INDEX

actual knowledge 15.137
adjustment of prior transactions 20.101
administration
administrator’s remuneration and expenses 5.08, 5.10, 5.19, 20.136
bank administration under Pt 3 of Banking Act 5.102–5.104
exclusion of restriction on enforcement of security 5.08–5.09
resolution administrator 5.123–5.124
powers of 5.124
SAR see special administration regime (SAR)
appropriation, remedy of 12.01–12.99
appropriation
alternative to power of sale or power to appoint receiver, as 12.06–12.07
available in relation to financial instruments and credit claims 12.04–12.05
creation of 12.02
duty to value collateral and account for difference in value on 12.03
foreclosure, comparison with 12.08–12.12
natural meaning of 12.01
Scots law, under 12.14
statutory power of appropriation 12.01–12.02
statutory power of appropriation, amendment to 12.45–12.46
use of 12.04–12.05
where ‘power of appropriation’ falls outside FCARs 12.13
test cases on appropriation 12.15–12.91
Cukurova see Cukurova
valuation of appropriated collateral 12.92–12.99
assets of clients
difficulties in dealing with policy maker’s responses 18.146–18.192
CASS operational oversight 18.177
CASS Resolution Pack 18.162
Client Money and Assets Return (CMAR) 18.176–18.178
FCA Client Money Distribution Rules, review of 18.151, 18.188–18.192
FCA PS14/9 – review of clients assets regime for investment business 18.150, 18.180–18.187
FCA supervision – Client’s Assets Unit 18.176–18.179
financial crisis, arrangements before 18.146–18.148
recovery and resolution plans, requirement for 18.149, 18.152–18.161
special administration regime (SAR) and SAR review 18.163–18.175
special resolution objectives 5.52
assignment
absolute assignment 4.51, 15.86
assignment by way of security 15.66–15.69, 15.87
credit claims, assignability of 15.80–15.97
credit claims, assignment of by way of security 15.66–15.69
notice of assignment 15.70–15.73
priority of competing assignments 15.70–15.72
general principle of assignment 15.81
loan agreements 15.83–15.87, 15.96

Geoffrey Yeowart, Robin Parsons, Edward Murray and Hamish Patrick - 9781782546320
Downloaded from Elgar Online at 01/28/2019 10:01:00AM via free access
mortgages operating as assignments 15.92–15.93
non-assignable rights 15.82
notice of assignment 15.70–15.73
novation 15.80, 15.92
transfer certificates 15.91
only rights under agreement assignable 15.80
prohibition of assignment 15.87–15.89, 24.62–24.93
voluntary assignment, cash collateral and 13.40–13.41
voluntary assignment of a claim choice of law 13.31, 13.33, 13.38–13.49
voluntary assignment of a claim, law applicable to 13.31, 13.33, 13.38–13.49
assignment by way of security 13.38
assignor and assignee, relationship between 13.42–13.43
cash collateral, and 13.40–13.41
‘claim’, meaning of 13.39
proprietary effect of voluntary assignment 13.47–13.49
Rome I Regulation determining applicable law 13.38, 13.42
third parties, voluntary assignment, and 13.43–13.49
third parties, voluntary assignment, Rome Convention and 13.44–13.46, 13.48
attorney, powers of see powers of attorney autonomous interpretation 2.05–2.07
‘civil and commercial matters’ 13.13–13.14
conflict of laws, and 13.05
contractual and non-contractual obligations 13.13
need for uniformity in application 2.05
avoidance of property dispositions 20.103–20.105
bail-in measures 5.105–5.137
compensation: ‘no shareholder or creditor worse off’ 5.137
competent authorities 5.108
contractual recognition of bail-in 5.136
discretionary power of exclusion 5.126–5.128
relevant factors 5.128
specified grounds 5.127
exclusions from bail-in 5.125
mandatory write-down or conversion of capital instruments 5.110–5.112
required in specified cases 5.111–5.112
method of bail-in 5.120
pre-resolution valuation 5.113
priority between creditors 5.119
protected liabilities contravention of order 5.131
definition of 5.129
derivatives 5.133
exclusions from safeguard 5.132–5.135
financial contracts 5.134
non-protected liabilities 5.132
qualifying master agreement 5.135
safeguard for 5.129–5.131
purpose 5.105–5.106
resolution administrator 5.123–5.124
powers of 5.124
set-off and netting of ‘protected liabilities’, safeguard for 5.129–5.131
stabilisation option, bail-in as 5.114–5.118
requirements for exercise of powers 5.115–5.116
termination rights and continuity 5.121–5.122
types of entity to which bail-in will apply 5.109

Banking Act 2009
bail-in measures 5.105–5.137
compensation: ‘no shareholder or creditor worse off’ 5.137
competent authorities 5.108
contractual recognition of bail-in 5.136
discretionary power of exclusion 5.126–5.128
exclusions from bail-in 5.125
mandatory write-down or conversion of capital instruments 5.110–5.112
method of bail-in 5.120
pre-resolution valuation 5.113
priority between creditors 5.119
‘protected liabilities’ safeguard, exclusions from 5.132–5.135
INDEX

'protected liabilities', safeguard for
5.129–5.131
purpose 5.105–5.106
resolution administrator 5.123–5.124
set-off and netting of 'protected
liabilities', safeguard for
5.129–5.131
stabilisation option, bail-in as
5.114–5.118
termination rights and continuity
5.121–5.122
types of entity to which bail-in will
apply 5.109
bank administration under Pt 3 of Act
5.102–5.104
bank insolvency under Pt 2 of Act
5.99–5.101
depositor preference and floating charges
5.19, 5.73–5.77, 18.90, fn. 104
(Chapter 18)
effect of exercising Pt 1 powers on
financial collateral arrangements
5.92–5.98
inter-relationship between Pt 1 of Act and
FCARs 5.89–5.91
overview of regimes established by
5.39–5.41
property transfers under
central counterparties recognised 5.60
effect on financial collateral
arrangements, and 5.56–5.61
financial markets, safeguard for
5.66–5.67
partial property transfers, restrictions on
5.62–6.63
secured liabilities, safeguard for 5.65
set-off and netting, safeguard for 5.64
trusts, property held on 5.58
trusts, safeguard for 5.72
safeguard orders, remedies for breach of
5.68–5.71
set-off: safeguard for partial property
transfers 21.33
special resolution regime, nature of
5.39–5.41, 18.164, 18.165
<table>
<thead>
<tr>
<th>INDEX</th>
</tr>
</thead>
<tbody>
<tr>
<td>regulator discretion 22.64</td>
</tr>
<tr>
<td>assets which constitute eligible collateral 22.97–22.100</td>
</tr>
<tr>
<td>background 22.53–22.59</td>
</tr>
<tr>
<td>aim of margin requirements 22.57</td>
</tr>
<tr>
<td>criticisms of mandatory initial margin exchange 22.54–22.56</td>
</tr>
<tr>
<td>lessening impact of new requirements 22.59</td>
</tr>
<tr>
<td>calculation of initial margin</td>
</tr>
<tr>
<td>considerations in respect of methods chosen 22.84–22.85</td>
</tr>
<tr>
<td>quantitative models, using 22.75–22.79</td>
</tr>
<tr>
<td>standardised margin schedule, using 22.80–22.83</td>
</tr>
<tr>
<td>cross-border issues 22.106–22.107</td>
</tr>
<tr>
<td>custodians, use of 22.86–22.87</td>
</tr>
<tr>
<td>eligible collateral 22.97–22.100</td>
</tr>
<tr>
<td>EU regime/draft regulatory technical standards (RTS) 22.115–22.120</td>
</tr>
<tr>
<td>implementing Framework into EU law 22.115</td>
</tr>
<tr>
<td>scope of 22.117–22.120</td>
</tr>
<tr>
<td>significant differences from BCBS-IOSCO Framework 22.121–2.135</td>
</tr>
<tr>
<td>haircuts 22.101–22.105</td>
</tr>
<tr>
<td>‘cross-currency’ haircut 22.121</td>
</tr>
<tr>
<td>impact of BCBS-IOSCO Framework 22.111–22.113</td>
</tr>
<tr>
<td>initial margin</td>
</tr>
<tr>
<td>initial margin threshold 22.69–22.73</td>
</tr>
<tr>
<td>model-based and schedule-based calculation 22.75–22.85</td>
</tr>
<tr>
<td>time line for phase-in 22.109–22.110</td>
</tr>
<tr>
<td>transfer of initial margin 22.67–22.68</td>
</tr>
<tr>
<td>when should initial margin be collected? 22.74</td>
</tr>
<tr>
<td>international convergence, significant step towards 22.51, 22.63</td>
</tr>
<tr>
<td>international standards, development of 22.50, 22.63</td>
</tr>
<tr>
<td>rehypothecation and reuse 22.88–22.94</td>
</tr>
<tr>
<td>conditions for rehypothecation 22.01</td>
</tr>
<tr>
<td>issues with conditions for rehypothecation 22.92, 22.93</td>
</tr>
<tr>
<td>risk-management procedures, EMIR imposing 22.52, 22.114</td>
</tr>
<tr>
<td>scope 22.60–22.62</td>
</tr>
<tr>
<td>Securities Financing Transactions</td>
</tr>
<tr>
<td>Regulation (SFTR) 22.136–22.166</td>
</tr>
<tr>
<td>administrative sanctions 22.161–22.163</td>
</tr>
<tr>
<td>disclosure to investors in funds 22.156–22.158</td>
</tr>
<tr>
<td>entry into force, transitional provisions and review 22.164–22.166</td>
</tr>
<tr>
<td>FSB policy framework on securities financing transactions (SFTs) 22.141–22.144</td>
</tr>
<tr>
<td>how are SFTs defined? 22.137, 22.150–22.154</td>
</tr>
<tr>
<td>policy aims of Commission 22.139–22.140</td>
</tr>
<tr>
<td>preconditions of reuse 22.159–22.160</td>
</tr>
<tr>
<td>requirement to report SFTs to a trade repository 22.155</td>
</tr>
<tr>
<td>reuse, definition of 22.160</td>
</tr>
<tr>
<td>securities financial transactions 22.137, 22.150–22.154</td>
</tr>
<tr>
<td>to whom will SFTR apply? 22.145–22.149</td>
</tr>
<tr>
<td>significant differences: RTS and BCBS-IOSCO Framework 22.121–2.135</td>
</tr>
<tr>
<td>calculation and collection of initial margin 22.122</td>
</tr>
<tr>
<td>concentration limits 22.130</td>
</tr>
<tr>
<td>cross-currency haircut 22.121</td>
</tr>
<tr>
<td>intra-group transactions 22.131–22.134</td>
</tr>
<tr>
<td>phase-in schedule 22.135</td>
</tr>
<tr>
<td>rehypothecation 22.129</td>
</tr>
<tr>
<td>segregation of initial margin 22.123–22.128</td>
</tr>
<tr>
<td>variation margin</td>
</tr>
<tr>
<td>time line for phase-in 22.108</td>
</tr>
<tr>
<td>transfer of 22.95–22.96</td>
</tr>
<tr>
<td>book entry securities as collateral 19.01–19.85</td>
</tr>
<tr>
<td>book entry securities collateral and applicable law 19.37–19.40</td>
</tr>
<tr>
<td>book entry securities collateral, definition of 19.37, 19.39</td>
</tr>
</tbody>
</table>

796

Geoffrey Yeowart, Robin Parsons, Edward Murray and Hamish Patrick - 9781782546320
Downloaded from Elgar Online at 01/28/2019 10:01:00AM via free access
intermediary, definition of 19.38–19.39
book entry securities collateral, law applicable to 19.40
control agreements and designating entries 19.72–19.73
effectiveness in relevant intermediary’s insolvency 19.81
entry into force 19.85
loss-sharing in case of intermediary’s insolvency 19.83
position in relation to third parties 19.75–19.79
priority of interests granted by an intermediary 19.80
prohibition of upper-tier attachment 19.82
protective provisions for collateral transactions 19.84
purpose 19.65–19.67
security interests in intermediated securities 19.68–19.71
title transfer collateral 19.74
immobilised securities 19.06–19.08
benefits of immobilisation 19.08
common in indirect holding systems 19.06
custody risk 19.07
immobilisation and dematerialisation, difference between 19.07
uncertificated securities, and 19.06, 19.07
indirect holdings system 19.01–19.36
book entry securities 19.05
Clearstream Banking operating ICSD 19.34–19.36
CSDs and ICSDs as fundamental part of financial markets 19.11–19.12
Euroclear Bank operating ICSD 19.29–19.33
fungibility 19.18–19.19
immobilised securities 19.06–19.08
indirect holdings structures 19.03–19.04
intermediated securities 19.05, 19.09–19.10
International Central Securities Depositories (ICSDs) 19.01, 19.11–19.12
legal structure 19.20–19.24
no direct relationship between issue of securities and investor 19.02
no look-through principle 19.25–19.28
other types of indirect holdings 19.09–19.10
rights of investor exercisable against direct intermediary 19.02
transfer of book entry securities 19.16–19.17
types of accounts held by intermediaries 19.13–19.15
substantive issues to consider 19.50–19.64
core issues 19.50–19.52
creation of book entry securities collateral 19.54
nature of account holder’s rights 19.53
perfection of book entry securities collateral 19.55
priorities 19.56
protection against intermediary’s insolvency 19.57
set-off 19.58–19.60
shortfall in pooled account 19.61–19.62
upper tier intermediaries 19.63–19.64
taking collateral over securities in indirect holding system 19.41–19.49
general 19.41
methods of taking collateral in Euroclear system 19.43–19.49
need for legal appraisal 19.42
‘bespoke’ depositary interests (DIs) 16.17
Capital Requirements Regulation (CCR) 22.05–22.08
Basel III, implementing 22.05–22.06
credit risk mitigation 22.17–22.20
credit risk mitigation techniques, principles governing eligibility of 22.21–22.24
directly applicable 22.06
eligibility: funded credit protection 22.25–22.26

797

Geoffrey Yeowart, Robin Parsons, Edward Murray and Hamish Patrick - 9781782546320
Downloaded from Elgar Online at 01/28/2019 10:01:00AM
via free access
eligibility: unfunded credit protection 22.26–22.28

Financial Collateral Comprehensive Model 22.20

institutions, application to 22.08

legal opinions as to enforceability, need for 22.21–22.24

maturity mismatches 22.47–22.48

measurement of credit risk 22.14–22.16

minimum capital requirements 22.11–22.13

recognition requirements

certain master netting agreements, for 22.43–22.44

financial collateral, for 22.29–22.33

on-balance sheet netting, for 22.41–22.42

receivables, for 22.35–22.40

third-party deposits/cash assimilated instruments, for 22.34

relevant provisions, structure of 22.09–22.10

risk weighting and Financial Collateral Simple Method 22.45–22.46

single rulebook, as 22.06

structure of capital requirements regulation 22.09–22.10

treatment of collateral provided to central counterparty 22.49

cash 1.61–1.64

alternative technique for taking cash collateral 21.01–21.02

See also set-off, contractual set-off; flawed asset arrangements

cash, nature of 1.64, 3.05–3.19

bank notes/coins 3.19

book debts 3.09, 4.16

credit claims 3.10

deposit or credit balances 3.06

money market deposits 3.08

no 'sweep up' wording; sub-mortgages 3.16–3.19

payment/repayment of money claims 3.07, 3.10–3.15

virtual currencies 3.20–3.25

definition of cash 3.05

FCD, why cash covered by 1.40, 1.61–1.64

'possession' or 'control' tests: charges over cash 8.51, 8.124–8.125

proprietary interest 18.108–18.134

taking security over 15.10–15.20

cash deposit held by third party, taking security over 15.11

charge-backs 9.24, fn.23 (Chapter 9), 15.12–15.20

virtual currencies 3.20–3.25

voluntary assignment, cash collateral and 13.40–13.41

CASS Resolution Pack 18.162

CCP see under clearing houses

Central Securities Depositories Regulation 16.114–16.134

aim of 20.44

between parties eligible under FCD? 16.132

consequences of infringing article 3(2) 16.133

does second limb of article 3(2) apply to equitable mortgage? 16.126–16.128

does second limb of article 3(2) apply only to financial collateral arrangement 16.117–16.125

impact on financial collateral arrangements 16.114–16.116

collateral arrangement 16.129–16.131

need for greater clarity 16.134

transferable securities, meaning of 16.118

centre of main interest (COMI) 5.139, 5.143, 15.127, 22.21

autonomous meaning 2.05

certificated securities 9.18–9.24

equitable mortgage of 9.19–9.21

charged securities, rights attached to see rights attached to charged securities


nature of 15.12

charges 15.02

charges for collateral-takers other than CREST settlement banks, choice of 16.24–16.50
checklist for taking mortgage/charge
over uncertificated securities 16.50
conversion of certificated units into
uncertificated form 16.47–16.48
equitable mortgage holder, position of
factors relevant when choosing type of
security 16.36–16.40
floating charge holder, position of
16.33–16.35
impact of default rules of recognised
investment exchange/clearing
house 16.41–16.44
legal mortgage holder, position of
16.25–16.26
legal or equitable mortgage?
stamp duty reserve tax 16.49
title transfer arrangements in relation to
security in CREST 16.45–16.46
charges held by CREST settlement banks
16.51–16.90
change of user 16.76–16.77
constraints 16.78
electronic instructions, ability to reply
on 16.79–16.86
electronic instructions, use of
16.70–16.72
‘fast-track’ enforcement procedure 16.73
‘fast-track’ enforcement procedure,
importance of 16.87–16.88
need for special method of enforcing
charges 16.69
pre-lodgment of security documents
16.74–16.75
role of CREST settlement banks
16.51–16.57
secured limits and margin 16.67–16.68
settlement bank’s internal procedure and
strategies 16.89–16.90
system-charges 16.61–16.65
use of debit cap to control exposure
16.66
see also CREST system, use of securities as
collateral held in
collateral security charges 16.58–16.60
definition of 16.59
credit claims 15.96
equitable charges 15.05
floating charges see floating charges
nature of 9.10, 15.03
non-possessory form of security
7.26–7.30, 15.02
mortgages, and 9.08–9.11, 15.03
system-charges 5.27, 16.22, 16.56, 16.61–16.65, 16.78, 16.88, 16.113
definition of 16.62
choice of law
FCARs 2.13
FCD 2.13
Rome I Regulation on contractual
obligations 13.11, 13.14, 13.15
application to financial collateral
arrangements 13.33
change in governing law, agreement to
effect 13.31
conditions governing choice of parties
13.20
contractual issues governed by 13.29
contractual subrogation of a claim 13.33
core rule that law expressly chosen
13.19
different laws governing different parts
of contract 1.72–1.77, 13.09, 13.32
freedom to choose governing
law/limitations on 13.16, 13.20–13.26
importance of making express choice of
law 13.26
limitations on freedom to choose
governing law 13.16
non-contractual obligations, freedom to
choose governing law 13.36
overriding mandatory rules of another
country 13.18
part only of contract, choice of law to
govern 13.32
renvoi, exclusion of 13.35

Geoffrey Yeowart, Robin Parsons, Edward Murray and Hamish Patrick - 9781782546320
Downloaded from Elgar Online at 01/28/2019 10:01:00AM
via free access
INDEX

Rome Convention, based on 13.15
rules for determining applicable law in
absence of choice 13.21–13.26
'characteristic performance' and
'habitual residence' 13.21–13.24
law of country with which contract
most closely connected 13.25
scope 13.15
set-off 13.33, 13.34
specific contracts, rules on 13.27
specific exclusions 13.17
universal application of rules 13.28
voluntary assignment of a claim 13.31,
13.33, 13.38–13.49
Rome II Regulation on non-contractual
obligations 13.11, 13.14
absence of agreement, applicable law in
13.37
choice of law 13.36
special rules relevant to financial
collateral arrangements 13.37
SFD 1.20, 1.72
City of London Law Society 5.110, fn. 150
(Chapter 5), 16.112, fn. 96 (Chapter
16), 19.79, fn. 81 (Chapter 19), 22.22,
fn. 21 (Chapter 22)
clearing houses 5.38
CCP, role of 20.01–20.05
clearing and settlement of transactions in
UK 20.10–20.51
acceptance of transaction for clearing by
CCP 20.19
bilateral settlement at CSD where
transaction not cleared by CCP
20.47
bilateral settlement on books and
records of custodian 20.48
central clearing through a CCP
20.15–20.18
central securities depositories
20.43–20.44
clearing of transactions 20.13–20.14
client transaction 20.26
collateral netting accounts 20.37
confirmation of transaction 20.11–20.12
default management 20.38
house and client accounts 20.30–20.33
novation of original transaction 20.20
open offer route 20.21–20.22
position netting between CCP and
clearing member 20.34–20.36
position of non-clearing firms
20.23–20.25
settlement 20.40
settlement failures 20.50–20–51
settlement of derivative contracts 20.49
settlement of securities transactions
20.41–20.42
settlement of securities transactions
cleared by CCP 20.45–20.46
taking of collateral by CCP
20.27–20.29
CREST, default rules, and 16.41–16.44
financial collateral, UK see financial
collateral in UK clearing houses, use of
financial crisis highlighting importance of
clearing 20.01
Part VII protection for recognised clearing
houses 20.77–20.122
adjustment of prior transactions 20.101
avoidance of property dispositions
20.103–20.105
default rules 20.112
disclaimer of property, rescission of
contracts 20.102
duty to give assistance 20.100
limitations 20.119–20.122
'margin' and 'default fund contributions',
use of 20.118
market charges, protection of 5.153,
20.109–20.111
'market charges', scope of 20.85–20.87
'market contracts' in recognised clearing
house, scope of 20.80–20.84
'market contracts' in recognised
investment exchange, scope of
20.79
modification of insolvency law
20.92–20.97
net sum payable on completion of
default proceedings 20.98–20.99

800

Geoffrey Yeowart, Robin Parsons, Edward Murray and Hamish Patrick - 9781782546320
Downloaded from Elgar Online at 01/28/2019 10:01:00AM
via free access
no assistance for foreign insolvency proceedings 20.114
powers of appropriate regulator to give directions 20.115–20.117
priorities 20.106–20.107
purpose and territorial extent of protection 20.77–20.78
‘qualifying collateral arrangements’, scope of 20.88
‘qualifying property transfers’, scope of 20.89–20.91
set-off disapplied in relation to client accounts 20.113
Settlement Finality Regulations (SFRs), under 5.38, 20.123–20.137
‘collateral security’, protection of 20.131–20.132
‘collateral security’, scope of 20.130
effect of system designation 20.127
insolvency protection 20.125
law applicable to securities held as collateral security 20.134
law applicable to a system 20.135
other jurisdictions, insolvency proceedings in 20.137
overseas protection 20.133
priorities 20.136
protection, scope of 20.126
purpose 20.123
territorial effect 20.124
summary of combined protection against insolvency risk 20.138
special resolution regime 5.51
Clearstream Banking operating ICSD 19.34–19.36
pro-rated co-ownership rights in pool of fungible securities acquired 19.34
‘reivindication’ rights on account holder’s insolvency 19.35
types of securities required to be deposited increased 19.36
client assets see assets of clients
Client Money Distribution Rules see FCA: Client Money Distribution Rules
Client Money Rules see FCA: Client Money Rules
clog on equity of redemption 11.31–11.32
appropriation 12.01, 12.14, 23.12
criticisms of doctrine 11.36
distinction between direct clog and the grant of a collateral advantage 11.32
possessor and non-possessor security fn.20 (Chapter 11)
reform 11.37–11.38
right of use, and 1.15, 11.33–11.35
right of use not under FCARs as 11.33–11.35
close-out netting 1.51, 3.07, 3.11–3.15
cash 3.05–3.15
close-out netting and financial collateral, relationship between 17.47–17.55
close-out netting and set-off, difference between 17.41–17.46, 21.04–21.05
credit risk 17.52, 17.77, 22.02
critical role in stability of financial markets 10.23
derivatives, and see close-out netting and financial collateral in relation to derivatives, use of equivalent financial collateral, obligation to provide 11.16
FCARS regulation 12
benefits of 10.81
extent of disapplication under regulation 12(2) 10.29–10.33
Lehman Firth Rixson 10.46–10.80
mark-to-market valuation 17.08–17.18
regulation 12: is it required? 10.21–10.28
rules 2.85 and 4.90 Insolvency Rules, interplay with 10.40–10.45
whether required 10.21–10.28
financial collateral, and 1.58–1.60, 17.47–17.55
foreign currency, debts in 5.25
how close-out netting works: two basic approaches 10.08, 17.37–17.40
conditional novation approach 10.08, 17.37–17.39, 17.44–17.46
set-off approach 10.08, 17.40, 17.44–17.46
importance of 21.04

Geoffrey Yeowart, Robin Parsons, Edward Murray and Hamish Patrick - 9781782546320
Downloaded from Elgar Online at 01/28/2019 10:01:00AM via free access
<table>
<thead>
<tr>
<th>Topic</th>
<th>Page(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>insolvency set-off, and 10.10–10.11, 10.26</td>
<td></td>
</tr>
<tr>
<td>differences with close-out netting 10.27</td>
<td></td>
</tr>
<tr>
<td>meaning and scope of close-out netting provisions 10.07–10.20</td>
<td></td>
</tr>
<tr>
<td>'close-out netting provision', definition of 10.07–10.15</td>
<td></td>
</tr>
<tr>
<td>'enforcement event', definition of 10.15–10.16</td>
<td></td>
</tr>
<tr>
<td>events of default/termination events 10.17–10.18</td>
<td></td>
</tr>
<tr>
<td>nature of 21.04</td>
<td></td>
</tr>
<tr>
<td>Part 1 BA 2009 5.89–5.91, 10.20</td>
<td></td>
</tr>
<tr>
<td>rationale for close-out netting provisions 10.01–10.06</td>
<td></td>
</tr>
<tr>
<td>title transfer financial collateral arrangements 6.08, 6.14–6.15, 6.34</td>
<td></td>
</tr>
<tr>
<td>ways in which close out netting provision takes effect 10.08</td>
<td></td>
</tr>
<tr>
<td>close-out netting and financial collateral in relation to derivatives, use of 17.01–17.82</td>
<td></td>
</tr>
<tr>
<td>close-out netting 17.29–17.55</td>
<td></td>
</tr>
<tr>
<td>close-out netting and financial collateral, relationship between 17.47–17.55</td>
<td></td>
</tr>
<tr>
<td>close-out netting and set-off, difference between 17.41–17.46, 21.04–21.05</td>
<td></td>
</tr>
<tr>
<td>how close-out netting works: two basic approaches 7.37–17.40</td>
<td></td>
</tr>
<tr>
<td>OTC derivative transactions: background 17.29–17.36</td>
<td></td>
</tr>
<tr>
<td>financial collateral in relation to derivatives 17.56–17.82</td>
<td></td>
</tr>
<tr>
<td>financial collateral and clearing of derivatives 17.82</td>
<td></td>
</tr>
<tr>
<td>ISDA financial collateral forms 17.58–17.75</td>
<td></td>
</tr>
<tr>
<td>other ISDA collateral management activities 17.76–17.81</td>
<td></td>
</tr>
<tr>
<td>OTC derivative transactions 17.01–17.03 clearing of OTC derivative transactions 17.28</td>
<td></td>
</tr>
<tr>
<td>close-out netting and mark-to-market valuation 17.08–17.18</td>
<td></td>
</tr>
<tr>
<td>financial collateral annexes 17.19</td>
<td></td>
</tr>
<tr>
<td>International Swaps and Derivatives Association 17.20–17.27</td>
<td></td>
</tr>
<tr>
<td>master agreements 17.04–17.07</td>
<td></td>
</tr>
<tr>
<td>nature of 17.02–17.03</td>
<td></td>
</tr>
<tr>
<td>collateral BCBS-IOSCO rules: assets which constitute eligible collateral 22.97–22.100</td>
<td></td>
</tr>
<tr>
<td>book entry securities as see book entry securities as collateral cash collateral see cash</td>
<td></td>
</tr>
<tr>
<td>credit claims see credit claims CREST securities see CREST system, use of securities as collateral held in excess collateral, withdrawal of see withdrawal of excess collateral financial see financial collateral sources of demand for 1.91</td>
<td></td>
</tr>
<tr>
<td>collective investment schemes 3.57–3.58, fn.54 (Chapter 3), fn.55 (Chapter 3), 18.50</td>
<td></td>
</tr>
<tr>
<td>companies exemption from registration if charge created by company or LLP 4.13–4.21, 8.111–8.113, 14.25–14.28, 15.18, 16.101, 21.21, 21.24, 23.08, 23.25 difficulty in relying upon exemption 4.21</td>
<td></td>
</tr>
<tr>
<td>disapplication of registration provisions for UK company's charges 4.13–4.14 transitional provisions relating to UK company charges 4.15–4.18 shares see shares in companies conflict of laws 13.01–13.104 book entry securities, treatment of 1.72–1.77 European approach autonomous meanings 13.05</td>
<td></td>
</tr>
<tr>
<td>ECJ, role of 13.06 financial collateral, and see conflict of laws and financial collateral Hague Securities Convention 1.105 PRIMA 1.75, 1.77, 1.103, 13.69–13.71 inadequacy of 13.78, 13.85 private international law conflict of laws, as 13.01 European law, as 13.03–13.04</td>
<td></td>
</tr>
</tbody>
</table>

802

Geoffrey Yeowart, Robin Parsons, Edward Murray and Hamish Patrick - 9781782546320
Downloaded from Elgar Online at 01/28/2019 10:01:00AM via free access
INDEX

nature of 13.01
rules divided into three areas 13.07
uncertainty as to rules 1.19–1.20
uncertainty concerning location of account 1.103–1.104
conflict of laws and financial collateral 13.01–13.104
contractual/non-contractual obligations in financial collateral arrangements, law applicable to 13.11–13.37
autonomous meanings of relevant terms 13.13–13.14
definition of financial collateral arrangements 13.11
financial collateral arrangements as civil and commercial matters 13.14
Rome I Regulation on contractual obligations 13.11, 13.14
Rome II Regulation on non-contractual obligations 13.11, 13.14
cross-border financial collateral arrangements
applicable law on 13.09–13.85
'connecting factors', nature of 13.09–13.10
how arising 13.02
nature of 13.02
no single law governing 13.09
cross-border security financial collateral arrangements 13.86–13.95
contractual aspects 13.87–13.89
creation/attachment of security, perfection, priority, enforcement 13.90–13.95
cross-border title transfer financial collateral arrangements 13.96–13.104
contractual aspects 13.97
effectiveness of transfer 13.98
recharacterisation risk 13.99–13.104
European approach
autonomous meanings 13.05
ECJ, role of 13.06
financial collateral arrangements, law applicable to 13.11–13.85
contractual/non-contractual obligations 13.11–13.37
no single law governing 13.09
proprietary effect of transfer in financial collateral arrangement 13.50–13.77
voluntary assignment of a claim 13.31, 13.33, 13.38–13.49
entry into force/ratification 13.83–13.84
fall back rules 13.82
law of account agreement as applicable law 13.80
party autonomy approach, constraint on 13.81
'qualifying office' test 13.81
private international law
conflict of laws, as 13.01
European law, as 13.03–13.04
nature of 13.01
rules divided into three areas 13.07
proprietary effect of transfer in financial collateral arrangement 13.50–13.77
bearer debt security treated as tangible property 13.54–13.55
intangible property, location of 13.53
lex situs for determining law applying to personal property transfer 13.52
registered securities as intangible property, location of 13.55–13.56
securities account, ascribing location to 13.56–13.85
chain of intermediated securities holdings 13.58
custodian's role 13.57, 13.59, 13.66
legal nature of intermediated securities 13.60–13.77
'look-through' approach 13.67–13.76
PRIMA 13.69–13.71, 13.78
uncertainty as to legal nature of intermediated securities 13.50
Rome I Regulation on contractual obligations 13.11, 13.14, 13.15
application to financial collateral arrangements 13.33
change in governing law, agreement to effect 13.31

803
Geoffrey Yeowart, Robin Parsons, Edward Murray and Hamish Patrick - 9781782546320
Downloaded from Elgar Online at 01/28/2019 10:01:00AM via free access
INDEX

‘characteristic performance’ and
‘habitual residence’ 13.21–13.24
conditions governing choice of parties
13.20
contractual issues governed by 13.29
contractual subrogation of a claim 13.33
core rule that law expressly chosen
13.19
different laws governing different parts
of contract 13.32
freedom to choose governing
law/limitations on 13.16
importance of making express choice of
law 13.26
law of country with which contract
most closely connected 13.25
limitations on freedom to choose
governing law 13.16
overriding mandatory rules of another
country 13.18
part only of contract, choice of law to
govern 13.32
renvoi, exclusion of 13.35
Rome Convention, based on 13.15
rules for determining applicable law in
absence of choice 13.21–13.26
scope 13.15
set-off 13.33, 13.34
specific contracts, rules on 13.27
specific exclusions 13.17
universal application of rules 13.28
voluntary assignment of a claim 13.31,
13.33, 13.38–13.49
Rome II Regulation on non-contractual
obligations 13.11, 13.14
absence of agreement, applicable law in
13.37
choice of law 13.36
special rules relevant to financial
collateral arrangements 13.37
voluntary assignment of a claim, law
applicable to 13.31, 13.33,
13.38–13.49
assignment by way of security 13.38
assignor and assignee, relationship
between 4.46–4.48, 13.42–13.43
Barbado Trust case 15.98–15.110
cash collateral, and 13.40–13.41
‘claim’, meaning of 13.39
credit claims 15.66–15.97
legal assignment 4.44–4.48
proprietary effect of voluntary
assignment 13.47–13.49
Rome I Regulation determining
applicable law 13.38, 13.42
third parties, voluntary assignment, and
13.43–13.49
third parties, voluntary assignment,
Rome Convention and
13.44–13.46, 13.48
constructive knowledge 15.140
Co-operative and Community Benefit
Societies Act 2014
s 63, disapplication of 4.55–4.56
credit claims 3.03, 3.62–3.82
appropriation, use of 12.05
appropriation, valuation of 12.97
see also appropriation, remedy of
assignability of 15.80–15.97
absolute assignment 15.86
charges 15.96
general principle of assignment 15.81
loan agreements 15.83–15.87, 15.96
mortgages of credit claims 15.93–15.95
mortgages operating as assignments
15.92–15.93
non-assignable rights 15.82
novation 15.80, 15.91, 15.92
only rights under agreements assignable
15.80
prohibition of assignment 15.87–15.89
restrictions in agreements 15.97
Scots law 23.14–23.16
book debts 3.09
collateral security under the SFRs 20.130
definition/nature of 3.62–3.65
eligible collateral assets 22.35
fixed security over 9.59
must arise from credit institution granting
credit as a loan 3.71–3.81
need not be tradeable 3.82
new class of collateral in FCD, as
1.91–1.101, 3.03, 3.10

804

Geoffrey Yeowart, Robin Parsons, Edward Murray and Hamish Patrick - 9781782546320
Downloaded from Elgar Online at 01/28/2019 10:01:00AM
via free access
enlarging pool of assets eligible as collateral 1.92–1.94
increasing demand for collateral 1.91
proposal for new Directive to amend SFD and FCD 1.95–1.101
sources of demand for collateral 1.91
why included 3.66–3.70
not fungible so no right of use 1.98, 11.07–11.08
‘possession’ or ‘control’ test
mortgages or charges over credit claims 8.126–8.127
partial definition of ‘possession’ does not apply to credit claims 8.19, fn.49 (Chapter 8), 8.50
right to collect proceeds of credit claims 7.02. 8.04, 8.11–8.13, 9.84–9.90
right to give consents, waivers and variations 9.91–9.92
right to receive repayments of principal and interest 9.84–9.90
right to value 9.81–9.83
right to vote 9.75–9.78
right of use, not subject of 11.07
taking security over 15.58–15.110
assignability of credit claims 15.80–15.97
assignment of credit claims by way of security 15.66–15.69
Barbados Trust case 15.98–15.110
credit claims as financial collateral 15.58–15.59
FCD and credit claims 15.61–15.65
notice of assignment 15.70–15.73
priority of competing assignments 15.70–15.72
waiver of set-off rights and bank secrecy rules 15.74–15.79
why included as financial collateral 3.66–3.70
credit institutions
definition of 22.08
EEA, insolvency of 5.149–5.150
credit risk 22.01–22.16
recognition requirements
certain master netting agreements, for 22.43–22.44
financial collateral, for 22.29–22.33
on-balance sheet netting, for 22.41–22.42
receivables, for 22.35–22.40
third-party deposits/cash assimilated instruments, for 22.34
risk weighting and Financial Collateral
Simple Method 22.45–22.46
Standardised Approach to measuring credit risk 22.15
treatment of collateral provided to central counterparty 22.49
creditors, protection of 5.28
CREST system, use of securities as collateral held in 16.01–16.134
‘bespoke’ depositary interests (DIs) 16.17
Central Securities Depositories Regulation 16.114–16.134
consequences of infringing article 3(2) 16.133
does second limb of article 3(2) apply to equitable mortgage? 16.126–16.128
does second limb of article 3(2) apply only to financial collateral arrangement between parties eligible under FCD? 16.132
impact on financial collateral arrangements 16.114–16.116
INDEX

is second limb of article 3(2) triggered by creation or only enforcement of security financial collateral arrangement? 16.129–16.131
need for greater clarity 16.134
securities to which second limb of article 3(2) applies 16.117
charges held by CREST settlement banks 16.51–16.90
change of user 16.76–16.77
collateral security charges 16.58–16.60
constraints 16.78
electronic instructions, ability to reply on 16.79–16.86
electronic instructions, use of 16.70–16.72
‘fast-track’ enforcement procedure 16.73
‘fast-track’ enforcement procedure, importance of 16.87–16.88
need for special method of enforcing charges 16.69
pre-lodgment of security documents 16.74–16.75
role of CREST settlement banks 16.51–16.57
secured limits and margin 16.67–16.68
settlement bank's internal procedure and strategies 16.89–16.90
system-charges 16.61–16.65
use of debit cap to control exposure 16.66
choice of charges for collateral-takers other than CREST settlement banks 16.24–16.50
checklist for taking mortgage/charge over uncertificated securities 16.50
conversion of certificated units into uncertificated form 16.47–16.48
equitable mortgage holder, position of 16.27–16.32
factors relevant when choosing type of security 16.36–16.40
floating charge holder, position of 16.33–16.35
impact of default rules of recognised investment exchange/clearing house 16.41–16.44
legal mortgage holder, position of 16.25–16.26
legal or equitable mortgage? 16.24
stamp duty reserve tax 16.49
title transfer arrangements 16.45–16.46
CREST depository interests (CDIs) 16.14–16.16
nature of 16.15
CREST services, nature of 16.01
direct holding system 16.04–16.06, 19.02
importance of CREST 16.02–16.03
intermediated securities 19.10
legislative framework 16.09–16.123
CREST records as ‘operator register of securities’ 16.10
five relevant systems 16.09
modes of participation in CREST 16.18–16.21
priorities 16.98–16.103
floating charges and preferential debts where collateral-taker is not CREST settlement bank 16.98–16.100
negative pledges 16.102
registration of charges 16.101
settlement finality of complex transactions in CREST 16.103–16.113
‘relation back’ approach 16.110–16.113
time at which transfer orders become irrevocable 16.105–16.107
what is secured? 16.103–16.104
suspension or termination of CREST membership, impact of 16.91–16.97
implications for collateral-takers 16.91–16.95
recertification option 16.96–16.97
types of collateral-taker 16.22–16.23
CREST settlement banks distinguished from other collateral-takers 16.22–16.23
UK CREST securities 16.13
uncertificated nature of CREST securities 16.07–16.08
cross-border insolvency recognition and cooperation 5.151–5.156
exceptions to protect financial collateral arrangements 5.153–5.156
UNCITRAL Model Law on cross-border insolvency 5.11, 5.152
cross-border transactions
applicability of FCARs to 2.31–2.35
see also conflict of laws
CSDs and ISCD 19.11–19.12

Cukurova

equitable relief, availability of 12.50–12.91
availability of equitable relief, Privy Council’s decision on 12.89–12.91
alleged collateral purpose and bad faith 12.51–12.53
compatibility with FCD? 12.55–12.62
how long does right to equitable relief survive after appropriation? 12.73
legal certainty, need for 12.85–12.88
question whether relief should be granted 12.63–12.65
relief from forfeiture, availability of relief from 12.54
terms of relief 12.66–12.72
variation to terms of relief: extension of time/interest suspended 12.74–12.84
facts 12.17–12.26
management of company whose shares subject to disputed appropriation 12.47–12.49
preliminary issue as to whether power effectively exercised 12.27–12.44
decision at first instance 12.31–12.37
decision of Court of Appeal 12.38–12.40
validity of appropriation upheld by Privy Council 12.41–12.44
regulations made under section 2(2) of the European Communities Act 1972 2.29
statutory power of appropriation, amendment to 12.45–12.46
custodians
BCBS-IOSCO rules on margin requirements 22.86–22.87
bilateral settlement on books and records of custodian 20.48
financial collateral held with third-party custodian 8.100–8.101
financial instruments: securities held through custodians 15.37–15.38
securities account, custodian’s role in 13.57, 13.59, 13.66
securities lending by global custodians and settlement systems 18.39
triparty arrangements, custodian acting as agent in 18.15–18.16
Custody Rules see FCA: Custody Rules
default
close-out netting provisions 10.17–10.18
GMSLA 18.26–18.38
events of default 18.36
events of default, effects of 18.37
GMRA 18.11–18.14
negative pledges 15.137
prime brokerage agreements 18.40–18.46, 18.100–18.107
events of default 18.100–18.104
events of default, effect of 18.101–18.104
remedies where prime broker in default 18.107
security, enforcement of 18.103
termination of associated agreements 18.102
recognised clearing houses, CREST and 16.41–16.44
recognised investment exchanges, and CREST 16.41–16.44
repos: triparty arrangements 18.16
dematerialised securities
equitable mortgage of 9.22
immobilisation and dematerialisation, difference between 19.07
immobilisation of 19.07
immobilised securities, and 19.06
securities account, location of 13.56
depository receipts/interests 3.36, 3.59
‘bespoke’ depositary interests (DIs) 3.36, 16.17
CREST depositary interests (CDIs) 3.36, 16.14–16.16
nature of 16.15
INDEX

derivatives/OTC derivatives 17.01–17.03
BCBS-IOSCO rules see BCBS-IOSCO
rules on margin requirements for
non-centrally cleared derivatives 20.02–20.03
CCP, and
dispossession 1.41–1.42, 4.03
‘possession’ or ‘control’ test 8.05–8.10
‘revindication’ right exercisable on
Euroclear’s insolvency 19.32
co-ownership right over fungible securities 19.29
transfer of co-ownership right 19.30
European Central Bank (ECB)
credit claims as collateral 1.92, 1.93
Financial Collateral Directive 1.44, 1.70
major holder of collateral, as 1.03
virtual currencies 3.24–3.25
European Commission
Action Plan for financial markets 1.29–1.32
Financial Collateral Directive see Financial
Collateral Directive 1.44
Forum Group on collateral 1.30
harmonising national laws relating to
collateral 1.05
Internal Market Directorate General 1.05
proprietary effect of voluntary assignment 13.47
SFTR see European Securities Financing
Transactions Regulation (SFTR)
European Court of Justice (ECJ)
interpreting EU legislation 2.03
background materials, use of 2.03
basic approach towards 2.02
preliminary rulings 13.06

disclaimer of property, rescission of contracts 20.102
increase in volume/range of contracts
cleared through 20.02–20.03
portability of client accounts 20.65–20.67
settlement of derivative contracts 20.49
close-out netting 17.29–17.55
close-out netting and financial
collateral, relationship between 17.47–17.55
close-out netting and set-off, difference
between 17.41–17.46, 21.04–21.05
how close-out netting works: two basic
approaches 7.37–17.40
mitigating credit risk 17.52–17.53
OTC derivative transactions:
background 17.29–17.36
financial collateral in relation to
derivatives 17.56–17.82
financial collateral and clearing of
derivatives 17.82
ISDA financial collateral forms
17.58–17.75
other ISDA collateral management
activities 17.76–17.81
master agreements 17.04–17.07
close-out netting provisions
17.06–17.07
ISDA standard form 10.17–10.18, 17.04
other standard form agreements 17.05
non-centrally cleared derivatives see
BCBS-IOSCO rules on margin
requirements for non-centrally
clarified derivatives
OTC derivative transactions 17.01–17.03
clearing of OTC derivative transactions 17.28
close-out netting and mark-to-market
valuation 17.08–17.18
financial collateral annexes 17.19
International Swaps and Derivatives
Association 17.20–17.27
master agreements 17.04–17.07
nature of 17.02–17.03
electronic instructions
ability to reply on 16.79–16.86
use of 16.70–16.72
eligible debt securities 3.59
Euroclear Bank operating ICSD
19.29–19.33
Belgian law, overhaul of 19.33
co-ownership right over fungible securities 19.29
methods of taking collateral in Euroclear
system 19.43–19.49
‘rematerialisation’ of securities permitted 19.31
European Commission
Action Plan for financial markets 1.29–1.32
Financial Collateral Directive see Financial
Collateral Directive 1.44
Forum Group on collateral 1.30
harmonising national laws relating to
collateral 1.05
Internal Market Directorate General 1.05
proprietary effect of voluntary assignment 13.47
SFTR see European Securities Financing
Transactions Regulation (SFTR)
European Court of Justice (ECJ)
interpreting EU legislation 2.03
background materials, use of 2.03
basic approach towards 2.02
preliminary rulings 13.06
European Financial Markets Lawyers Group

1.31
Financial Collateral Directive
approach of new legislation 1.88
reuse of pledged collateral 1.53

European Market Infrastructure Regulation
(EMIR) 20.02–20.03, 22.09
CCPs
central clearing 22.15–22.18
collateral requirements 22.06–22.07
default funds 22.05, 22.08
default management 20.38
investment policy 20.55
loss-sharing arrangements
20.72–20.75
segregation requirements 20.33,
20.57–20.58, 20.69, 20.91

OTC derivatives
intra-group transactions 22.131–22.134
risk management procedures 22.52,
22.114
portability 20.65–20.66

European Parliament
Committee on Economic and Monetary
Affairs 1.36, 1.70
Financial Collateral Directive 1.41–1.42

European Securities Financing Transactions
Regulation (SFTR) 22.136–22.166
administrative sanctions 22.161–22.163
disclosure to investors in funds
22.156–22.158
entry into force, transitional provisions
and review 22.164–22.166
FSB policy framework on securities
financing transactions 22.141–22.144
how are SFTs defined? 22.137.
22.150–22.154
policy aims of Commission 22.139–22.140
preconditions of reuse 22.159–22.160
reuse, definition of 22.160
security financing transactions 22.137,
22.150–22.154
buy-sell/sell-buy back transactions,
definition of 22.153
margin lending transaction, definition
of 22.154

repurchase transaction, definition of
22.151
requirement to report SFTs to trade
repository 22.155
securities or commodities
lending/borrowing, definition of
22.152
to whom will SFTR apply?
22.145–22.149
Eurosystem credit operations 1.44
credit claims 1.93, 3.10
excess collateral, withdrawal of see
withdrawal of excess collateral

‘fast-track’ enforcement procedure 16.73
importance of 16.87–16.88

FCA: Client Money Distribution Rules
18.67, 18.72–18.75, 18.77, 18.82
review of 18.151, fn.100 (Chapter 8),
18.175, 18.181, 18.187,
18.188–18.192
consulting on revised proposals 18.181
proposals, nature of 18.192

‘records based distribution’ proposal
18.189–18.191

FCA: Client Money Rules
application of Client Money Rules 18.64
changes to 18.181, 18.185, 18.187
claims against prime brokerage firms
18.89
Client Money Distribution Rules
18.72–18.75
deposit of client money with credit
institutions 18.67
firms authorised by PCA/FCA, Client
Money Rules applying to
18.62–18.63
pooling events 18.73–18.75
review of 18.181
safeguarding client’s rights, general
requirements of 18.66
SARs, dealing with losses in 18.173
scope of Client Money Rules,
modification of 18.65
segregation of client money 18.66–18.72
alternative approach 18.68, 18.70
normal approach 18.68–18.70
INDEX

statutory trust in relation to client money
18.62, 18.72, 18.90
Lehman Client Money case
18.77–18.88
nature of 18.76–18.90
terms of 18.72
transfer of client money to third party for purposes of transaction 18.71
TTCA, client money held under 18.90, 18.96
FCA: Custody Rules 18.47–18.61
application of Custody Rules 18.50
assets held subject to FCA requirements 18.47–18.48
changes to 18.181, 18.184, 18.187
no statutory trust in relation to client’s custody assets 18.53
prime broker’s interests, protection of 18.59–18.61
review of 18.181
right of use 18.60–18.61
safeguarding client’s ownership rights 18.52
scope of Custody Rules, modification of 18.51
segregation of assets 18.52
when Custody Rules apply 18.49
whether valid trust of custody assets exists/trust requirements 18.53–18.58
FCA PS14/9 – review of clients assets regime 18.150, 18.180–18.187
changes introduced 18.181–18.186
FCA fundamental review of client assets regime 18.180, 18.188
scope of review 18.181
FCA supervision – Client’s Assets Unit (CASS Unit) 18.176–18.179
auditor’s client assets report 18.179
changes introduced 18.182–18.184, 18.186
Client Money and Assets Return (CMAR), introduction of 18.178
establishment of 18.176
functions of 18.176
operational oversight function 18.177, 18.178
financial collateral arrangements see financial collateral arrangements
classification of 9.01–9.02
close-out netting, and 17.47–17.55
conflict of laws, and see conflict of laws and financial collateral
creation and terms of issue 9.03–9.05
definition of 3.02, 12.04
derivatives, financial collateral in relation to 17.56–17.82
financial collateral and clearing of derivatives 17.82
ISDA financial collateral forms 17.58–17.75
other ISDA collateral management activities 17.76–17.81
see also close-out netting and financial collateral in relation to derivatives, use of
financial collateral arrangements see financial collateral arrangements
tenature of 3.01–3.04
personal property, as 9.01
proprietary interests of clients in financial collateral/ cash deriving from it
can prime broker compromise by using scheme of arrangement? 18.135–18.145
does client retain? 18.108–18.145
security arrangements see security financial collateral arrangements
taking and perfecting security over see taking and perfecting security over financial collateral
title transfer arrangements see title transfer financial collateral arrangements
types of financial collateral 3.01–3.82
cash 3.05–3.25
credit claims 3.03, 3.62–3.82
financial instruments 3.26–3.61
see also types of financial collateral
use in UK clearing houses see financial collateral in UK clearing houses, use of
see also rights attached to charged securities
financial collateral arrangements
Central Securities Depositories
Regulation, and 16.132
impact on financial collateral arrangements 16.114–16.116
cross-border financial collateral arrangements
applicable law on 13.09–13.85
conflict of laws, and see conflict of laws and financial collateral
‘connecting factors’, nature of 13.09–13.10
how arising 13.02
nature of 13.02
no single law governing 13.09
cross-border security financial collateral arrangements 13.86–13.95
contractual aspects 13.87–13.89
creation/attachment of security, perfection, priority, enforcement
13.90–13.95
cross-border title transfer financial collateral arrangements 13.96–13.104
contractual aspects 13.97
effectiveness of transfer 13.98
recharacterisation risk 13.99–13.104
definition of 13.11
law applicable to 13.11–13.85
contractual/non-contractual obligations 13.11–13.37
no single law governing 13.09
proprietary effect of transfer in financial collateral arrangement 13.50–13.77
voluntary assignment of a claim 13.38–13.49
title transfer financial collateral arrangements 6.01–6.63
agreements included 6.03–6.07
close-out netting 17.54–17.55
cross-border title transfer financial collateral arrangements 13.96–13.104
definition of 6.02, 6.39
legal and beneficial ownership, transfer of 6.39–6.49
non-natural persons 6.50–6.63
purpose of agreement 6.35–6.38
recharacterisation 6.10–6.34
security financial collateral arrangements, and 6.06–6.07, 7.03
significance 6.08–6.09
see also title transfer financial collateral arrangements
security financial collateral arrangements
6.01, 7.01–7.32
Central Securities Depositories Regulation, and 16.129–16.131
cross-border security financial collateral arrangements 13.86–13.95
definition of 7.02
meaning of 7.01–7.05
non-natural persons 7.32
possession ‘control’ see ‘possession’ or ‘control’ test when creating security financial collateral arrangements
purpose 7.06–7.20
regulatory treatment of see regulatory treatment of financial collateral arrangements
security interest 7.21–7.30
significance of 7.03–7.05
title transfer financial collateral arrangements, and 6.06–6.07, 7.03
see also conflict of laws and financial collateral; security financial collateral arrangements
Financial Collateral Directive
addition of credit claims as new class of collateral 1.91–1.101, 3.62–3.82
enlarging pool of assets eligible as collateral 1.92–1.94
increasing demand for collateral 1.91
proposal for new Directive to amend SFD and FCD 1.95–1.101
sources of demand for collateral 1.91
aims of 5.02–5.06
binding nature of 1.02
‘close-out netting provision’, definition of 10.09
conflict of laws, revisiting 1.103–1.105
Hague Securities Convention 1.105
INDEX

uncertainty concerning location of account 1.103–1.104
credit claims 15.61–15.65
dispossession 1.41–1.42, 4.03, 8.05–8.10
‘enforcement event’, definition of 10.15
evidence of provision of financial collateral 4.03–4.04, 4.06–4.08, 4.12
implementation in UK 2.08, 5.07
key questions behind Directive 1.29–1.89
abolishing administrative burdens 1.83–1.87
action plan 1.29–1.32
approach to be adopted by new legislation 1.88
assets and exposure, types of 1.38–1.45
cash collateral 1.61–1.64
conflict of laws treatment of book entry securities 1.72–1.77
legal persons, types of 1.33–1.37
legislative measure, choice of 1.89
matters outside scope of Directive 1.90
netting 1.58–1.60, 10.03
rapid liquidation, need for 1.68–1.71
reuse of pledged collateral 1.52–1.55
scope of collateral arrangements covered 1.33–1.37
scope of collateral assets covered 1.38–1.45
simplified perfection procedures 1.83–1.87
substitution 1.56–1.57, 5.03, 5.06
territorial coverage 1.78–1.82
title transfer and security 1.46–1.51
top-up collateral 1.65–1.67, 5.03, 5.06
legislative background, relevance of 1.02
non-natural persons 6.50–6.54, 6.56
objective 1.01
position previously 1.03–1.28
cumbersome formalities 1.09–1.12
ISDA suggested principles for law reform 1.28
legal restrictions on use of collateral as security 1.13–1.15
mark-to-market collateral arrangements, vulnerability of 1.23–1.27
need for reform 1.03–1.08
third party rights, vulnerability to 1.21–1.22
uncertain enforceability of title transfer collateral 1.16–1.18
uncertainty as to conflict of laws rules 1.19–1.20
‘provision of financial collateral’, meaning of 4.03, 4.05–4.12
purpose/objectives 1.01–1.02, 5.01–5.06
conveyancing legislation, as form of 14.18
improve legal certainty 10.01
to limit formal requirements 4.01–4.04
reasons for 1.31
regulations, UK see Financial Collateral Regulations (FCARs)
‘relevant financial obligations’, definition of 7.14, 7.17–7.19
right of use, revisiting 1.102
SFD, and 1.89
text of see Appendix 2
title transfer financial collateral arrangement, definition of 4.09,
6.01–6.08, 6.39–6.45
travaux preparatoires see Appendix 3
financial collateral in UK clearing houses, use of 20.01–20.138
clearing and settlement of transactions 20.10–20.51
acceptance of transaction for clearing by CCP 20.19
bilateral settlement at CSD where transaction not cleared by CCP 20.47
bilateral settlement on books and records of custodian 20.48
central clearing through a CCP 20.15–20.18
central securities depositories 20.43–20.44
clearing of transactions 20.13–20.14
client transaction 20.26
collateral netting accounts 20.37
confirmation of transaction 20.11–20.12
default management 20.38
house and client accounts 20.30–20.33
novation of original transaction 20.20
<table>
<thead>
<tr>
<th>Topic</th>
<th>Page Numbers</th>
</tr>
</thead>
<tbody>
<tr>
<td>open offer route</td>
<td>20.21–20.22</td>
</tr>
<tr>
<td>position netting between CCP and clearing member</td>
<td>20.34–20.36</td>
</tr>
<tr>
<td>position of non-clearing firms</td>
<td>20.23–20.25</td>
</tr>
<tr>
<td>settlement</td>
<td>20.40</td>
</tr>
<tr>
<td>settlement failures</td>
<td>20.50–20.51</td>
</tr>
<tr>
<td>settlement of derivative contracts</td>
<td>20.49</td>
</tr>
<tr>
<td>settlement of securities transactions</td>
<td>20.41–20.42</td>
</tr>
<tr>
<td>settlement of securities transactions cleared by CCP</td>
<td>20.45–20.46</td>
</tr>
<tr>
<td>taking of collateral by CCP</td>
<td>20.27–20.29</td>
</tr>
<tr>
<td>clearing members providing indirect clearing services</td>
<td>20.68–20.71</td>
</tr>
<tr>
<td>comparison between title transfer</td>
<td></td>
</tr>
<tr>
<td>collateral and security collateral</td>
<td>20.51</td>
</tr>
<tr>
<td>default procedures</td>
<td>20.61–20.64</td>
</tr>
<tr>
<td>loss-sharing arrangements</td>
<td>20.72–20.75</td>
</tr>
<tr>
<td>Part VII protection for recognised investment exchanges/clearing houses</td>
<td>20.77–20.122</td>
</tr>
<tr>
<td>adjustment of prior transactions</td>
<td>20.101</td>
</tr>
<tr>
<td>avoidance of property dispositions</td>
<td>20.103–20.105</td>
</tr>
<tr>
<td>default rules</td>
<td>20.112</td>
</tr>
<tr>
<td>disclaimers of property, rescission of contracts</td>
<td>20.102</td>
</tr>
<tr>
<td>duty to give assistance</td>
<td>20.100</td>
</tr>
<tr>
<td>limitations</td>
<td>20.119–20.122</td>
</tr>
<tr>
<td>'margin' and 'default fund contributions', use of 20.118</td>
<td></td>
</tr>
<tr>
<td>market charges, protection of</td>
<td>20.109–20.111</td>
</tr>
<tr>
<td>'market charges', scope of 20.85–20.87</td>
<td></td>
</tr>
<tr>
<td>'market contracts' in recognised clearing house, scope of 20.80–20.84</td>
<td></td>
</tr>
<tr>
<td>'market contracts' in recognised investment exchange, scope of 20.79</td>
<td></td>
</tr>
<tr>
<td>modification of insolvency law</td>
<td>20.92–20.97</td>
</tr>
<tr>
<td>net sum payable on completion of default proceedings</td>
<td>20.98–20.99</td>
</tr>
<tr>
<td>no assistance for foreign insolvency</td>
<td>20.114</td>
</tr>
<tr>
<td>powers of appropriate regulator to give directions</td>
<td>20.115–20.117</td>
</tr>
<tr>
<td>priorities</td>
<td>20.106–20.107</td>
</tr>
<tr>
<td>purpose and territorial extent of</td>
<td>20.77–20.78</td>
</tr>
<tr>
<td>'qualifying collateral arrangements', scope of 20.88</td>
<td></td>
</tr>
<tr>
<td>'qualifying property transfers', scope of 20.89–20.91</td>
<td></td>
</tr>
<tr>
<td>set-off disappplied in relation to client accounts</td>
<td>20.113</td>
</tr>
<tr>
<td>portability of client accounts</td>
<td>20.65–20.67</td>
</tr>
<tr>
<td>reliance on financial collateral</td>
<td>20.01–20.09</td>
</tr>
<tr>
<td>collateral requirements</td>
<td>20.06–20.08</td>
</tr>
<tr>
<td>regulatory background</td>
<td>20.01–20.05</td>
</tr>
<tr>
<td>statutory framework for clearing houses</td>
<td>20.09</td>
</tr>
<tr>
<td>return of surplus collateral on client account</td>
<td>20.76</td>
</tr>
<tr>
<td>right of use by CCP over collateral</td>
<td>20.55–20.56</td>
</tr>
<tr>
<td>safeguarding and investment of collateral</td>
<td>20.52–20.54</td>
</tr>
<tr>
<td>segregation of client accounts</td>
<td>20.57–20.60</td>
</tr>
<tr>
<td>settlement finality</td>
<td>20.123–20.137</td>
</tr>
<tr>
<td>'collateral security', protection of 20.131–20.132</td>
<td></td>
</tr>
<tr>
<td>'collateral security', scope of 20.130</td>
<td></td>
</tr>
<tr>
<td>effect of system designation</td>
<td>20.127</td>
</tr>
<tr>
<td>insolvency protection</td>
<td>20.125</td>
</tr>
<tr>
<td>law applicable to securities held as collateral security 20.134</td>
<td></td>
</tr>
<tr>
<td>law applicable to a system 20.135</td>
<td></td>
</tr>
<tr>
<td>other jurisdictions, insolvency proceedings in 20.137</td>
<td></td>
</tr>
<tr>
<td>overseas protection</td>
<td>20.133</td>
</tr>
<tr>
<td>priorities 20.136</td>
<td></td>
</tr>
<tr>
<td>protection, scope of 20.126</td>
<td></td>
</tr>
<tr>
<td>purpose 20.123</td>
<td></td>
</tr>
<tr>
<td>summary of combined protection against insolvency risk 20.138</td>
<td></td>
</tr>
<tr>
<td>territorial effect 20.124</td>
<td></td>
</tr>
<tr>
<td>'transfer orders', scope of 20.128–20.129</td>
<td></td>
</tr>
</tbody>
</table>
INDEX

Financial Collateral Regulations (FCARs) appropriation, remedy of see appropriation, remedy of challenge to validity of 2.18–2.29 Cukurova application for judicial review 2.18–2.28 USA v Nolan 2.29 enabling powers to amend FCARs 2.30 close-out netting: regulation 12 benefits of 10.81 extent of disapplication under regulation 12(2) 10.29–10.33 Lehman Firth Rixson 10.46–10.80, 10.84 regulation 12(2): drafting problem? 10.34–10.39, 10.83 rules 2.85 and 4.90 Insolvency Rules, interplay with 10.40–10.45 whether required 10.21–10.28 see also close-out netting cross-border transactions, applicability to 2.31–2.35 evidence in writing of arrangements 4.09, 4.28 financial instrument, definition of 6.44 formal requirements disapplied see formal requirements disapplied by FCARs implementation of Financial Collateral Directive in UK 2.08 interpretation of legislation, approach to 2.01–2.07, 6.42 autonomous meaning 2.05–2.07 ECJ, approach of 2.02–2.03 interpretation of EU Directives/implementing UK legislation 2.01–2.04 national law not derogating from Directive 2.04 travaux préparatoires as aid to interpretation 2.03, 2.10 UK courts, approach of 2.01, 2.03–2.04 inter-relationship between Pt 1 of Banking Act, and 5.89–5.91 non-natural persons 6.55–6.58 ‘possession’, partial definition of 8.19–8.20 purpose as form of conveyancing legislation 14.18 ‘relevant financial obligations’, definition of 7.14–7.20 retroactivity of see retroactivity of the Financial Collateral Regulations right of use rights under regulation 16(3) FCARs 11.17–11.27 statutory right of set-off under regulation 16(2) FCARS 11.13–11.16 see also right of use scope of 2.01–2.35 security financial collateral arrangements, definition of 2.04, 2.17, fn. 19 (Chapter 2), 4.09, 7.01–7.015 see also security financial collateral arrangements security interest, definition of 7.22–7.24 shortcomings/uncertainties of see Appendix 1 territorial scope 2.09–2.14 choice of law 2.13 non-natural persons 2.11 scope of UK domestic legislation 2.14 text of see Appendix 2 title transfer arrangements see title transfer financial collateral arrangements types of entity to which FCARs apply 2.15–2.17 Financial Conduct Authority (FCA) see FCA financial crisis in 2007–09 changes to regulatory regime for client assets following 18.145–18.146 effect on prime brokerage of 18.106–18.107 no prime broker now too big to fail 18.107 remedies where prime broker in default 18.107 G7 reform programme 22.50 importance of clearing houses highlighted 20.01 financial instruments 3.26–3.61 definition/nature of 3.26 express inclusions 3.57–3.61

814

Geoffrey Yeowart, Robin Parsons, Edward Murray and Hamish Patrick - 9781782546320
Downloaded from Elgar Online at 01/28/2019 10:01:00AM via free access
other instruments normally dealt in
securities equivalent to shares
3.51–3.56
shares in companies
3.27–3.33
taking security over
15.21–15.57
choice of security method
15.21–15.22
equitable mortgages
15.26–15.30
legal mortgages
15.23–15.25
listed and unlisted securities
15.31–15.36
nominees or custodians, securities held
through
15.37–15.38
risk collateral-taker becoming liable to
meet calls on members
15.55–15.57
risk collateral-taker of receiving
financial support
direction/contribution notice under
Pensions Act
15.45–15.54
risk company issuer of securities
becoming subsidiary of
collateral-taker
15.39–15.44
tradeable bonds
3.42–3.50
financial institutions, special resolution and
insolvency regimes for
Banking Act
2009
financial markets
Banking Act, safeguard under
5.66–5.67
close-out netting providing stability
10.23
CSDs and ICSDs as fundamental part of
19.11
global nature of
1.03, 2.12
increasing demand for collateral
1.91
integration and cost efficiency
1.10
right of use increasing liquidity
11.04
Financial Markets Law Committee (FMLC)
'control', meaning of
9.82
financial collateral held with third-party
custodian
8.100–8.101
indirect holding system: look-through
principle
19.25
Pensions Protection Fund notices
15.50–15.51
'possession', meaning of
8.42–8.43, 8.45–8.46
partial definition of 'possession'
8.47–8.48, 8.57, 8.62
proprietary effect of voluntary assignment
13.47
'records based distribution' proposal, FCA
18.190
flawed asset arrangements
21.66–21.79
alternative techniques for taking cash
collateral, as
21.01–21.02
anti-deprivation principle
10.25, fn. 25
(Clint, 10.53, 10.57, 10.60,
10.74–10.80, 21.74–21.79
legal nature of arrangement
21.66–21.69
'pari passu' principle
21.70–21.73
floating charges
application of
5.19
Banking Act
5.73–5.77
characteristics/nature of
9.49–9.57
CREST, and see under CREST system,
use of securities as collateral held in
disadvantages of
5.19
invalidity
5.20
negative pledges protecting
15.134
'possession' or 'control', and
8.87–8.99
floating charges over securities
8.123
priorities
16.98–16.100
removal of limitations on
5.19–5.22
security interest, as
7.24, 7.28
foreclosure
appropriation, comparison with
12.08–12.12
legal mortgages, and
12.12
nature of
12.10–12.11
foreign currency debts, modification of rules
on
5.25–5.26
formal requirements disappplied by FCARs
4.01–4.59
disapplication of s 63 Co-operative and
Community Benefit Societies Act
4.55–4.56
disapplication of s 4 Industrial and
Provident Societies Act
4.54–4.56
disapplication of s 53(1)(c) Law of
Property Act
4.29–4.43
disapplication
4.29–4.30
scope of s 53(1)(c)
4.31–4.32
significance of disapplication
4.33–4.43
disapplication of s 136 Law of Property
Act
4.44–4.53
INDEX

disapplication 4.44–4.48
other formal acts not disapplied
4.49–4.50
significance of disapplication 4.51–4.53
disapplication of Scottish registrations for
book entry securities collateral
4.57–4.59
consequences 4.59
disapplication 4.57–4.58
disapplication of Statute of Frauds 1677
4.22–4.28
disapplication 4.22–4.23
scope of s 4 of Statute of Frauds
4.24–4.26
significance of disapplication 4.27–4.28
exemption from registration as charge
created by company/LLP 4.13–4.21
difficulty in relying upon exemption
4.21
disapplication of registration provisions
for LLP’s charges 4.19–4.20
disapplication of registration provisions
for UK company’s charges
4.13–4.14
transitional provisions relating to UK
company charges 4.15–4.18
purpose of FCD
‘provision of financial collateral’,
meaning of 4.03, 4.05–4.12
to limit formal requirements 4.01–4.04
fungibility
fungible, meaning of 19.18
indirect holding systems 19.18–19.20
advantages/disadvantages of 19.19
G20 at Pittsburg Summit 20.02–20.03
control agreements and designating entries
19.72–19.73
effectiveness in relevant intermediary’s
insolvency 19.81
entry into force 19.85
loss-sharing in case of intermediary’s
insolvency 19.83
position in relation to third parties
19.75–19.79

priority of interests granted by an
intermediary 19.80
prohibition of upper-tier attachment 19.82
protective provisions for collateral
transactions 19.84
purpose 19.65–19.67
security interests in intermediated
securities 19.68–19.71
title transfer collateral 19.74
Global Master Repurchase Agreement 2011
(GRMRA) 18.05–18.14
Agency Annex 18.05
buy/sell back transactions and repos, used
for 18.05
default, rights and obligations of parties
on 18.11–18.14
early termination 18.11–18.12
exposure, elimination of 18.08–18.09
margin maintenance 18.06
margin ratio 18.06
repricing transactions 18.07–18.08
Global Master Security Lending Agreement
2010 (GMSLA) 18.26–18.38
absolute transfer of securities and
collateral 18.28
close-out/netting provisions similar to
GMRA 18.38
default position 18.35
events of default 18.36
events of default, effects of 18.37
Guidance notes 18.26, 18.28
‘manufactured payments’ 18.34
margin calculation on global basis 18.31
margin calculation on loan by loan basis
18.32
parties acting as lender and borrower in
different transactions 18.29
Schedule allowing parties to specify
relevant terms 18.28
substitution of collateral 18.33
termination rights 18.30
Hague Securities Convention 1.105
haircuts 22.101–22.105
‘cross-currency haircut 22.121
hypothescate, right to see right of use

816
Geoffrey Yeowart, Robin Parsons, Edward Murray and Hamish Patrick - 9781782546320
Downloaded from Elgar Online at 01/28/2019 10:01:00AM
via free access
immobilised securities 19.06–19.08
benefits of immobilisation 19.08
common in indirect holding systems 19.06
custody risk 19.07
immobilisation and dematerialisation,
difference between 19.07
uncertificated securities, and 19.06, 19.07
imputed knowledge 15.138
indirect holdings system 19.01–19.36
book entry securities 19.05
Clearstream Banking operating ICSD
19.34–19.36
pro-rated co-ownership rights in pool
of fungible securities acquired
19.34
'revindicatio' rights on account holder's
insolvency 19.35
types of deposited securities to be
increased 19.36
CSDs and ICSDs as fundamental part of
financial markets 19.11–19.12
Euroclear Bank operating ICSD
19.29–19.33
Belgian law, overhaul of 19.33
co-ownership right over fungible
securities 19.29
'rematerialisation' of securities permitted
19.31
'revindicatio' right exercisable on
Euroclear's insolvency 19.32
transfer of co-ownership right 19.30
fungibility 19.18–19.19
advantages/disadvantages of indirect
holding system 19.19
immobilised securities 19.06–19.08
indirect holdings structures 19.03–19.04
intermediated securities 19.05,
19.09–19.10
International Central Securities
Depositories (ICSDs) 19.01,
19.11–19.12
legal structure 19.20–19.24
account holders acquiring bundle of
contractual/property rights
19.22–19.23
intermediary's duty as trustee to keep
assets separate 19.24
legal position may differ at each tier of
structure 19.21
securities commingled 19.20
trust and co-ownership rights
19.22.19–23
no direct relationship between issuer of
securities and investor 19.02
no look-through principle 19.25–19.28
investors' interests in securities treated
as separate pool of property 19.27
investors' personal right against direct
intermediary 19.26
other types of indirect holdings
19.09–19.10
rights of investor exercisable against direct
intermediary 19.02
taking collateral over securities in indirect
holding system 19.41–19.49
general 19.41
methods of taking collateral in
Euroclear system 19.43–19.49
need for legal appraisal 19.42
transfer of book entry securities
19.16–19.17
types of accounts held by intermediaries
19.13–19.15
Industrial and Provident Societies Act 1967
s 4, disapplication of 4.54–4.56
insolvency law, UK 5.01–5.158
bail-in measures 5.104–5.137
compensation: 'no shareholder or
creditor worse off' 5.137
competent authorities 5.108
contractual recognition of bail-in 5.136
discretionary power of exclusion
5.126–5.128
exclusions from bail-in 5.125
mandatory write-down or conversion of
capital instruments 5.110–5.112
method of bail-in 5.120
pre-resolution valuation 5.113
priority between creditors 5.119
'protected liabilities' safeguard,
exclusions from 5.132–5.135
'protected liabilities', safeguard for
5.129–5.131
purpose 5.105–5.106
INDEX

resolution administrator 5.123–5.124
set-off and netting of 'protected liabilities', safeguard for 5.129–5.131
stabilisation option, bail-in as 5.114–5.118
termination rights and continuity 5.121–5.122
types of entity to which bail-in will apply 5.109
financial institutions, special resolution and insolvency regimes for 5.39–5.104
bank administration under Pt 3 of Banking Act 5.102–5.104
bank insolvency under Pt 2 of Banking Act 5.99–5.101
effect of Pt 1 powers on financial collateral arrangements 5.93–5.98
overview of regimes established by Banking Act 5.39–5.41
property transfers and effect on financial collateral arrangements 5.56–5.61
security interests, restriction on enforcement of 5.81–5.83
special resolution objectives 5.52
stabilisation options, general conditions for exercise of 5.44
stabilisation options under Pt 1 of Banking Act 5.42–5.43
supplemental, onward or reverse transfer orders 5.53
suspension of obligations 5.78–5.80
temporary public ownership/asset management, conditions for 5.45–5.47
termination rights and contractual stays, suspension of 5.84–5.88
types of entity against which stabilisation powers may be exercised 5.48–5.51
implementing FCD in UK 5.07
insolvency law provisions not excluded by FCARs 5.28–5.38
parties against whom orders may be made 5.33
preferences 5.31–5.32
protection of creditors 5.28
recognised clearing houses and designated systems under SFRs 5.38
rescission of contracts by court 5.35
time limits for challenging transactions at undervalue/as preference 5.34
transactions at an undervalue 5.29–5.30
transactions defrauding creditors 5.36–5.37
modification in relation to financial collateral arrangements 5.08–5.27
additional protection under Pt VII Companies Act and SFRs 5.27
avoidance of property dispositions, exclusion of 5.11–5.15
debts in foreign currency, modification of rules on 5.25–5.26
enforceability where collateral-taker unaware of reorganisation 5.23–5.24
enforceability where collateral-taker unaware of winding-up 5.23–5.24
floating charges, removal of limitations on 5.19–5.22
power to disclaim onerous property, exclusion of 5.16–5.18
restriction on enforcement of security, exclusion of 5.08–5.10
objectives/aims of FCD 5.01–5.06
overseas insolvency proceedings, impact of 5.138–5.158
cross-border insolvency recognition and cooperation 5.152–5.156
EC Insolvency Regulation 5.138–5.148
exclusion of assistance for foreign insolvency proceedings 5.157–5.158
insolvency of EEA credit institutions and insurers 5.149–5.151
insolvency proceedings, foreign 20.114
Insolvency Regulation, EC (EUIR) 5.138–5.148
applicable law 5.146–5.147
main and secondary proceedings 5.139
rules on *situs* of assets 5.143
safeguards assisting financial collateral arrangements 5.140–5.147
set-off 5.144–5.145
third party rights *in rem*, protecting 5.140–5.143
insolvency risk, summary of combined protection against 20.138
insurers of EEA, insolvency of 5.151
intermediaries
definition of 19.38–19.39
effectiveness in relevant intermediary’s insolvency 19.81
loss-sharing in case of intermediary’s insolvency 19.83
priority of interests granted by an intermediary 19.80
indirect holdings systems
intermediary’s duty as trustee to keep assets separate 19.24
investor’s personal right against direct intermediary 19.26
protection against intermediary’s insolvency 19.57
rights of investor exercisable against direct intermediary 19.02
types of accounts held by intermediaries 19.13–19.15
upper tier intermediaries 19.63–19.64
intermediated securities 9.18–9.24, 13.56
book entry securities, as 19.05
conceptual difficulty in characterising 13.08
equitable mortgage of 9.18, 9.23–9.24
financial collateral, as 13.57
Geneva Securities Convention 19.68–19.71
indirect holdings, and 19.09–19.10
meaning of 9.18
securities account, location of 13.56
uncertainty as to legal nature 13.50
International Central Securities Depositories (ICSDs) 19.01
Clearstream Banking operating ICSD 19.34–19.36
CSDs, and 19.11–19.12
Euroclear Bank operating ICSD 19.29–19.33
importance of 19.11
International Organisation for Securities Commissions (IOSCO) standards see BCBS-IOSCO
rules on margin requirements for non-centrally cleared derivatives
International Securities Lenders Association (ISLA)
GMSLA see Global Master Security Lending Agreement (GMSLA)
International Swaps and Derivatives Association (ISDA)
collateral management activities 17.76–17.81
Collateral Law Reform Group 17.78–17.81
guidance publication, surveys, standardised definitions 17.76
segregation of independent accounts documents on 17.77
strengthening legal certainty for OTC derivatives 17.78–17.80
Collateral Law Reform Group: collateral management activities 17.78–17.81
Collateral Law Reform Group: ISDA Report 1.06–1.28, 1.30
collision of laws rules, uncertainty as to 1.19–1.20
enforceability of title transfer collateral 1.16–1.18
lack of legal certainty/legal risk as critical issue 1.05, 1.07
law reform, suggested principles for 1.28
mark-to-market collateral arrangements, vulnerability of 1.23–1.27
need for reform 1.05
security collateral arrangements, proposals to improve rules of 1.09–1.12
security provided as collateral, greater freedom to use 1.13–1.15
INDEX

third party rights 1.21–1.22

market charges, protection of 20.109–20.111

financial collateral arrangements, standard
forms for 17.56–17.75

'market charges', scope of 20.85–20.87

English CSA (1995) 17.54, 17.59,
17.60, 17.66, 17.71–17.73

'market contracts' in recognised clearing
house, scope of 20.80–20.84

English Deed (1995) 17.59,
17.61–17.63, 17.66, 17.72

'market contracts' in recognised
investment exchange, scope of
20.79

Margin Provisions (2001) 17.67–17.69,
17.71

modification of insolvency law
20.92–20.97

Margin Supplement (2001)
17.69–17.70

net sum payable on completion of
default proceedings 20.98–20.99

NY CSA (1994) 17.58, 17.60,
17.71–17.73

no assistance for foreign insolvency
proceedings 20.114

Standard Credit Support Annexes
(2013) 17.73–17.74

powers of appropriate regulator to give
directions 20.115–20.17

nature of 1.05

priorities 20.106–20.107

OTC derivative transactions 17.20–17.27

purpose and territorial extent of
protection 20.77–20.78

conditional novation approach
17.37–17.39

'qualifying collateral arrangements',
scope of 20.88

ISDA Code 17.29

'qualifying property transfers', scope of
20.89–20.91

ISDA Code (1986) 17.30–17.31, 17.33

set-off disapplied in relation to client
accounts 20.113

master agreements 17.04, 17.24–17.26,
17.32–17.35

Model Netting Act 17.36

Model Netting Act 20.98–20.99

other collateral management activities
17.76–17.81

security collateral arrangements, proposals
to improve rules of 1.09–1.12

investment banks/firms 5.50

security provided as collateral, greater
freedom to use 1.13–1.15

investment bank, definition of 18.167,
22.08

third party rights 1.21–1.22

investment exchanges

'SARs, and see special administration
regime (SAR)

CREST, default rules, and 16.41–16.44

knowledge

Part VII protection for 20.77–20.122

actual knowledge 15.137

adjustment of prior transactions 20.101

constructive knowledge 15.140

avoidance of property dispositions
20.103–20.105

security provided as collateral, greater
freedom to use 1.13–1.15

default rules 20.112

third party rights 1.21–1.22

duty to give assistance 20.100

'default fund contributions',
use of 20.118

limitations 20.119–20.122

'default fund contributions',
use of 20.118

knowledge

'qualifying property transfers', scope of
20.89–20.91

'third party rights' 1.21–1.22

set-off disapplied in relation to client
accounts 20.113

'third party rights' 1.21–1.22
Law of Property Act 1925
  s 53(1)(c), disapplication of 4.29–4.43
    disapplication 4.29–4.30
    scope of s 53(1)(c) 4.31–4.32
    significance of disapplication 4.33–4.43
  s 136, disapplication of 4.44–4.53
    disapplication 4.44–4.48
    other formal acts not disapplied 4.49–4.50
    significance of disapplication 4.51–4.53
Law Commission report on company security interests 24.41–25.54
  background 24.41–24.47
  recommendations regarding financial collateral 24.48–25.54
law reform 24.01–24.99
  building European capital markets union 24.33–24.54
    collateral 24.37
    insolvency law 24.39
    market infrastructure 24.36
    next steps 24.40
    objective 24.33–24.35
    securities law 24.38
English law of security, reform of 24.55–24.61
  secured transactions law reform project 24.55–24.57
  secured transactions law review by City of London Law Society 24.58–24.61
Law Commission report on company security interests 24.41–25.54
  background 24.41–24.47
  recommendations regarding financial collateral 24.48–25.54
nullification of clauses restricting assignment of receivables 24.62–24.93
  should statute render ineffective contractual restrictions 24.62–24.69
Small Business etc Act power to invalidate restrictions 24.70–24.93
  proposal for EU legislation on holding/disposition of securities 24.01–24.32
account-held securities 24.08–24.09
  attachment by creditor of account holder 24.22
  attachment by creditor of account provider 24.23–24.24
  conflict of laws 24.25–24.27
  consultation document 24.02–24.04
  cross-border recognition of rights attached to securities 24.28
  effectiveness in insolvency 24.13
  facilitation of ultimate account holder’s position 24.30–24.31
  instructions to intermediaries 24.21
  legal effectiveness of acquisitions and dispositions 24.12
  methods for acquisition and disposition 24.10–24.11
  non-discriminatory charges 24.32
  objectives of proposed legislation 24.05–24.07
  passing on information 24.29
  priority of competing interests 24.14–24.19
  protection of account-holders in account provider’s insolvency 24.20
Scots law of security, reform of 24.94–24.95
  proposal for new fixed security interest 24.94–24.95
UNCITRAL model law on secured transactions 24.96–24.99
liens 15.02
  possessory form of security 15.02
limited liability partnerships (LLPs)
  disapplication of registration provisions for LLP’s charges 4.19–4.20
  shares 3.28
liquidation
  rapid liquidation, need for 1.68–1.71
  set-off, and 19.58
  statutory set-off, impact of see set-off, statutory set-off, impact of ‘living wills’ see recovery and resolution plans (‘living wills’)
look-through principle
  indirect holding system, no look-through principle in 19.25–19.28
INDEX

securities account, ascribing location to 13.67–13.76

‘manufactured payments’ 18.34

margins

BCBS-IOSCO rules see BCBS-IOSCO
rules on margin requirements for
non-centrally cleared derivatives
charges held by CREST settlement banks:
secured limits and margin
16.67–16.68

GRMRA

margin maintenance 18.06
margin ratio 18.06

ISDA: financial collateral arrangements,
standard forms for 17.56–17.75
Margin Provisions (2001) 17.67–17.69,
17.71
Margin Supplement (2001)
17.69–17.70

‘margin’ and ‘default fund contributions’,
use of 20.118

prime brokerage agreements: security and
margin requirement 18.96–18.99
margin requirement, client’s obligation
to maintain 18.98

securities lending
margin calculation on global basis 18.31
margin calculation on loan by loan basis
18.32
market charges, protection of
20.109–20.111

mark-to-market arrangements/mechanism

OTC derivative transactions 17.16–17.17
top-up collateral, mark-to-market
calculations for 1.66, 5.03
vulnerability of 1.23–1.27
‘market charges’, scope of 20.85–20.87
‘market contracts’ in recognised clearing
house, scope of 20.80–20.84
‘market contracts’ in recognised investment
exchange, scope of 20.79

money
essential legal characteristic of 3.22
functions of 3.21
virtual currencies 3.20–3.25

money market instruments 3.59
mortgage-backs 3.13, 9.24, fn. 23 (Chapter 9) 15.19
mortgages 15.02
charges, and 9.08–9.11, 15.03
credit claims, mortgages or charges over
8.126–8.127
assignment of credit claims by way of
security 15.66–15.67
CREST, and see under CREST system,
use of securities as collateral held in
equitable mortgages 9.17, 15.04
advantages of 15.27
assignment of credit claims by way of
security 15.66
Central Securities Depositories
Regulation, and 16.126–16.128
credit claims, of 15.94–15.95
disadvantages of 15.28
enabling equitable mortgagee to transfer
legal title 15.111–15.112
financial collateral, over 15.112
financial instruments, taking security
over 15.26–15.30
irrevocable powers of attorney 15.112
legal mortgages, and 9.12–9.17
nature of 9.13
priority 15.29
financial instruments, of 8.117–8.119
legal mortgages 9.12–9.16, 15.04
advantages of 15.24
assignment of credit claims by way of
security 15.66–15.67
creation 9.14–9.16
credit claims, of 15.93–15.95
disadvantages of 15.25
equitable mortgages, and 9.12–9.17
financial instruments, taking security
over 15.23–15.25
nature of 9.13
nature of 9.09, 15.03
non-possessory form of security 15.02
‘possession’ or ‘control’ tests: fixed
mortgages 8.124–8.125
prime brokerage: client mortgages/charges
of money transferred to broker 18.96
national insolvency law, disapplying 1.01
negative pledges 15.129–15.149
actual or imputed knowledge 15.137–15.139
imputed knowledge, nature of 15.137
wrongfully inducing breach of contract 15.138–15.139
constructive notice 15.140–15.143
effect of 15.135–15.136
event of default 15.136
limitations 15.135
forms of 15.133–15.134
main objectives of 15.130–15.134
nature of 15.129
priorities 16.102
purpose 15.132–15.133
remedies for breach 15.144–15.149
advantages of negative pledges in negotiating 15.149
contractual in nature 15.145
damages 15.147
injunctions 15.146
remedies against third parties 15.146–15.148
trust, security to held on 15.148
standard feature of financing, as 15.129
netting 1.22, 1.58–1.60
Banking Act safeguards for 5.64
bail-in measures 5.129–5.131
CCPs
collateral netting accounts 20.37
position netting between CCP and clearing member 20.34–20.36
close-out netting see close-out netting
contractual arrangement, as 21.05
nature of 21.04
set-off, and 1.60, 21.05
non-natural persons
FCARs 6.55–6.58
territorial scope 2.11
FCD 6.50–6.54, 6.56
security financial collateral arrangements 7.32
title transfer financial collateral arrangements 6.50–6.63
implementation of FCD 6.50–6.54
meaning of 6.55–6.63
trusts 6.59–6.63
onerous property, exclusion of power to disclaim 5.16–5.18
OTC derivative transactions see derivatives/OTC derivatives
overseas insolvency proceedings, impact of 5.138–5.158
cross-border insolvency recognition and cooperation 5.152–5.156
exceptions to protect financial collateral arrangements 5.153–5.156
UNCITRAL Model Law on cross-border insolvency 5.11
EU Insolvency Regulation (EUIR) 5.138–5.148
applicable law 5.146–5.147
main and secondary proceedings 5.139
rules on situs of assets 5.143
safeguards assisting financial collateral arrangements 5.140–5.147
set-off 5.144–5.145
third party rights in rem, protecting 5.140–5.143
exclusion of assistance for foreign insolvency proceedings 5.157–5.158
insolvency of EEA credit institutions and insurers 5.149–5.151

pari passu principle 21.70–21.73
Pensions Protection Fund notices 15.45–15.54
contribution notices 15.47–15.49
financial support directions 15.45–15.46, 15.49
Type A events 15.51–15.54
pledges 1.48, 15.02
cash collateral 1.61–1.64
creation of 15.06
meaning of 7.30
negative pledges see negative pledges
possessor form of security 15.02
reuse of pledged collateral 1.52–1.55
security interest, as 7.28
pooling
INDEX

PRIMA
book entry securities collateral, law applicable to 19.40
conflict of laws 1.75, 1.77, 1.103, 13.69–13.71
inadequacy of 13.78, 13.85
securities account, ascribing location to 13.69–13.71, 13.78
SFD 1.75
prime brokerage
no prime broker now too big to fail 18.107
remedies where prime broker in default 18.107
prime brokerage agreements: common features 18.43–18.46
complexity of arrangements/documents 18.46
master or framework agreements 18.45
prime broker as agent and trustee as well as for itself 18.44
prime brokerage agreements: Client Money Rules 18.62–18.75
application of Client Money Rules 18.64
claims against prime brokerage firms 18.89
Client Money Distribution Rules 18.73–18.74
deposit of client money with credit institution 18.67
firms authorised by PCA/FCA, Client Money Rules applying to 18.62–18.63
pooling events 18.73–18.75
safeguarding client’s rights, general requirements of 18.66
scope of Client Money Rules, modification of 18.65
segregation of client money 18.66–18.72
segregation of client money: alternative approach 18.68, 18.70
segregation of client money: normal approach 18.68–18.70
statutory trust in relation to client money 18.62, 18.72, 18.90
statutory trust in relation to client money, nature of 18.76–18.90
statutory trust in relation to client money, terms of 18.72
transfer of client money to third party for purposes of transaction 18.71
TTCA, client money held under 18.90, 18.96
prime brokerage agreements: default 18.100–18.104
events of default 18.100
events of default, effect of 18.101–18.104
remedies where prime broker in default 18.107
security, enforcement of 18.103
termination of associated agreements 18.102
application of Custody Rules 18.50
assets held subject to FCA requirements 18.47–18.48
no statutory trust in relation to client’s custody assets 18.53
prime broker’s interests, protection of 18.59–18.61
right of use 18.60–18.61
safeguarding client’s ownership rights 18.52
scope of Custody Rules, modification of 18.51
segregation of assets 18.52
when Custody Rules apply 18.49
whether valid trust of custody assets exists/trust requirements 18.53–18.58
prime brokerage agreements: general terms 18.105
prime brokerage agreements: security and margin requirement 18.96–18.99
client mortgages/charges of money transferred to broker 18.96
margin requirement, client’s obligation to maintain 18.98
INDEX

securities, client's right to 18.97
trustee, prime broker as 18.99
prime brokerage agreements: trustees of
client money having powers of
compromise under Trustee Act
18.91–18.95
prime brokerage agreements
agreements, no market standard form of
18.42, 18.43
nature of prime brokerage 18.40–18.41
special issue: can prime broker
compromise proprietary interests of
clients in financial collateral by using
scheme of arrangement?
18.135–18.145

Lehman Scheme of Arrangement case
18.135–18.144
special issue: proprietary interest in
financial collateral/cash deriving from
it, does client retain? 18.108–18.145
Lehman Prime Brokerage case
18.109–18.134

private international law
conflict of laws, as 13.01
European law, as 13.03–13.04
nature of 13.01
Rome I and Rome II Regulations 13.13
rules divided into three areas 13.07
see also conflict of laws
property dispositions, exclusion of avoidance
of 5.11–5.15
property transfers under Banking Act 2009
see under Banking Act 2009

‘qualifying collateral arrangements’, scope of
20.88
‘qualifying property transfers’, scope of
20.89–20.91

receivers 5.09, 12.06–12.07
recharacterisation
recharacterisation risk
collateral-provider to exercise rights
before security is enforced
9.45–9.74
cross-border title transfer financial
collateral arrangements
13.99–13.104
title transfer financial collateral
arrangements 6.10–6.34
arrangements take effect in accordance
with their terms 6.10–6.15
case law authority on recharacterisation
under English law 6.16–6.30
market standard terms 6.31–6.34
sale and charge/other security interest,
distinguishing 6.17–6.25
‘touchstone’ cases 6.26–6.30
recognised clearing houses see clearing
houses
recognised investment exchanges see
investment exchanges
recovery and resolution plans (‘living wills’)
18.152–18.161
application of rules 18.156
CASS resolution pack 18.162
failing institutions, likely approach to
18.160
orderly failure as objective 18.159
recovery plans, contents of 18.157, 18.160
requirement for 18.149
PRA Policy Statement/Handbook, in
18.154–18.155
resolution pack, contents of 18.158,
18.160–18.161
Turner Review Discussion Paper
18.152–18.153
regulatory treatment of financial collateral
arrangements
BCBS-IOSCO rules see BCBS-IOSCO
rules on margin requirements for
non-centrally cleared derivatives
credit risk 22.01–22.02
Basel III’s focus on three types of risk
22.14
close-out netting, importance of 22.02
credit risk mitigation 22.17–22.20
credit risk mitigation, eligible types of
22.18–22.20

Geoffrey Yeowart, Robin Parsons, Edward Murray and Hamish Patrick - 9781782546320
Downloaded from Elgar Online at 01/28/2019 10:01:00AM via free access
credit risk mitigation techniques, principles governing eligibility of 22.21–22.24
eligibility: funded credit protection 22.25–22.26
eligibility: unfunded credit protection 22.26–22.28
instruments 22.34
Internal Ratings Based Approach to measuring credit risk 22.15
legal opinions as to enforceability, need for 22.21–22.24
maturity mismatches 22.47–22.48
measurement of credit risk 2.14–22.16
recognition requirements for certain master netting agreements 22.43–22.44
recognition requirements for financial collateral 22.29–22.33
recognition requirements for on-balance sheet netting 22.41–22.42
recognition requirements for receivables 22.35–22.40
recognition requirements for third-party deposits/cash assimilated
risk weighting and Financial Collateral Simple Method 22.45–22.46
Standardised Approach to measuring credit risk 22.15
treatment of collateral provided to central counterparty 22.49
margin requirements for non-centrally cleared derivatives 22.01
SFTR on reporting/transparency of securities financing transactions 22.03–22.04
treatment of financial collateral for regulatory capital purposes 22.05–22.49
Basel III 22.05
focus on three types of risk 22.14
CCR see Capital Requirements Regulation (CCR)
Fourth Capital Requirements Directive (CRD IV) 22.05
not directly applicable 22.07
provisions of 22.07
repos/repurchase agreements 1.39, 1.47–1.50, 6.10, 10.14, 18.01–18.15, 22.137
economic effect of 6.12–6.13
European repo market, size of 1.91
Global Master Repurchase Agreement 2011 (GRMRA) 18.05–18.14
Agency Annex 18.05
buy/sell back transactions and repos, used for 18.05
default, rights and obligations of parties on 18.11–18.14
early termination 18.11–18.12
exposure, elimination of 18.08–18.09
margin maintenance 18.06
margin ratio 18.06
repricing transactions 18.07–18.08
how are repos used? 18.04–18.05
Global Master Repurchase Agreement 2011 (GRMRA) 18.05–18.14
incorporating GMRA standard forms 18.04
title transfer financial collateral arrangements
market standard terms 6.31–6.34
not recharacterised as secured loans 6.10, 6.15
repos included in 6.03–6.04
substitution 6.49
triparty arrangements 18.15–18.16
custodian acting as agent 18.15–18.16
default, effect of 18.16
what are repos? 18.01–18.03
nature of 6.11, 18.01
reverse repos 18.02
secured loan, similar to 18.03
rescission of contracts by court 5.35
retroactivity of the Financial Collateral Regulations 14.01–14.28
amendments to FCARs 4.01
coming into force of original FCARs, 2010 Regulations, BRR Order 14.01–14.02
to what extent are FCARs, 2010 Regulations, BRR Order retroactive? 14.07–14.28
conclusions 14.22–14.28

INDEX
INDEX

dicta in Lehman Extended Liens case 14.07–14.21
when should legislation have retroactive effect? 14.03–14.06
‘retrospective’, meaning of 14.05
underlying principle of parliamentary intention 14.03–14.04
right of use 1.102, 2.34, 11.01–11.38
CCP over collateral, right of use by 20.55–20.56
definition of 11.01
FCA’s Custody Rules 18.60–18.61
nature of right of use 11.01–11.03
purpose of allowing right of use 11.04
right of use where regulation 16 FCARs does not apply 11.28–11.38
clog on equity of redemption 11.31–11.32
contractual agreement 11.28–11.30
reform 11.36–11.38
right of use not under FCARs as clog on equity of redemption 11.33–11.35
risk to collateral-provider in agreeing to right of use 11.10–11.27
loss of collateral-provider’s proprietary claim on insolvency proceedings affecting collateral-taker 11.10–11.12
rights under regulation 16(3) FCARs 11.17–11.27
statutory right of set-off under regulation 16(2) FCARS 11.13–11.16
when arising 11.09
why the right of use is important 11.04–11.08
rights attached to charged securities 9.01–9.92
background 9.01–9.07
classification 9.01–9.02
creation and terms of issue 9.03–9.05
other considerations 9.06–9.07
bundle of rights/obligations which may be subject of security 9.25–9.41
other rights 9.40–9.41
rights to attend/vote at meetings and vote by written resolution 9.31–9.37
right to determine value of financial collateral or secured obligations 9.38–9.39
rights to payment of capital and income 9.25–9.30
consequences of allowing collateral provider to exercise rights before security is enforced 9.42–9.92
general 9.42
potential problem: ‘possession’ or ‘control’ test 9.75–9.92
potential problem: recharacterisation risk 9.45–9.74
forms of non-possessory security interest 9.08–9.24
intermediated securities and certificated/uncertificated securities 9.18–9.24
legal and equitable mortgages, difference between 9.12–9.17
mortgages and charges, difference between 9.08–9.11
potential problem: ‘possession’ or ‘control’ test 9.75–9.92
credit claims: right to give consents, waivers and variations 9.91–9.92
credit claims: right to receive repayments of principal and interest 9.84–9.90
shares or other securities: rights of valuation etc 9.81–9.83
shares or other securities: voting rights/rights to distributions 9.75–9.80
Rome Convention
Rome I Regulation based on 13.15
third parties, voluntary assignments and 13.44–13.46, 13.48
Rome I Regulation on contractual obligations 13.11, 13.14, 13.15
application to financial collateral arrangements 13.33
change in governing law, agreement to effect 13.31

828

Geoffrey Yeowart, Robin Parsons, Edward Murray and Hamish Patrick - 9781782546320
Downloaded from Elgar Online at 01/28/2019 10:01:00AM
via free access
conditions governing choice of parties 13.20
contractual issues governed by 13.29
contractual subrogation of a claim 13.33
core rule that law expressly chosen 13.19
different laws governing different parts of
contract 13.32
freedom to choose governing
law/limitations on 13.16
importance of making express choice of
law 13.26
limitations on freedom to choose
governing law 13.16
overriding mandatory rules of another
country 13.18
part only of contract, choice of law to
govern 13.32
renvoi, exclusion of 13.35
Rome Convention, based on 13.15
rules for determining applicable law in
absence of choice 13.21–13.26
‘characteristic performance’ and
‘habitual residence’ 13.21–13.24
law of country with which contract
most closely connected 13.25
scope 13.15
set-off 13.33, 13.34
specific contracts, rules on 13.27
specific exclusions 13.17
universal application of rules 13.28
voluntary assignment of a claim 13.31,
13.33, 13.38–13.49
Rome II Regulation on non-contractual
obligations 13.11, 13.14
absence of agreement, applicable law in
13.37
choice of law 13.36
special rules relevant to financial collateral
arrangements 13.37

SAR see special administration regime (SAR)

Scotland
appropriation 12.14
FCARs 23.01–22.50
applicable in Scotland 23.03
effects of FCARs in Scotland 23.49
general status of FCARs in Scotland
23.47–23.48
insolvency 23.36–23.46
Scots law, and 23.47–23.50
set-off, flawed assets and netting
23.28–23.35
specific Scottish issues on FCARs 23.50
transfer of/fixed security over financial
collateral 23.06–23.23
financial collateral as incorporeal moveable
property 9.01
fixed security interests as title transfer
financial collateral arrangements 6.07
flawed assets 23.34
floating charges 15.09, 23.24–23.26
insolvency 23.36–23.46
corporate insolvency 23.36, 23.39–23.40
partnership insolvency 23.36–23.38
legal system
no equitable interest in Scots law
23.04–23.05
Scottish Parliament, establishment of
23.02
separate legal system 23.01
liens 15.09
pledges 15.09
netting 23.35
powers of attorney 23.27
preferences and undervalue transactions
23.41–23.46
reform of law of security 24.94–24.95
proposal for new fixed security interest
24.94–24.95
registrations 4.57–4.59
consequences 4.59
disapplication for book entry securities
collateral 4.57–4.58
security interests 7.25
set-off 21.06, 23.28–23.33
transfer of/fixed security over financial
collateral 23.06–23.23
bearer securities 23.17
cash, credit claims and residual financial
instruments 23.14–23.16
categories of financial collateral 23.13

829
Geoffrey Yeowart, Robin Parsons, Edward Murray and Hamish Patrick - 9781782546320
Downloaded from Elgar Online at 01/28/2019 10:01:00AM
via free access
INDEX

creating fixed security by ownership transfer 23.06–23.12
intermediated securities 23.20–23.22
reform 23.23
registered securities 23.18
uncertificated securities 23.19
security financial collateral arrangements 6.01, 7.01–7.32
Central Securities Depositories
Regulation, and 16.129–16.131
cross-border security financial collateral arrangements 13.86–13.95
contractual aspects 13.87–13.89
creation/attachment of security, perfection, priority, enforcement 13.90–13.95
definition of 7.02
meaning of 7.01–7.05
non-natural persons 7.32
‘possession’/’control’ see ‘possession’ or ‘control’ test when creating security financial collateral arrangements
purpose 7.06–7.20
explanation for including purpose test 7.07–7.09
non-monetary obligations 7.15–7.20
obligations owed to collateral-taker 7.10–7.14
purpose not stated in FCD 7.06–7.09
security interest 7.21–7.30
definition of 7.22–7.24
Scottish security interests 7.25
security interests arising by operation of law 7.26–7.30
security interests: possessory and non-possessory 7.21–7.24
significance of 7.03–7.05
benefits under FCARs 7.04
partial property transfers 7.05
stabilisation options 7.05
title transfer financial collateral arrangements, and 6.06–6.07, 7.03
mutually exclusive 7.22
securities financing transactions 22.137.
22.150–22.154
buy-sell/sell-buy back transactions, definition of 22.153
margin lending transaction, definition of 22.154
repurchase transaction, definition of 22.151
requirement to report to trade repository 22.155
securities or commodities lending/borrowing, definition of 22.152
securities lending
global custodians and settlement systems, securities lending by 18.39
Global Master Security Lending Agreement 2010 (GMSLA) 18.26–18.38
absolute transfer of securities and collateral 18.28
close-out/netting provisions similar to GMRA 18.38
default position 18.35
events of default 18.36
events of default, effects of 18.37
Guidance notes 18.26, 18.28
‘manufactured payments’ 18.34
margin calculation on global basis 18.31
margin calculation on loan by loan basis 18.32
parties acting as lender and borrower in different transactions 18.29
Schedule allowing parties to specify relevant terms 18.28
substitution of collateral 18.33
termination rights 18.30
securities lending agreements
borrowing on ‘open’ and ‘closed’ bases 18.25
‘cash driven’ market, arrangements in 18.20
contract of outright sale or title transfer 18.19–18.20
nature of 18.17–18.22
nature of use of 18.23–18.25
‘securities driven’ market, in 18.20, 18.23–18.25
security powers of attorney see under powers of attorney
security/security interest
book entry securities 19.05
bundle of rights/obligations which may be subject of security 9.25–9.41
other rights 9.40–9.41
rights to attend/vote at meetings and vote by written resolution 9.31–9.37
right to determine value of financial collateral or secured obligations 9.38–9.39
rights to payment of capital and income 9.25–9.30
certificated securities 9.18–9.24
equitable mortgage of 9.19–9.21
charges see charges
creation/attachment of security, perfection, priority, enforcement 13.90–13.95
definition of security interest 7.22–7.24
security interest 'arising' and 'created' 7.28
enforcing 1.01
exclusion of restriction on enforcement 5.08–5.10
fixed security 9.59
nature of 9.51
floating charges see floating charges
forms of non-possessory security interest 9.08–9.24
intermediated securities and certificated/uncertificated securities 9.18–9.24
legal and equitable mortgages, difference between 9.12–9.17
mortgages and charges, difference between 9.08–9.11
immobilised securities 19.06–19.08
benefits of immobilisation 19.08
common in indirect holding systems 19.06
custody risk 19.07
immobilisation and dematerialisation, difference between 19.07
uncertificated securities, and 19.06, 19.07
intermediated securities 9.18–9.24, 13.56
book entry securities, as 19.05
conceptual difficulty in characterising 13.08
equitable mortgage of 9.18, 9.23–9.24
financial collateral, as 13.57
Geneva Securities Convention 19.68–19.71
indirect holdings, and 19.09–19.10
meaning of 9.18
securities account, location of 13.56
uncertainty as to legal nature 13.50
liens 15.02
possessor form of security 15.02
listed securities 15.31–15.36
nominees or custodians, securities held through 15.37–15.38
mortgages see mortgages
pledges see pledges
'possession' or 'control' tests 15.02
fixed charges over book entry securities 8.120–8.122
floating charges over securities 8.123
operation of law, security interests arising by 7.26–7.30
liens 7.29
possessor and non-possessor 7.21–7.24
registered securities 13.56
intangible property, location as 13.55–13.56
rights attached to charged securities 9.01–9.92
background 9.01–9.07
bundle of rights/obligations which may be subject of security 9.25–9.41
consequences of collateral provider exercising rights before security enforcement 9.42–9.92
forms of non-possessory security interest interest 9.08–9.24
potential problem: 'possession' or 'control' test 9.75–9.92
see also rights attached to charged securities
Scottish security interests see under Scotland
secured liabilities, Banking Act safeguard for 5.65

831
Geoffrey Yeowart, Robin Parsons, Edward Murray and Hamish Patrick - 9781782546320
Downloaded from Elgar Online at 01/28/2019 10:01:00AM via free access
INDEX

foreign currency debts, periodic payments and interest 21.46–21.48
future debts 21.49–21.50
hindsight principle and estimation of unmatured claims 21.63–21.64
liquidation, set-off taking effect in 21.35
time of taking the account 21.61–21.62
treatment of acquired debts 21.58–21.60
types of set-off 21.03
waiver of set-off rights 1.100, 15.74–15.79
set-off, contractual see set-off, contractual
set-off, use of Settlement Finality Directive (SFD) 1.31, 1.51
choice of law rules 1.20, 1.72
FCD, and 1.89
PRIMA 1.75
proposal for new Directive to amend 1.95–1.101
proprietary effect of collateral security arrangements 1.07
scope 1.33
systemic risk, importance of reducing 20.123
Settlement Finality Regulations (SFRs) 20.123–20.137
'collateral security', protection of 20.131–20.132
'collateral security', scope of 20.130
effect of system designation 20.127
insolvency protection 20.125
law applicable to securities held as collateral security 20.134
law applicable to a system 20.135
other jurisdictions, insolvency proceedings in 20.137
overseas protection 20.133
priorities 20.136
protection, scope of 20.126
purpose 20.123
territorial effect 20.124
'transfer orders', scope of 20.128–20.129
summary of combined protection against insolvency risk 20.138
shares in companies 3.27–3.33
limited liability partnerships 3.28
private company shares 3.27
securities equivalent to shares 3.34–3.41
depository receipts/interests 3.36
ETFs, securities in 3.37–3.41
subordinated claims 3.35
shares held in uncertificated form 3.33
transfers under financial collateral arrangements 5.14
special administration regime (SAR) 18.163–18.175
SAR administrator's order of pursuit of objectives 18.169–18.170
bar dates for submission of claims 18.171–18.172
investment bank, definition of 18.167
investment firms entering 18.166, 18.168
losses borne pro rata 18.173
objectives of 18.168–18.170, 18.175
SAR review 18.174–18.175
proposed changes 18.175
special resolution regime 18.164–18.165, 18.168
special issues from use of financial collateral in repos, securities lending and prime brokerage 18.01–18.192
prime brokerage agreements common features 18.43–18.46
Client Money Rules 18.62–18.75
Custody Rules 18.47–18.61
general terms 18.105
nature of 18.40–18.42
security and margin requirement 18.96–18.99
trustees of client money having powers of compromise under Trustee Act 18.91–18.95
see also prime brokerage repos
Global Master Repurchase Agreement 2011 (GRMRA) 18.05–18.14
nature of 18.01–18.03

833

Geoffrey Yeowart, Robin Parsons, Edward Murray and Hamish Patrick - 9781782546320
Downloaded from Elgar Online at 01/28/2019 10:01:00AM
via free access
INDEX

nature of use 18.04–18.05

triparty arrangements 18.15–18.16

see also repos/repurchase agreements

securities lending

global custodians and settlement systems, by 18.39

Global Master Security Lending Agreement 2010 (GMSLA) 18.26–18.38

securities lending agreements

nature of 18.17–18.22

nature of use of 18.23–18.25

‘securities driven’ market, in 18.20, 18.23–18.25

see also securities lending

special issue: can prime broker compromise proprietary interests of clients in financial collateral by using scheme of arrangement? 18.135–18.145

Lehman Scheme of Arrangement case 18.135–18.144

special issue: difficulties in dealing with client assets – policy maker’s responses 18.146–18.192

CASS Resolution Pack 18.162

FCA Client Money Distribution Rules, review of 18.151, 18.188–18.192

FCA PS14/9 – review of clients assets regime for investment business 18.150, 18.180–18.187

FCA supervision – Client’s Assets Unit 18.176–18.179

financial crisis, arrangements before 18.146–18.148

recovery and resolution plans, requirement for 18.149, 18.152–18.161

special administration regime (SAR) and SAR review 18.163–18.175

special issue: proprietary interest in financial collateral or cash deriving from it, does client retain? 18.108–18.145

Lehman Prime Brokerage case 18.109–18.134

special resolution regime see under Banking Act 2009

stamp duty reserve tax (SDRT) 16.49

Statute of Frauds 1677 4.22–4.28

disapplication 4.22–4.23

scope of s 4 of Statute 4.24–4.26

significance of disapplication 4.27–4.28

statutory trust in relation to client money 18.62, 18.72

extent to which general principles of trust law apply 18.76–18.84

nature of 18.76–18.90

Lehman Client Money case 18.77–18.88

terms of 18.72

substitution 1.56–1.57, 5.03, 5.06

‘possession’ or ‘control’ test: rights of substitution 8.11–8.13

repurchase agreements, in 6.49

securities lending: substitution of collateral 18.33

taking and perfecting security over financial collateral 15.01–15.149

cash, taking security over 15.10–15.20

cash deposit held by third party, taking security over 15.11

charge-backs 15.12–15.20

credit claims, assignability of 15.80–15.97

absolute assignment 15.86

charges 15.96

general principle of assignment 15.81

loan agreements 15.83–15.87, 15.96

mortgages of credit claims 15.93–15.95

mortgages operating as assignments 15.92–15.93

non-assignable rights 15.82

novation 15.80, 15.91, 15.92

only rights under agreements assignable 15.80

prohibition of assignment 15.87–15.89

restrictions in agreements 15.97

credit claims, taking security over 15.58–15.110

assignability of credit claims 15.80–15.97
assignment of credit claims by way of security 15.66–15.69
Barbados Trust case 15.98–15.110
credit claims as financial collateral 15.58–15.59
FCD and credit claims 15.61–15.65
notice of assignment 15.70–15.73
priority of competing assignments 15.70–15.72
waiver of set-off rights and bank secrecy rules 15.74–15.79
financial instruments, taking security over 15.21–15.57
choice of security method 15.21–15.22
equitable mortgages 15.26–15.30
legal mortgages 15.23–15.25
listed and unlisted securities 15.31–15.36
nominees or custodians, securities held through 15.37–15.38
risk of collateral-taker becoming liable to meet calls on members 15.55–15.57
risk of collateral-taker receiving financial support
direction/contribution notice under Pensions Act 15.45–15.54
risk of company issuer of securities becoming subsidiary of collateral-taker 15.39–15.44
negative pledges 15.129–15.149
actual or imputed knowledge 15.137–15.139
constructive notice 15.140–15.143
effect of 15.135–15.136
main objectives of 15.130–15.134
nature of 15.129
remedies for breach 15.144–15.149
preliminary questions 15.01
security powers of attorney 15.111–15.128
enabling equitable mortgagee to transfer legal title 15.111–15.112
reliance on 15.113–15.123
revocability of power of attorney granted by foreign donor 15.124–15.128
types of security 15.02–15.09
charges see charges
liens see liens
mortgages see mortgages
pledges see pledges
title transfer financial collateral arrangements 6.01–6.63
agreements included 6.03–6.07
credit support arrangements 6.05
repurchase agreements 6.03–6.04
securities lending agreements 6.05
close-out netting 17.54–17.55
cross-border title transfer financial collateral arrangements 13.96–13.104
contractual aspects 13.97
effectiveness of transfer 13.98
recharacterisation risk 13.99–13.104
definition of 6.02, 6.39
legal and beneficial ownership, transfer of 6.39–6.49
'equivalent financial collateral', meaning of 6.47–6.49
equivalent financial collateral, transfer of ownership in 6.45–6.46
original financial collateral, transfer of ownership in 6.39–6.44
non-natural persons 6.50–6.63
implementation of FCD 6.50–6.54
meaning of 6.55–6.63
purpose of agreement 6.35–6.38
meaning of 'to secure or otherwise cover' 6.35–6.38
travaux preparatoires 6.36–6.37
recharacterisation 6.10–6.34
arrangements take effect in accordance with their terms 6.10–6.15
case law authority on recharacterisation under English law 6.16–6.30
market standard terms 6.31–6.34
sale and charge/other security interest, distinguishing 6.17–6.25
'touchstone' cases 6.26–6.30
security financial collateral arrangements, and 6.06–6.07, 7.03
mutually exclusive 7.22
significance 6.08–6.09
bail-in option, exercise of 6.09
benefits under FCARs 6.08
INDEX

partial property transfers 6.09
stabilisation options restricted 6.09
top-up collateral 1.65–1.67, 5.03, 5.06
tradeable bonds 3.42–3.50
meaning of ‘tradeable’ 3.46–3.47
transferability 3.48
transactions
defrauding creditors 5.36–5.37
undervalue see undervalue, transactions at
travaux préparatoires
aid to interpretation, as 2.03, 2.10
title transfer financial collateral
arrangements 6.36–6.37
trusts
Banking Act safeguard for 5.72
property held on trusts 5.58
title transfer financial collateral
arrangements: non-natural persons 6.59–6.63
types of financial collateral 3.01–3.82
cash, nature of 3.05–3.25
bank notes/coins 3.19
book debts 3.09
definition of cash 3.05–3.07
deposit or credit balances 3.06
money market deposits 3.08
no ‘sweep up’ wording: sub-mortgages 3.16–3.19
payment/repayment of money claims 3.10–3.15
virtual currencies 3.20–3.25
credit claims 3.03, 3.62–3.82
definition/nature of 3.62–3.65
must arise from credit institution granting credit as a loan 3.71–3.81
need not be tradeable 3.82
why included as financial collateral 3.66–3.70
definition of financial collateral 3.02
financial instruments 3.26–3.61
definition/nature of 3.26
express inclusions 3.57–3.61
other instruments normally dealt in 3.51–3.56
securities equivalent to shares 3.34–3.41
shares in companies 3.27–3.33
tradeable bonds 3.42–3.50
nature of financial collateral 3.01–3.04
uncertificated securities
equitable mortgage of 9.22
immobilisation and dematerialisation, difference between 19.07
immobilisation of 19.07
immobilised securities, and 19.06
securities account, location of 13.56
UNCITRAL model law on secured transactions 24.96–24.99
undervalue, transactions at 5.29–5.30
time limits for challenging 5.34
virtual currencies 3.20–3.25
digital representation of value, as 3.23
FCARs, and 3.25
nature of 3.23
voting rights see rights attached to charged securities
withdrawal of excess collateral
excess collateral, meaning of 8.14–8.18
‘possession’ or ‘control’ test, and 8.11–8.18