

《2004年破產(修訂)條例草案》委員會
二零零五年三月十一日第五次會議
就跟進事項一覽表作出的回應

引言

本文載述政府當局對法案委員會二零零五年三月十一日會議所討論事項的跟進事項一覽表作出的回應。

A. 關於外判簡易程序破產案件予私營清盤/破產工作從業員的擬議招標方案，以及考慮到委員的意見，政府當局應重新研究：

(a) 擬議方案的財政可行性及成本效益

2. 正如我們先前發出題為「《2004年破產(修訂)條例草案》委員會二零零五年一月十一日第三次會議：就跟進事項一覽表的回應」的文件所述，在典型的簡易程序破產案件中，即使沒有額外資產變現，而破產人也沒有作出供款，可用以支付由私營清盤/破產工作從業員正當地聘用的人士的費用及該等從業員酬金的款額，估計介乎 4,150 元與 5,750 元之間。有了這筆款項，加上該類案件的管理工作性質較為簡單，而有關案件會分批外判以收規模經濟效益，因此我們相信，私營從業員會對投標感興趣。

3. 無論如何，擬議條例草案的目的是讓破產管理署可以選擇把簡易程序破產案件外判，而並非強制規定該署必須這樣做。私營清盤/破產工作從業員可在考慮有關安排和顧及其本身的商業考慮因素後，才決定是否參加投標。繳存按金餘額(即呈請人所繳款項減去破產管理署所招致的有關費用和開支)少於私營從業員所招致支出及所要求酬金的估計總額的情況，相當可能不會出現。但若然真的出現，破產管理署就不會把有關案件外判。

(b) 訂定最低投標價格的可行性

4. 正如我們先前發給法案委員會的文件所述，政府當局的目的，是以競爭性招標方式，把案件外判給合資格的私營清盤/破產工作從業員。我們認為這是外判案件的最佳方法，因為在這項安排下，私營從業員有彈性處理的餘地，可在考慮市場環境及本身的業務情況後才遞交標書。同時，這過程的透明度亦很高。此外，由於透過市場競爭而取得的效益，會有更多資產留給破產人的產業，而這些產業可作其他用途，包括可能派發攤還債款予債權人。

5. 我們認為不宜由政府釐訂私營從業員的最低費用，因為並無相類的基準以資參考。這類措施亦可能有違市場競爭。

6. 我們亦想重申，有關方面會有多項法定及非法定措施協助確保私營從業員處理外判案件的服務質素。

B. 請政府當局提交擬議的委員會審議階段修正案的草稿，以便法案委員會逐一審議條例草案各條文

7. 我們打算對條例草案提出數項更改。我們已在附件標示擬對有關條文作出的更改。附件的註腳解釋為何我們建議作出更改，而有關標示則指出我們所擬更改後的條文以便反映政策目的。有關字眼尚未敲定，還須待法律草擬專員作進一步考慮。當法案委員會開始逐一審議條例草案的條文，我們可能會在委員表達意見後再提出委員會審議階段修正案，對條例草案作出更多修訂。

財經事務及庫務局／
破產管理署

二零零五年三月

標示政府當局擬修訂的
《 2004 年破產(修訂)條例草案 》條文
(只有英文文本)

3. Effect of bankruptcy order

Section 12 is amended -

- (a) in subsection (1), by repealing “the Official Receiver shall be thereby constituted receiver” and substituting “, the Official Receiver shall thereby become the provisional trustee”;
- (b) by adding -

“(1A) In the case of a debtor’s petition, if¹
~~Where~~ the Official Receiver as the provisional trustee considers that the value of the property of the bankrupt is unlikely to exceed \$200,000, he may at any time appoint any person as provisional trustee of the property of the bankrupt in his place.

(1B) The power of the Official Receiver to appoint a person as provisional trustee includes power to appoint 2 or more persons as joint provisional trustees; but such an appointment must make provision as to the circumstances in

¹ This amendment aims to reflect the policy intent that only debtor-petitioned bankruptcy cases may be outsourced.

which the provisional trustees must act together and the circumstances in which one or more of them may act for the others.”.

15. Vesting and transfer of property

Section 58(1) is repealed and the following substituted -

“(1) On the making of a bankruptcy order, the property of the bankrupt shall vest in the Official Receiver.

(1A) On the appointment of a person other than the Official Receiver as provisional trustee, the property shall forthwith pass to and vest in the provisional trustee appointed.

(1B) Save in sections 15(4), 17, 17A, 17B, 42(3), ~~43A, 43B, 43C~~,² 58(2), 60~~(1)~~³, 79, 80, 81, 85, 85A, 96(1) and 112A, the provisional trustee shall, unless the context otherwise requires, be regarded as the trustee for the purposes of this Ordinance.”.

17. Powers of provisional trustee and trustee to deal with property of the bankrupt

Section 60 is amended -

- (a) by renumbering it as section 60(1);
- (b) in subsection (1) -

² This amendment aims to enable provisional trustees to have the same power of trustees in claiming after-acquired property and certain items of excess value under existing sections 43A, 43B and 43C of the Bankruptcy Ordinance (BO).

³ This amendment is consequential to the amendments made to clause 17 below.

- (i) by repealing “, the trustee” and substituting “, a trustee or the Official Receiver when acting as provisional trustee”;
- (ii) in paragraph (a), by repealing “Official Receiver or” and substituting “trustee or the Official Receiver when acting as provisional”;
- (c) by adding -
 - “(2) Notwithstanding any other provisions of this Ordinance but subject to subsections (3) and (4), a provisional trustee other than the Official Receiver may do all or any of the following things -
 - (a) take into his custody or under his control all the property to which the bankrupt is or appears to be entitled;
 - (b) sell or dispose of perishable goods, or any property (other than derivatives, warrants, options, shares or choses in action) the estimated value of which is less than \$100,000 and is likely to significantly diminish if such property is not immediately sold or disposed of;

(c) subject to section 61, do all such other things as may be necessary for protecting or preserving the bankrupt's property;

(d) exercise any power the capacity to exercise which is vested in the provisional trustee under this Ordinance and execute any powers of attorney, deeds and other instruments for the purpose of carrying into effect the provisions of this Ordinance⁴; and

(e) subject to section 61, do all such other things as may be necessary for administering the estate pending the appointment of a trustee.⁵

⁴ This amendment aims to clarify that a provisional trustee may exercise all the powers vested in him — including monitoring the conduct of a bankrupt and ensuring that the bankrupt performs his duties. Similar provision can be found in the existing section 60(d) of the BO.

⁵ This amendment aims to clarify that a provisional trustee has powers to administer the estate — which include interviewing a bankrupt and taking possession of his property. The phrase “administering the estate” is also used in section 60(e) of the BO.

(3) A provisional trustee other than the Official Receiver may also exercise a power under subsection (1) if the power is exercised under an order of the court or with the prior approval of the Official Receiver.

(4) A provisional trustee other than the Official Receiver shall not sell or dispose of anything under subsection (2)(b) to a person who is an associate of the bankrupt, unless the sale or disposal is under an order of the court or with the prior approval of the Official Receiver.

(5) For the purposes of subsection (4), any question whether a person is an associate of another person shall be determined in accordance with section 51B as if -

- (a) that section were applicable also for the purposes of such determination; and
- (b) references to the “debtor” in that section were references to the “bankrupt” in subsection (4).

(6) The Official Receiver shall not be personally liable for any costs and charges incurred by any person as a result of any refusal to grant approval under subsection (3) or (4).”.

28. Sections added

The following are added immediately after section 86 -

“Duties of trustee as regards the bankrupt’s conduct and estate

86A. Duties of trustee as regards the bankrupt’s conduct⁶

(1) As regards the conduct of a bankrupt, it shall be the duty of the trustee to investigate the conduct of the bankrupt and to report to the court on any conduct that justifies the court in refusing, suspending or qualifying an order for the bankrupt’s discharge.

(2) In the case of a trustee other than the Official Receiver, it shall also be the duty of the trustee –

(a) to investigate the conduct of the bankrupt and to immediately report to the Official Receiver

⁶ Section 86A of the Bill originally provides that it shall be the duty of a trustee to (a) investigate the conduct of a bankrupt, and to submit a report to the court (if the trustee is the OR) or OR (if the trustee is a person other than OR), stating whether there is reason to believe that the bankrupt has committed any act that constitutes an indictable offence under the BO; and (b) to report to the court on any conduct of the bankrupt that justifies the court in refusing, suspending or qualifying an order for the bankrupt’s discharge. On the former duty, new section 86A(1) aims to clarify that the trustee should also investigate the conduct of the bankrupt (a similar duty is also found in existing section 77 of the BO). As regards the latter duty, the existing arrangement is that whenever there is any report of an offence (whether indictable or not) under the BO, the OR will initiate the prosecution action, where appropriate. In view of this, it is not considered necessary to impose a reporting duty on the OR in relation to any conduct which constitutes an indictable offence under the BO. Furthermore, the scope of the reporting duty imposed on a trustee (other than the OR) should be expanded to cover both indictable and summary (not indictable) offences. New section 86A(2) aims to give effect to these changes.

when he reasonably believes that the bankrupt has committed an act that constitutes an offence under this Ordinance; and

(b) to take such part and give such assistance in relation to the prosecution of any bankrupt as the Secretary for Justice or the Official Receiver may direct.

~~(1) As regards the conduct of a bankrupt, it shall be the duty of the trustee—~~

~~(a) to investigate the conduct of the bankrupt and to submit a report in accordance with subsection (2) or (3), as the case may be, stating whether there is reason to believe that the bankrupt has committed any act that constitutes an indictable offence under this Ordinance;~~

~~(b) to report to the court on any conduct of the bankrupt that justifies the court in refusing, suspending or qualifying an order for the bankrupt's discharge;~~

~~(c) to take such part and give such assistance in relation to the prosecution of any bankrupt as the Secretary for Justice or the Official Receiver may direct.~~

~~(2) Where the trustee is a person other than the Official Receiver, the report referred to in subsection (1)(a) shall be submitted to the Official Receiver.~~

~~(3) — Where the trustee is the Official Receiver, the report referred to in subsection (1)(a) shall be submitted to the court.~~

47. Consequential amendments

The enactments specified in column 2 of the Schedule are amended in the manner set out in column 3 of the Schedule.

SCHEDULE

[s. 47]

CONSEQUENTIAL AMENDMENTS

Item	Enactment	Amendment
1.	Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405)	<p>(a) In section 16(5), repeal “receiver” where it twice appears and substitute “trustee”.</p> <p>(b) In section 18(3)(b)(i), repeal “receiver, interim receiver, special manager or trustee” and substitute “trustee (including provisional trustee), interim trustee or special manager”.</p>
2.	Drug Trafficking (Recovery of Proceeds) (Designated Countries and Territories) Order	<p>(a) In Schedule 2, in section 16(5), repeal “receiver” where it twice appears and substitute “trustee”.</p> <p>(b) In Schedule 2, in section</p>

- (Cap. 405 sub. leg. A) 18(3)(b)(i), repeal “receiver, interim receiver, special manager or trustee” and substitute “trustee (including provisional trustee), interim trustee or special manager”.
3. Organized and Serious Crimes Ordinance (Cap. 455)
- (a) In section 2(1), in the definition of “insolvency officer”, in paragraph (b)(i), repeal “receiver, interim receiver, special manager or trustee” and substitute “trustee (including provisional trustee), interim trustee or special manager”.
- (b) In section 21(5), repeal “receiver” where it twice appears and substitute “trustee”.
4. Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525)
- (a) In Schedule 2, in section 12(5), repeal “receiver” where it twice appears and substitute “trustee”.
- (b) In Schedule 2, in section 14(3)(b)(i), repeal “receiver, interim receiver, special manager or trustee” and substitute “trustee (including provisional trustee),

interim trustee or special manager”.

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| 5. | Securities and Futures
(Licensing and
Registration)
(Information) Rules
(Cap. 571 sub. leg. S) | In Schedule 1, in Part 2, in section 1(k),
repeal “receiver” and substitute
“provisional trustee”. |
| 6. | <u>Clearing and Settlement
Systems Ordinance
(Cap. 584)</u> | <u>In section 2⁷, in the definition of
“relevant insolvency office-holder”,
repeal “receiver” and substitute for
“trustee”⁸.</u> |

⁷ Copy of section 2, Cap. 584 at Appendix.

⁸ This is a consequential amendment to the Clearing and Settlement Systems Ordinance, which was enacted in July 2004.

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Chapter:	584	Title:	CLEARING AND SETTLEMENT SYSTEMS ORDINANCE	Gazette Number:	L.N. 145 of 2004
Section:	2	Heading:	Interpretation	Version Date:	04/11/2004

In this Ordinance, unless the context otherwise requires—

“applicant” (申請人), in relation to any proceedings under Part 4, means the person who refers a decision to the Tribunal for review under section 35(1);

“book-entry securities” (記帳證券) means any securities issued under any law transferable by a book-entry (whether on a register or of any other kind);

“certificate of finality” (終局性證明書) means a certificate issued by the Monetary Authority under section 16(3);

“Chairman of the Tribunal” (審裁處主席) means the person appointed as such under section 34(3);

“clearing and settlement system” (結算及交收系統) means a system established for—

- (a) the clearing or settlement of payment obligations; or
- (b) the clearing or settlement of obligations for the transfer of book-entry securities, or the transfer of such securities;

“collateral security” (附屬抵押品), in relation to a clearing and settlement system, means any realizable assets provided, whether under a charge or a re-purchase or similar agreement or otherwise (including money provided under a charge), for the purpose of securing rights and obligations potentially arising in connection with participation in the system;

“default arrangements” (違責處理安排), in relation to a clearing and settlement system, means the arrangements in place within the system for limiting systemic and other types of risk in the event of a participant appearing to be, or likely to become, unable to meet his obligations in respect of a transfer order; and, without affecting the generality of the foregoing, includes any arrangements for—

- (a) the netting of obligations owed to or by the participant;
- (b) the closing out of open positions held by the participant; or
- (c) the realizing of collateral security securing obligations owed by the participant;

“defaulting participant” (違責參與者), in relation to a clearing and settlement system, means a participant in respect of whom action has been taken by the system operator or settlement institution under the system’s default arrangements;

“designated system” (指定系統) means a clearing and settlement system that has been designated for the purposes of this Ordinance by the Monetary Authority under section 4(1);

“directors’ voluntary winding up statement” (董事自動清盤陳述書) means a statement made under section 228A(1) of the Companies Ordinance (Cap 32), and a reference to such a statement taking effect is a reference to it being delivered for registration as specified in section 228A(3) of that Ordinance;

“disposition of property” (財產產權處置), in the context of a disposition made to or by a participant in a designated system, includes a payment made to or by the participant in the designated system or in a clearing and settlement system, wherever located, that is utilized by the designated system to effect payments;

“Monetary Authority” (金融管理專員) means the Monetary Authority appointed under section 5A of the Exchange Fund Ordinance (Cap 66);

“netting” (淨額計算), in relation to a clearing and settlement system, means the conversion of the various obligations owed to or by a participant, as between that participant and all the other participants in the system, into one net obligation owed to or by the participant;

“obligations” (義務), in the context of the default arrangements under a clearing and settlement system, means obligations resulting from the issue and receipt of transfer orders between participants, or otherwise resulting from action taken under the operating rules of the system;

“officer” (高級人員), in relation to a corporation, means a director, manager or secretary of, or any other person involved in the management of, the corporation and, where the corporation is a system operator or settlement institution of a designated system, means in addition the chief executive of the designated system;

“operating rules” (運作規則), in relation to a clearing and settlement system, means the rules or terms that govern the functioning or operations of the system;

“participant” (參與者), in relation to a clearing and settlement system, means a person who for the time being is a party to the arrangement by which the system is established;

“relevant insolvency office-holder” (有關破產清盤人員) means—

- (a) the Official Receiver appointed under section 75 of the Bankruptcy Ordinance (Cap 6);
- (b) a person acting under the laws of Hong Kong in relation to a company as its liquidator, provisional liquidator, receiver or manager or an equivalent officer;
- (c) a person acting under the laws of Hong Kong in relation to an individual as his trustee in bankruptcy or interim receiver of his property or an equivalent officer; or
- (d) a person appointed under the laws of Hong Kong pursuant to an order for the administration in bankruptcy of an insolvent estate of a deceased person;

“resolution for voluntary winding up” (自動清盤決議) means a resolution under section 228(1)(c) of the Companies Ordinance (Cap 32);

“settlement account” (交收帳戶), in relation to a clearing and settlement system, means an account at a settlement institution used to hold funds or securities (or both) and to settle transfer orders between participants in the system;

“settlement institution” (交收機構), in relation to a clearing and settlement system, means a person providing settlement accounts to the participants and to any central counterparty in the system for the settlement of transfer orders within the system and, as the case may be, for extending credit to such participants and any such central counterparty for settlement purposes;

“system operator” (系統營運者), in relation to a clearing and settlement system, means any person who, for the purposes of the system’s operating rules, is responsible for the operation of the clearing or settlement functions of the system;

“transfer order” (轉撥指令), in relation to a clearing and settlement system, means either of the following instructions—

- (a) an instruction—
 - (i) by a participant to place at the disposal of another participant an amount of money by means of a book-entry on the accounts of a settlement institution for the system; or
 - (ii) which results in the assumption or discharge of a payment obligation for the purposes of the operating rules of the system; or
- (b) an instruction by a participant either to settle an obligation for the transfer of book-entry securities, or for the transfer of such securities;

“Tribunal” (審裁處) means the Tribunal established under section 34(1).

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