrary intention.

(8)

(8) In this paragraph references to a transfer in accordance with an FMI transfer scheme include references to the creation in accordance with such a scheme of an interest, right or liability.

Effect of scheme

7(1) In relation to each provision of an FMI transfer scheme for the transfer of property, rights or liabilities, or for the creation of interests, rights or liabilities—

(a) the property, interests, rights or liabilities become by virtue of this Schedule the property, interests, rights or liabilities of the transferee at the time appointed by the court for the purposes of paragraph 4(4), and

(b) the provisions of that scheme in relation to that property or those interests, rights or liabilities, have effect from that time.

(2) In this paragraph "the transferee" means—

(a) in relation to property, rights or liabilities transferred by an FMI transfer scheme, the new company;

(b) in relation to interests, rights or liabilities created by such a scheme, the person in whose favour, or in relation to whom, they are created.

Subsequent modification of scheme

8(1) The Bank of England may by notice to the old company and the new company modify an FMI transfer scheme after it has taken effect, but only modifications to which both the old company and the new company have consented may be made.

(2) The notice must specify the time at which it is to take effect (the "modification time").

(3) Where a notice is issued under this paragraph in relation to an FMI transfer scheme, as from the modification time, the scheme shall for all purposes be treated as having taken effect, at the time appointed for the purposes of paragraph 4(4) with the modifications made by the notice.

(4) Those modifications may make—

(a) any provision that could have been included in the scheme when it took effect at the time appointed for the purposes of paragraph 4(4), and

(b) transitional provision in connection with provision falling within paragraph (a).

(5) In deciding whether to modify an FMI transfer scheme, the Bank of England must have regard, in particular, to—

(a) the public interest, and

(b) any effect that the modification is likely to have on the interests of third parties

(6) Before modifying an FMI transfer scheme that has taken effect, the Bank of England must consult the Treasury.

(7) The old company and the new company each have a duty to provide the Bank of England with all information and other assistance that the Bank may reasonably require for the purposes of, or in connection with, the exercise of the powers conferred on it by this paragraph.

Provision relating to foreign property

9(1) An FMI transfer scheme may contain provision about—

(a) the transfer of foreign property, right and liabilities, and

(b) the creation of foreign property, rights and liabilities.

(2) For this purpose property, or a right, interest or liability, is "foreign" if an issue relating to it arising in any proceedings would (in accordance with the rules of private international law) be determined under the law of a country or territory outside the United Kingdom.

Application of Schedule to transfers to subsidiaries

10 Where a proposed transfer falling within subsection (5) of section (*Objective of FMI administration*) is a transfer of the kind mentioned in subsection (6)(a) of that section, this Schedule has effect in relation to the transfer as if—

(a) paragraph 4 (1)(a) were omitted, and

(b) in paragraph 4(6), for the words from "both" onwards there were substituted "the old company has consented may be made"."

This provision makes modifications of the application of this Schedule in the case of transfers from an infrastructure company to a wholly – owned subsidiary of the infrastructure company.