

**Bills Committee on Bankruptcy (Amendment) Bill 2004  
Eighth and Ninth Meetings on 10 and 20 May 2005**

**List of follow-up actions**

***Detailed proposals for setting out in subsidiary legislation the basic criteria for appointment as provisional trustee or trustees for summary bankruptcy cases***

As mentioned in the paper for the meeting held on 20 May 2005 (LC Paper No. CB(1)1564/04-05(02)), we have considered the views expressed by relevant stakeholders and the Bills Committee and also consulted the Law Draftsman. We propose to set out the basic qualification criteria for a private sector insolvency practitioner (PIP) to be eligible for appointment under the new section 12(1A) as a provisional trustee in a schedule to the Bankruptcy Ordinance (BO). Please see clause 3 and the new Schedule 3 in the mark-up version (at Annex) of the provisions to which the Administration intends to propose changes. As regards the detailed criteria, they would be set out in tender document and made accessible to the public. As explained to Members at the meeting on 10 May 2005, our current plan is that the tender document should be similar to the one for outsourcing summary liquidation cases.

**Clause 11 – Proposed section 37(1) of the Bankruptcy Ordinance**

***(a) Concerns about the proposed arrangement to accord the remuneration and disbursements of PIPs almost the lowest priority for payment (proposed subsections (1)(f), (g) and (h) of section 37)***

2. Proposed section 37(1) of the BO provides for the priority of the payments of the assets of the bankrupt. Under this section, the expenses properly incurred in preserving, getting in or realizing any of the assets of the bankrupt would first be paid. The remaining assets would then be used to cover payments according to the order of priority as stated in proposed section 37(1)(a) to (i). The proposed order applies to both summary and non-summary cases as well as debtor-petitions and creditors petitions. We consider the order appropriate, as it is consistent with the existing treatment under Rule 179 of the Companies (Winding Up) Rules for payments in liquidation cases (whether outsourced or not), which has been operating

smoothly for years. Its adoption would ensure a consistent approach in the whole insolvency regime. In a more “micro” context, there are specific justifications for each of the items ranking above the disbursement and remuneration of PIPs appointed as trustees. These specific justifications are set out in paragraphs 3 to 7 below.

***Proposed section 37(1)(a) – (i)***

3. Under proposed section 37(1)(a), a higher priority is accorded to the remuneration of, fees, commissions, percentages and charges payable to, and costs, charges and expenses incurred or authorized by, the Official Receiver’s Office (ORO). As mentioned in paragraphs 4 to 7 of our earlier paper “Seventh meeting on 21 April 2005 – Responses to List of Follow-up Actions” (LC Paper No. CB(1)1467/04-05(02)), there are mainly two reasons for such treatment, namely consistency and multiple roles and functions of the ORO. First, the proposed treatment is consistent with the existing treatment under Rule 179 of the Companies (Winding Up) Rules for payments in liquidation cases (whether outsourced or not). Second, the proposed priority is made in recognition of the ORO’s multiple roles and duties under the BO. The ORO has a supervisory role and another role of administering the bankrupt’s estate while acting as trustee in bankruptcy. Unlike PIPs, the ORO also acts as the trustee in bankruptcy of the last resort.

4. The taxed costs of petition is given the next priority under proposed section 37(1)(b) because the petition must come before any bankruptcy, let alone processes such as the appointment of PIPs as provisional trustees or trustees.

5. Next in line are the remuneration and fees, disbursements and expenses properly incurred by the special manager under proposed section 37(1)(c). This order of priority is appropriate as the term of appointment of the special manager will last until there is a provisional trustee/trustee meaning that the special manager will be appointed *prior to* the appointment of provisional trustee/trustee, c.f. proposed section 15(4)(a) and (b) of the BO. It is logical for his remuneration and disbursements etc. to come before those of the PIP acting as a provisional trustee/trustee.

6. Next in line for priority are the costs of any person who makes the bankrupts’ statement of affairs under proposed section 37(1)(d). The statement of affairs is an essential document for the administration of the estate of the bankrupt. It is also one required at the very early stage of the bankruptcy proceedings.

7. Next in line are the taxed charges of a shorthand writer appointed to take an examination under proposed section 37(1)(e). The higher priority is appropriate as the shorthand writer is appointed by the court to perform the important function of taking down the records of the proceedings of the examination. Furthermore, under the proposed section 19(4A) and (4B), in the case of a public examination of a bankrupt, the PIP appointed as provisional trustee or trustee would be able to request the relevant creditors to deposit a sum to pay the costs and expenses in holding the public examination, including the cost of any shorthand writer. If the creditors do not make the deposit, the PIP may refuse to hold the public examination.

8. Next in line are the necessary disbursements, the costs of any person properly employed by and the remuneration of PIPs acting as provisional trustees or trustees (proposed section 37(1)(f) – (h)), to be followed by the actual out-of-pocket expenses necessarily incurred by the creditors' committee subject to the approval of the trustee.

### ***Ramifications of any proposed changes***

9. We have carefully looked again into the feasibility of changing the proposed priority, and remain of the view that it would be inappropriate to do so. First, any change would lead to continued inconsistency in the relevant arrangements in company winding-up cases vis-à-vis that in bankruptcy cases.

10. Secondly, while some of the costs and charges referred to in the proposed section 37(1)(a) to (e) would unlikely arise in a debtor-petition summary bankruptcy case (i.e. cases that may be outsourced by the ORO)<sup>1</sup>, as a matter of principle this should not be a reason for changes. Moreover, as mentioned in paragraph 2 above, the order of priority under proposed section 37(1) applies to both summary and non-summary cases as well as debtor-petitions and creditor-petitions<sup>2</sup>. In addition, as set out in paragraphs 3 to 7 above, there are specific justifications for the ranking of each of the items.

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<sup>1</sup> As we have explained to the Bills Committee, the items under section 37(1)(a) to (e) would unlikely arise, or their costs would unlikely be payable by PIPs, in a debtor-petition summary case. For example, it is extremely rare that a special manager would need to be appointed.

<sup>2</sup> Having different orders of priority for summary and non-summary cases would lead to problems. Other than causing inconsistency, it would lead to problems when, say, a summary case becomes non-summary during the bankruptcy period.

11. Thirdly, we do not see a need for such change in the light of actual operating experience. The proposed order of priority has been in operation smoothly for years in companies winding up, including summary and non-summary cases. Thus, the disbursement and remuneration of PIPs acting as liquidators for companies winding up (including outsourced cases) already rank lower than other items such as the taxed costs of the petitioner and the remuneration and expenses of the special manager. In this regard, we would like to point out that the chance of such other items affecting the amount of assets from the estate available for payments of PIPs' disbursement and remuneration is higher under companies winding up than that under a bankruptcy case. For example, since most companies winding up are creditor-petition cases, it is more likely that the petition costs would come from the estate.

### ***Outsourced Bankruptcy Cases***

12. Apart from the justifications for the proposed order of priority and the potential ramifications of any changes as set out above, we would also like to reiterate that in practice –

- (a) As some of the costs and charges referred to in the proposed section 37(1)(a) to (e) would unlikely arise in a typical outsourced case, the disbursements and remuneration of the PIP appointed to handle the case would likely rank next in line to the ORO's fees and charges;
- (b) Unlike the ORO who has to act as the trustee of the last resort, PIPs are free to decide whether or not to accept the appointment as a provisional trustee. It is also up to a PIP to take into account the relevant arrangements, including the proposed section 37(1), in determining his/her tender price; and
- (c) The order of priority under section 37(1) is subject to any order of the court. Thus, if a PIP considers that, say, the expenses incurred by the ORO in an outsourced case are unreasonable, he/she may seek an order of the court. This can serve as a safeguard of the last resort.

***(b) Suggestion to regard PIPs as persons employed by ORO so that PIPs' remuneration and expenses will be included as costs incurred by ORO under the proposed section 37(1)(a)***

13. PIPs who accept the appointment as provisional trustee to handle outsourced summary bankruptcy cases are *not* persons employed by the ORO. The PIPs are appointed by the ORO pursuant to proposed section 12(1A) to perform the functions of a provisional trustee under the BO. Once the appointment is made, the PIPs are under duty to perform the functions as per the BO. They are *not* employees of the ORO.

14. In any case, to regard the PIPs' remuneration and disbursement to be included as costs incurred by ORO under the proposed section 37(1)(a) has the effect of elevating the priority of such remuneration and disbursement above the items in proposed section 37(1)(b) to (e). We consider that this is not justified, as explained in paragraphs 2 to 11 above.

***(c) Suggestion of setting it out clearly that "remuneration of, fees, commissions, percentages and charges payable to" OR referred to in proposed section 37(1)(a) mean those fees, charges and percentages set out in the Bankruptcy (Fees and Percentages) Order***

15. Taking into account Members' views, we propose to delete the words "remuneration" and "commissions" in the proposed section 37(1)(a). We also accept the suggestion to add a reference to the Bankruptcy (Fees and Percentages) Order. We will propose Committee Stage Amendment ("CSA") to effect the two refinements. Please see clause 11 of the mark-up version at [Annex](#).

***(d) The English and Chinese texts of the proposed section 37(1)(a)***

16. We consider that the appropriate word should be "and" as is provided in the English text, and will propose a CSA to change the Chinese text accordingly.

***(e) Cost incurred for the employment by the OR of an external party to look into suspected malpractices of a PIP in handling outsourced cases***

17. The ORO will monitor the performance of the PIPs appointed to handle outsourced cases. For investigation into suspected malpractices of the PIP, funds will generally come from ORO's own resources. In deciding

whether to employ an external party to look into the suspected malpractices of a PIP, the ORO will first assess whether such employment is appropriate in the circumstances. So far the ORO has not resorted to such means of investigation. In a hypothetical case that an external party is employed, as the matter is in investigation stage, the funds for the investigation will in general come from the ORO's own resources.

18. If the ORO finds that the case is substantiated and court action is taken against the PIP for removal under section 96(2) or for an inquiry of the court under section 84 of the BO, the ORO may make application to court for an order as to the costs or other expenses of the ORO and the court will make the order as appropriate in the circumstances of the case.

### ***Proposed new section 86A***

19. In existing sections 29, 30A(4)(d), 76(1), 77(a), 84, 91(3), 93(5), 94(3) and 112(5) of the BO, the word "conduct" is rendered as "行為操守" in the Chinese text. These provisions deal with the conduct of either the bankrupt or trustee. They not only cover pure acts but also certain practices or standards that relate to the bankrupt's or trustee's integrity.

20. In the proposed section 86A(1) and (2)(a), the trustee is required to investigate the conduct of a bankrupt to see if there is any conduct that may affect the bankrupt's discharge or that constitutes an offence under the Ordinance. Such investigation will involve an investigation on the bankrupt's acts as well as his underlying intention leading to such acts, for instance, whether he has acted honestly, properly or in good faith, whether he has duly observed the requirements imposed on him by the Ordinance, etc. Hence we think the expression "行為操守" more accurately reflects the meaning carried by the word "conduct". We do not intend to propose any amendment in this regard

### ***Proposed Committee Stage Amendments***

21. The latest mark-up version (as at 24 May 2005) of the relevant provisions to which the Administration would like to propose amendments, taking into account views expressed at the Bills Committee meetings is at Annex. The wordings are subject to further consideration by the Law Draftsman.

22. Compared with the version discussed at the last Bills Committee meeting held on 20 May 2005, the following changes have been made –

- (a) Clause 3 of the Bill amended and a new Schedule 3 added to set out the basic qualification requirements for a PIP to be eligible for appointment as a provisional trustee (see paragraph 1 above);
- (b) Clause 11 to refine the proposed section 37 (see paragraphs 15 and 16 above);
- (c) As pointed out by LegCo's Assistant Legal Adviser at the meeting on 20 May 2005, the word "term" is proposed to be added after "included under the" in the new section 80(1) and 80(1A); and
- (d) In the new section 86A(2)(b), "any bankrupt" is proposed to be changed to "the bankrupt", the latter of which is consistently used in other parts of section 86A.

**Financial Services and Treasury Bureau**  
**Official Receiver's Office**  
**May 2005**

**Mark-up version of provisions  
in the Bankruptcy (Amendment) Bill 2004  
to which the Administration intends to propose amendments  
As at 24 May 2005**

**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”<sup>1</sup>;

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

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<sup>1</sup> 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.

### 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)<sup>2</sup>, the appointment; or
- (b) in any other case, ~~there is a trustee in relation to the bankrupt’s estate~~ a trustee is appointed or constituted

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

under sections 17, 78(1)(g), 81(4), 100D(1), 112(4), 112A(1)(i) or paragraph 6 of Part II of Schedule 1.”<sup>3</sup>.

## 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 any person properly employed by him;

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<sup>3</sup> Same as footnote 3 above.

- (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,~~<sup>4</sup> 58(2), ~~60(1)~~<sup>5</sup>, 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;”<sup>6</sup>.
- (c) by adding -

<sup>4</sup> 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).

<sup>5</sup> This amendment is consequential to the amendments made to clause 17 below.

<sup>6</sup> 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 Ordinance<sup>7</sup>; 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.<sup>8</sup>

(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

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<sup>7</sup> 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.

<sup>8</sup> 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”<sup>9</sup> ~~shall each~~

<sup>9</sup> 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”<sup>10</sup> ~~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 conduct<sup>11</sup>**

<sup>10</sup> See footnote (10).

<sup>11</sup> 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)”<sup>12</sup>.

### **47. Consequential amendments**

<sup>12</sup> 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) (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 2<sup>13</sup>, in the definition of “relevant insolvency office-holder”, repeal “receiver” and substitute for “trustee”<sup>14</sup>.

**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

<sup>13</sup> Copy of section 2, Cap. 584 at Appendix.

<sup>14</sup> 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.”.

## Individual Section Mode

Previous section of enactment      Next section of enactment      Switch language      Back to the List of Laws

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**Contents of Section**


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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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[Previous section of enactment](#)

[Next section of enactment](#)

[Switch language](#)

[Back to the List of Laws](#)