

**《2004年破產(修訂)條例草案》委員會
二零零五年五月十日及二十日的第八次和第九次會議**

跟進行動一覽表

在附屬法例內列明獲委任為簡易程序破產案暫行受託人或受託人的基本準則的詳細建議

正如二零零五年五月二十日會議文件(立法會CB(1)1564/04-05(02)號文件)所載述，我們已考慮利益相關者及法案委員會的意見，並已諮詢法律草擬專員。我們建議在《破產條例》的附表內，列明私營清盤/破產工作從業員(簡稱私營從業員)獲委任為暫行受託人的基本資格準則。詳情請參閱政府打算修訂的條文的最新標示版本(見附件)的第3條及新附表3。至於詳細的準則，則會載於招標文件並可供公眾取覽。正如我們在二零零五年五月十日的會議上向委員解釋，按我們現時的計劃，有關招標文件將和在外判公司清盤個案中使用的招標文件相若。

草案第11條 - 《破產條例》擬議第37(1)條

(a) 關注幾乎最後才支付私營從業員的酬金及支出的擬議安排(第37條擬議第(1)(f)、(g)及(h)款)

2. 《破產條例》擬議第37(1)條訂明破產人的資產支付各種款項的優先次序。根據該條，為保存或取得破產人的任何資產或將破產人的任何資產變現而正當地招致的開支會先獲得支付，剩餘資產會按擬議第37(1)(a)至(i)條所述優先次序，支付其他開支。擬議的優先次序同時適用於簡易程序案件和非簡易程序案件，以及債務人的呈請和債權人的呈請。我們認為該優先次序是恰當的，因為與《公司(清盤)規則》現行第179(1)條就清盤案(不論是否外判個案)所訂定的付款次序相符，而該規則多年來一直運作暢順。採用該優先次序可確保整個無力償債制度的做法一致。從較「微觀」的角度來看，較獲委任為受託人的私營從業員的支出及酬金優先獲得支付的每個項目，都有具體的理

據。有關的具體理據載於下文第 3 至 7 段。

擬議第 37(1)(a)至(i)條

3. 在擬議第 37(1)(a)條下，破產管理署的酬金、須支付予破產管理署的費用、手續費、百分率及收費，或破產管理署所招致或批准的訟費、收費及開支，會較優先獲得支付。正如我們在先前發出題為「二零零五年四月二十一日第七次會議跟進事項一覽表」的立法會 CB(1)1467/04-05(02)號文件第 4 至 7 段所述，保持一致性和顧及破產管理署的多重身分和職能，是採取這種處理方法的兩大原因。首先，擬議的處理方法與《公司(清盤)規則》現行第 179 條有關支付清盤案(無論是否外判個案)費用的規定一致。其次，擬議的處理方法是因應破產管理署的多重身分和職能而作出的。破產管理署擔當監督的角色，以及在出任破產案受託人時管理破產人的產業。與私營從業員不同的是，破產管理署亦須作為最後的安排，出任破產案的受託人。

4. 根據擬議第 37(1)(b)條，下一個優先獲得支付的項目為呈請的經評定訟費，這是由於必先有呈請才有破產，何況是委任私營從業員為暫行受託人或受託人等程序。

5. 其次是擬議第 37(1)(c)條所訂的特別經理人酬金及其正當地招致的費用、支出和開支。這優先次序是恰當的，因為特別經理人的任期持續至有一位暫行受託人／受託人為止，即指特別經理人是在委任暫行受託人／受託人前獲委任的(參看《破產條例》擬議第 15(4)(a)及(b)條)。因此，特別經理人的酬金及支出等較擔任暫行受託人／受託人的私營從業員優先獲得支付，是符合邏輯的。

6. 接着是擬議第 37(1)(d)條所訂的任何填寫破產人的資產負債狀況說明書的人的費用。資產負債狀況說明書是管理破產人產業的必要文件，亦是破產程序非常早期所需的文件。

7. 根據擬議第 37(1)(e)條，下一個獲得支付的項目是獲委任記錄訊問的速記員的經評定收費。這項開支獲較優先支付，亦屬恰當，因為速記員是獲法院委任負責記錄訊問程序這項重要職務。此外，擬議第 19(4A)及(4B)條訂明，如對破產人進行公開訊問，獲委擔任暫行受託人或受託人的私營從業員可要求有關債權人繳存一筆款項，以支付進行公開訊問的費用及開支(包

括速記員的費用)。如債權人沒有繳存該筆款項，私營從業員可拒絕進行公開訊問。

8. 接着下來是出任暫行受託人或受託人的私營從業員的必要支出，他們適當地聘用其他人士的開支，以及他們本身的酬金(見擬議第 37(1)(f)至(h)條)，最後是債權人委員會招致的實際現金付款開支(須獲受託人核准)。

擬議改動的影響

9. 經再度仔細研究改動擬議優先次序的可行性後，我們仍然認為此舉並不恰當。首先，任何改動都會令公司清盤案與破產案的有關安排不能保持一致。

10. 其次，雖然擬議第37(1)(a)至(e)條所指的部分訟費和收費，在債務人呈請的簡易程序破產案件(即破產管理署署長或會外判的案件)中相當可能無須支付¹，但原則上不應因此而作出改動。此外，一如上文第2段所述，擬議第37(1)條所訂的優先次序適用於簡易程序及非簡易程序案件以及債務人的呈請和債權人的呈請²。正如上文第3至7段所述，每一項目的先後次序都有其特定理據。

11. 第三，根據實際運作經驗，我們不認為有需要作出該等改動。對於公司清盤案件，擬議的優先次序多年來一直運作暢順。換言之，在公司清盤案(包括外判案件)中，出任清盤人的私營從業員的支出和酬金獲支付的次序，已低於呈請人的經評定訟費，以及特別經理人的酬金和開支等其他項目。關於這方面，我們擬指出，與破產案相比，在公司清盤案中，該等其他項目更有機會影響到產業中可供支付私營從業員的支出和酬金的資產數額。舉例來說，由於大部分公司清盤案屬於債權人呈請案件，呈請訟費很可能會以產業支付。

¹ 一如過往我們曾經多次向法案委員會所解釋，在債務人呈請的簡易程序案件中，第 37(1)(a)至(e)條所載的項目相當可能無須支付，或有關費用相當可能無須由私營從業員支付。舉例來說，需要委任一名特別經理人的情況極為罕見。

² 就簡易程序案件及非簡易程序案件訂定不同的優先次序會引致多種問題。除造成不一致的安排外，當遇到簡易程序案件在破產期內變成非簡易程序案件等情況時，問題便會出現。

外判破產案件

12. 除上述擬議優先次序的理據，以及任何改動可能帶來的影響外，我們擬重申，實際上：

- (a) 由於擬議第37(1)(a)至(e)條所提述的部分訟費及費用，在一般的外判案件中相當可能無須支付，故獲委任處理有關案件的私營從業員的支出及酬金，一般都會在緊接破產管理署的費用和收費之後獲得支付；
 - (b) 與破產管理署不同的是，破產管理署須作為最後的安排，出任破產案的受託人，而私營從業員則可自行決定是否接受委任為暫行受託人。私營從業員亦可在考慮有關安排(包括第37(1)條所訂的擬議付款優先次序)後，才決定其投標價；以及
 - (c) 第37(1)條所訂的優先次序受制於法院的任何命令。因此，私營從業員若認為，例如，破產管理署在處理外判個案時所招致的支出並不合理，可申請法院命令。這可作為安排的一項最終保障措施。
- (b) 提議把私營從業員視作受聘於破產管理署，使私營從業員的酬金及支出，可根據擬議第37(1)(a)條納入為破產管理署所招致的費用**

13. 接受委任為外判的簡易程序破產案件暫行受託人的私營從業員，**並非**受聘於破產管理署。私營從業員是由破產管理署根據擬議第12(1A)條委任以履行《破產條例》下暫行受託人的職能。私營從業員於獲委任後，即有責任履行《破產條例》下的有關職能。他們**並非**破產管理署的僱員。

14. 無論如何，把私營從業員的酬金及支出納入為擬議第37(1)(a)條下破產管理署所招致的費用，的確可將該類酬金及支出的優先次序，提升至高於擬議第37(1)(b)至(e)條的項目。不過，基於上文第2至第11段所述理由，我們認為這提議並無充分理據。

(c) 提議清楚訂明擬議第 37(1)(a)條所提述的「破產管理署署長的酬金、須支付予破產管理署署長的費用、手續費、百分率及收費」，是指《破產(費用及百分率)令》所列載的費用、收費及百分率

15. 經考慮委員的意見後，我們建議刪除擬議第 37(1)(a)條內的「酬金」和「手續費」字眼，並接納有關加入提述《破產(費用及百分率)令》的建議。我們會提出委員會審議階段修正案(簡稱修正案)，以作出該兩項修訂。請參閱載於附件的標示版本第 11 條。

(d) 擬議第 37(1)(a)條中英文版

16. 我們認為，英文版的「and」字是恰當的。我們建議提出一項修正案，對中文版作出相應修改。

(e) 破產管理署署長聘請外界人士調查處理外判案件的私營從業員的涉嫌行為不當而招致的費用

17. 破產管理署會監察獲委任的私營從業員處理外判案件的表現。就私營從業員涉嫌行為不當的調查，所需費用一般會由破產管理署以本身的資源支付。在決定是否聘請外界人士就私營從業員涉嫌行為不當事件進行調查時，破產管理署會先按當時情況評估該項聘請是否適當。至目前為止，破產管理署沒有採用這種做法進行調查。假設破產管理署真的聘請外界人士進行調查，由於事件在調查階段，調查費用一般會由破產管理署以本身的資源支付。

18. 如破產管理署認為事件屬實，而向法院提出根據《破產條例》第 96(2)條有關的私營從業員免任或根據第 84 條的查訊，破產管理署可向法院申請作出有關該署的訟費或其他開支的命令，而法院會按案件的情況作出適當的命令。

擬議新 86A 條

19. 《破產條例》第 29, 30A(4)(d), 76(1), 77(a), 84, 91(3), 93(5), 94(3)及 112(5)條內「conduct」一字，在中文版的相應用詞是「行為操守」。該等條文主要關於破產人或受託人的「行為操守」，

不單純粹涵蓋破產人或受託人的行爲，亦同時關涉他們某些做法或準則是否誠實正直。

20. 在擬議第 86A(1)及(2)(a)條，受託人須調查破產人的行爲操守，以了解其行操守爲會否影響破產人被解除破產，或會否構成《破產條例》所訂的罪行。有關工作包括調查破產人的行爲以及導致該等行爲的意圖，例如他有否誠實地、適當地或真誠地行事，又或者他是否已妥爲遵守《破產條例》對他所施加的規定等。因此，我們認爲「行爲操守」一詞較能準確反映「conduct」的意思。我們無意就此方面作出任何修訂。

建議的委員會審議階段修正案

21. 我們打算修訂的某些條文的最新標示版本(截至二零零五年五月二十四日)，載於附件 I (有關修訂已顧及委員在過往法案委員會會議上提出的意見)。有關字眼須由法律草擬專員作進一步研究。

22. 相對於法案委員會上次於二零零五年五月二十日會議上所討論的版本，我們已作出以下修訂：

- (a) 修訂條例草案第 3 條，並加入新的附表 3，列明私營從業員有資格獲委任爲暫行受託人所須符合的基本資格準則(見上文第 1 段)；
- (b) 修訂條例草案第 11 條，以修改擬議第 37 條(見上文第 15 至 16 段)；
- (c) 正如立法會助理法律顧問在二零零五年五月二十日會上指出，在新的第 80(1)和 80(1A)條內的「included under the」之後，加入「term」一詞；以及
- (d) 在擬議第 86A(2)(b)條，「any bankrupt」改爲「the bankrupt」(第 86A 條的其他部份都一致使用後者)。

財經事務及庫務局
破產管理署
二零零五年五月

政府當局打算修訂的
《 2004 年破產(修訂)條例草案 》
某些條文的標示版本
(截至二零零五年五月二十四日)

2. Interpretation

Section 2 of the Bankruptcy Ordinance (Cap. 6) is amended -

(a) in the definition of “誓章”, by repealing the full stop at the end and substituting a semicolon;

(aa) in the definition of “trustee”, by adding “subject to section 58(1B),” before “means”¹;

(b) by adding -

““provisional trustee” (暫行受託人), in relation

to a bankrupt, means -

(a) where no person is appointed as provisional trustee of the property of the bankrupt under section 12(1A), the Official Receiver; or

(b) where any person is appointed as provisional trustee of the property of the

¹ This is in response to the suggestion that the definition of “trustee” in section 2, the interpretation provision, should make reference to the new subsection (1B) of section 58.

bankrupt under section
12(1A), the person;”.

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, the Official Receiver as the provisional trustee may at any time appoint any person as provisional trustee of the property of the bankrupt in his place if he considers that –

- (a) the value of the property of the bankrupt is unlikely to exceed \$200,000; and

- (b) the person is a person that falls within Schedule 3.

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

(1C) The Secretary for Financial Services and the Treasury may, by notice in the Gazette, amend Schedule 3. ”.

5. Power to appoint special manager

Section 15 is amended -

- (a) in subsection (1), by repealing “to act until a trustee is appointed, and with” and substituting “, who shall have”;
- (b) by adding -

“(4) The term of office of the special manager shall last until -

- (a) in a case where a person other than the Official Receiver is appointed as provisional trustee under section 12(1A)², the appointment; or
- (b) in any other case, ~~there is a trustee in relation to the~~

² The proposed change is in response to the discussion at the Bills Committee on 1 April 2005.

~~bankrupt's estate~~ a trustee is appointed or constituted under sections 17, 78(1)(g), 81(4), 100D(1), 112(4), 112A(1)(i) or paragraph 6 of Part II of Schedule 1.³.

11. Priority of costs and charges

Section 37 is amended -

- (a) in subsection (1) -
 - (i) by repealing “actual expenses incurred in” and substituting “expenses properly incurred in preserving, getting in or”;
 - (ii) by repealing paragraphs (a), (b), (c) and (d) and substituting -
 - “(a) the fees, percentages and charges payable to the Official Receiver under the Bankruptcy (Fees and Percentages) Order (Cap. 6 sub. Leg. C) ~~remuneration of, fees, commissions, percentages and charges payable to,~~ and costs, charges and expenses incurred or authorized by, the Official Receiver, whether acting as trustee or otherwise, including the costs of

³ Same as footnote 3 above.

- any person properly employed by him;
- (b) the taxed costs of the petition, including the taxed costs of any person appearing at the hearing of the petition whose costs are allowed by the court but excluding the interest on such costs;
 - (c) the remuneration of, and fees, disbursements and expenses properly incurred by the special manager, if any;
 - (d) the costs and expenses of any person who makes the bankrupt's statement of affairs;
 - (e) the taxed charges of any shorthand writer appointed to take any examination under this Ordinance, except expenses properly incurred in preserving, getting in or realizing the assets of the bankrupt;
 - (f) the necessary disbursements of any trustee other than the Official Receiver, except expenses properly incurred in preserving, getting in or realizing the assets of the bankrupt;

- (g) the costs of any person properly employed by any trustee other than the Official Receiver;
- (h) the remuneration of any trustee other than the Official Receiver; and
- (i) the actual out-of-pocket expenses necessarily incurred by the creditors' committee subject to the approval of the trustee.”;

(b) by adding -

“(3) For the purposes of subsection (1)(e), if the shorthand writer is appointed or authorized by the Official Receiver, the cost of the shorthand notes shall be regarded as an expense properly incurred in getting in or realizing the assets of the bankrupt.”.

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,~~⁴ 58(2), ~~60(1)~~⁵, 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) -
 - (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”;
 - (iii) by adding before paragraph (a) –
“(aa) take into his custody or under his control all the property to which the bankrupt is or appears to be entitled;”⁶.
- (c) by adding -

⁴ 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).

⁵ This amendment is consequential to the amendments made to clause 17 below.

⁶ The proposed change is in response to the suggestion of the LegCo Assistant Legal Adviser at the meeting on 10 May 2005 that there would be a need to provide the Official Receiver with the power to take custody or control of the property to which the bankrupt is or appears to be entitled.

“(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 Ordinance⁷; 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.⁸

(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

⁷ 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.

⁸ 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.

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).”.

24. Power to appoint joint or successive trustees and provisional trustees

Section 80(1) is repealed and the following substituted -

“(1) When 2 or more persons are appointed as provisional trustees, the appointment shall state whether any act required or authorized to be done by a provisional trustee is to be done by all or any one or more of such persons, but all such persons are in this Ordinance included under the term “provisional trustee”⁹ ~~shall each~~

⁹ Upon further review, we consider the wording used in the existing section 80(1) better reflects our policy intent.

~~be regarded as a provisional trustee for the purposes of this Ordinance,~~
and shall be joint tenants of the property of the bankrupt.

(1A) When 2 or more persons are appointed as trustees, the appointment shall state whether any act required or authorized to be done by a trustee is to be done by all or any one or more of such persons, but all such persons are in this Ordinance included under the term “trustee”¹⁰ ~~shall each be regarded as a trustee for the purposes of this Ordinance,~~ and shall be joint tenants of the property of the bankrupt.”.

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 conduct¹¹

¹⁰ See footnote (10).

¹¹ Section 86A of the Bill originally provides that it shall be the duty of a trustee to (a) 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; and (b) 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. 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.

(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 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~~ the 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.~~

36. Review and appeals in bankruptcy

Section 98(2) is amended by repealing ~~“21” and substituting “28”~~ “The appeal shall be commenced within 21 days from the time when the decision appealed against is pronounced or made” and substituting “The notice of appeal shall be served within the time for appealing against an order made in the matter of any bankruptcy as specified in Order 59, rule 4(1)(b) of the Rules of the High Court (Cap. 4 sub. leg. A)”¹².

47. Consequential amendments

¹² Existing section 98(2) sets out the time limit for the lodging of appeal against orders of the court or the Registrar of the High Court in bankruptcy proceedings. The proposed amendment aims to make section 98(2) in line with the Order 59, rule 4(1)(b) of the Rules of the High Court. At present, the time limit prescribed in the latter provision is 28 days.

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 (Cap. 405 sub. leg. A) | <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 18(3)(b)(i), repeal “receiver, interim receiver, special manager or trustee” and substitute “trustee (including provisional trustee), interim trustee or special manager”.</p> |

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”.

5. Securities and Futures (Licensing and Registration) Rules (Information) Rules (Cap. 571 sub. leg. S)

In Schedule 1, in Part 2, in section 1(k), repeal “receiver” and substitute “provisional trustee”.

6. Clearing and Settlement Systems Ordinance (Cap. 584) In section 2¹³, in the definition of “relevant insolvency office-holder”, repeal “receiver” and substitute for “trustee”¹⁴.

New Schedule 3: Qualifications for appointment under section 12(1A)

By adding –

“SCHEDULE 3 [s.12(1A) & (1C)]

QUALIFICATIONS FOR APPOINTMENT
UNDER SECTION 12(1A)

To qualify for appointment under section 12(1A) of this Ordinance,
a person shall –

(a) be –

(i) a certified public accountant within the
meaning of section 2 of the Professional
Accountants Ordinance (Cap. 50);

(ii) a solicitor within the meaning of section
2(1) of the Legal Practitioners Ordinance
(Cap. 159); or

¹³ Copy of section 2, Cap. 584 at Appendix.

¹⁴ This is a consequential amendment to the Clearing and Settlement Systems Ordinance, which was enacted in July 2004.

- (iii) a company secretary, who is currently a member of The Hong Kong Institute of Company Secretaries; and
- (b) satisfy any reasonable conditions that the Official Receiver may impose and has made accessible to the public.”.

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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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