

LEGISLATIVE COUNCIL BRIEF

COMPANIES (CORPORATE RESCUE) BILL

INTRODUCTION

At the meeting of the Executive Council on 15 May 2001, the Council **ADVISED** and the Chief Executive **ORDERED** that the Companies (Corporate Rescue) Bill at Annex A, should be introduced into the Legislative Council.

BACKGROUND AND ARGUMENT

Need for Corporate Rescue Procedure

2. At present, companies liable to be wound up under the Companies Ordinance (the Ordinance) may agree to an arrangement with their creditors in a non-statutory manner or pursuant to section 166 of the Ordinance, which provides for the manner in which a company may do so, subject to the sanction of the court. However, the section does not protect the company from its creditors' actions to wind up the company, which may terminate an arrangement being formulated.

3. To address this, the Law Reform Commission (LRC) has recommended a corporate rescue procedure for companies in financial difficulty. The recommendation aims to impose a moratorium during which a company is protected from creditors' action and put under the control of a provisional supervisor (an independent professional third party) whose task is to formulate an arrangement for agreement with its creditors.

A summary of the LRC's recommendation is at Annex B.

4. The corporate rescue procedure, if introduced, would give companies in financial difficulty an opportunity to try to turn around. Employment that would otherwise disappear might be preserved, at least to some extent. The legislative proposals to implement this recommendation formed part of the Companies (Amendment) Bill 2000, which was

introduced into the Legislative Council on 19 January 2000.

5. During the Bills Committee stage, the Bills Committee, having regard to time constraints and the complexity of the legislative proposals, recommended that these proposals be excised from the Bill and deferred for re-submission to the Legislative Council at a later stage. The Bills Committee was generally supportive of a corporate rescue procedure. However, some of its Members expressed doubts on the requirement placed upon a financially troubled company to set aside sufficient funds to settle all arrears of wages, severance pay and other statutory entitlements of its employees as if it were a going concern. They were concerned that the Bill did not provide the flexibility to allow employees to trade in their claims for, say, shares of the company.

6. As suggested by the Bills Committee, the Administration has consulted the Labour Advisory Board (LAB) on its proposal to provide some flexibility to the requirement to settle all arrears due and owing by the company to its employees. We have also consulted the Protection of Wages on Insolvency Fund (PWIF) Board on this matter. Having regard to the objection by the LAB and the PWIF Board, we have decided not to pursue the flexibility proposal put forward by the Bills Committee. We have revised the legislative proposals in the light of their views and those from the professional bodies and trade organisations received after the publication of the Bill in 2000.

Main Features of Corporate Rescue Procedure

Application

7. The corporate rescue procedure which may be initiated by a company or its directors or liquidators will apply to local and overseas companies formed/registered under the Ordinance, except –

- (a) as recommended by the LRC, the authorized institutions regulated by the Hong Kong Monetary Authority under the Banking Ordinance; and
- (b) insurance companies and registered entities in the securities and futures industry regulated by law which empowers the regulator to assume control of the regulated entity or oblige the entity to act in a certain manner in case the entity has financial difficulty.

Moratorium

8. The moratorium starts as soon as the appointment of the provisional supervisor comes into effect (i.e. the provisional supervision starts). The moratorium period is 30 days initially and may be extended for up to six months by the court upon the provisional supervisor's application. Any further extensions must be approved by creditors at a relevant meeting (and the court's approval is not required).

9. During the moratorium, there will be a stay of all proceedings (such as an application to the court to wind up the company, appointment of a receiver of the assets of the company) against the company. The only exceptions are the proceedings of the Insider Dealing Tribunal and the Securities and Futures Commission in the exercise of its regulatory powers under the relevant provisions of the Securities and Futures Commission Ordinance and Leveraged Foreign Exchange Trading Ordinance.

Exemptions from Application of Moratorium

10. The moratorium should not apply to eligible financial contracts (for example, currency or interest rate swap agreements, or agreements to buy or sell securities). These dealings occur in certain closed markets, such as the central clearing and settlement system of the Stock Exchange. To impose a moratorium on such contracts could involve unravelling innumerable other contracts which would cause chaos in the market concerned.

11. Nor should the moratorium apply to debts and liabilities incurred by the company after the initiation of the corporate rescue procedure so that the company can continue with its normal business during the provisional supervision by maintaining the necessary credit facilities with its business partners. Any resumptions by Government pursuant to a Government lease or otherwise should also be exempted from the moratorium.

Provisional Supervisor

12. Once appointed, the provisional supervisor will effectively take charge of the company. To inspire confidence, he must be independent, acting with integrity and possess the necessary expertise. He will be selected from a panel of practitioners to be operated by the Official Receiver (OR) and comprising solicitors and professional accountants. The OR may also approve other suitably qualified independent persons as provisional

supervisors.

13. The provisional supervisor will manage and control the company, acting as the agent of the company when exercising his powers. He may retain or dismiss directors of the company, make alternative arrangements for any creditor and exclude such creditor from the moratorium, and will be personally liable for any contract he enters into when performing his functions. He will be indemnified out of the assets of the company.

14. In response to the views from the professional bodies (see paragraph 6 above), we agree that the provisional supervisor should have the power to investigate voidable transactions made prior to the start of the corporate rescue procedure. The provisional supervisor will be required to report the outcome of such investigation to a meeting of creditors so as to help the creditors to reach an informed decision on whether to proceed with a voluntary arrangement or a creditor's voluntary winding up.

Provisional Supervision

15. Unless objected to by a major secured creditor of a company (in which case the provisional supervision would cease), the provisional supervisor would ascertain the financial position of the company and decide whether a proposal can be made for a voluntary arrangement. If so, he will call a meeting of creditors to consider it and upon the creditors' approval of the proposal, the provisional supervision will cease and the voluntary arrangement take effect immediately thereafter. If not, he will report it to the meeting of creditors which should resolve to terminate the provisional supervision and that the company be wound up as a creditors' voluntary winding up.

16. The original approach as recommended by the LRC was that a company had to notify its major secured creditor of the proposed corporate rescue. The latter had the right to object to the initiation of the procedure and upon receipt of such objection by the provisional supervisor, the provisional supervision would end. The LRC has not proposed to accord the same treatment to minor secured creditors, who will be bound by the terms of the voluntary arrangement that may eventually be drawn up at the end of the procedure.

17. We have received views from the professional bodies and trade organisations that this approach represents a major departure from the long established and respected secured lending practice, i.e. secured creditors, be

they large or small, cannot be forced to accept any “hair-cut” of debts without their consent. We are mindful of the impact of such approach on the existing secured lending practice, the lending institutions and the business community, and consider it necessary to modify the approach to provide that the rights of all secured creditors may not be affected by the voluntary arrangement except with their consent. If a proposal is not acceptable to a secured creditor (be he major or minor), he may choose to opt out of the voluntary arrangement and rely on his own security.

18. We have also modified the approach to provide that a member of a company who claims substantial prejudice may apply to the court for a determination on the resolution of the creditors on a proposal for a voluntary arrangement. Such modification aims to protect the interest of the member in view of the binding effect of the terms of the voluntary arrangement on the member.

Insolvent Trading

19. In relation to the introduction of a corporate rescue procedure and in order to encourage directors and senior management to act on insolvency earlier rather than later, they should be made personally liable for the debts of a company which traded while insolvent. This will encourage them to face the fact that a company was slipping into insolvency at an early date and to address the situation.

Outstanding Wages and Other Entitlements Owed to Employees who are Laid Off by a Company in Provisional Supervision

20. The treatment of outstanding wages and other entitlements owed to employees has been a sensitive subject. As mentioned in paragraph 6 above, the Bills Committee in considering the Companies (Amendment) Bill 2000 has suggested that the Administration should consult the LAB on its proposal to provide some flexibility to the requirement to settle all arrears due and owing by the company to its employees. Flexibility could be in the form of a deferral of payment or payment in lieu of cash (e.g. shares under a trade-in agreement) in respect of the wages and other entitlements accrued owing immediately prior to the commencement of the corporate rescue procedure.

21. In late 2000, we consulted the PWIF Board and the LAB on these forms of flexibility. While both bodies supported in principle the introduction of the corporate rescue procedure, they firmly objected to the

flexibility proposal. They held the view that such a proposal would erode the protection accorded to employees under the existing labour legislation, and alter fundamentally the nature and policy intent of the PWIF in that it would amount to using the PWIF to bail out companies in financial difficulties. They also pointed out that the proposal would have financial implications on the PWIF. The two bodies asked the Administration to adhere to the original proposal on settlement of arrears in wages as set out in the Companies (Amendment) Bill 2000. A summary of the outcome of our consultation with the two bodies is at Annex C.

22. We recognise that any statutory corporate rescue procedure must be workable, bearing in mind the needs of the company in difficulty, interests of creditors, and rights of employees. Having regard to the views of the PWIF Board and the LAB, we intend to adopt a pragmatic approach as originally designed, balancing the interests of all the relevant parties.

THE BILL

23. Clause 3 specifies the companies to which the Bill will apply. Clauses 4 and 5 empowers the OR to appoint a panel of professional accountants and solicitors eligible for appointment as provisional supervisors. The persons that may appoint a provisional supervisor are specified under clause 6.

24. The filing and notification requirements in respect of the notice of appointment of the provisional supervisor are set out in clauses 8 and 9. The notice has to include a 'consent to act' form duly signed by the provisional supervisor. The form will be prescribed by the OR who will require, amongst other matters, the level of remuneration of the provisional supervisor to be displayed prominently in the notice form for creditors to be so informed in the first instance. In addition, the notice will require the company to confirm that it has set aside sufficient money to settle the statutory liabilities owed to its former employees and any wages owed to its existing employees under the Employment Ordinance before the company goes into provisional supervision.

25. The effects of moratorium and the exemptions to it are set out in clause 11. The length, cessation and extension of the moratorium are governed by clauses 12 and 13. The duties and powers of the provisional supervisor are set out in Schedule 4. Powers of directors are to be suspended under clause 14 and the provisional supervisor will act as an

agent of the company.

26. Clauses 15 and 16 specify the liability of the provisional supervisor vis-à-vis contracts of goods and services and contracts of employment entered into before and after the rescue. Where the provisional supervisor accepts a pre-existing contract of employment, or enters into a new contract of employment, the wages and salaries thereby payable have priority over the provisional supervisor's remuneration. The provisional supervisor is indemnified out of the property of the company under Schedule 4 Part 4 for all debts for which he is liable.

27. Under Schedule 4 Part 5, the provisional supervisor is remunerated in accordance with a scale of fees approved by the OR. The court, on the application of the provisional supervisor, may vary the scale. Creditors may also object if they consider the fees to be excessive.

28. The provisional supervisor shall require specified persons to prepare a statement of affairs of the company as soon as practicable under clause 17. The procedures for the removal and resignation of the provisional supervisor are set out in clause 20.

29. The creation of "super" priority debt is in clause 18. Borrowings made by the company in provisional supervision will receive priority over all existing debts, with the exception of fixed charges. This is necessary because in all likelihood, a company under rescue would need to raise capital to fund its operations during the provisional supervision period.

30. Clause 19 sets out the procedures for major secured creditors of the company to decide whether or not the provisional supervisor may proceed to prepare the proposal. If the major secured refuses, the moratorium ceases and the provisional supervisor vacates his office. If the major secured creditor agrees to the drawing up of a proposal but the proposal is eventually rejected by the creditors, the company may either be wound up as a creditors' voluntary winding up, or if it was previously under court winding-up procedures, the stayed procedures would be re-activated.

31. The requirements and procedures for the creditors' meetings to consider the proposal by the provisional supervisor are in clauses 21 to 24. Clause 23 provides that a proposal approved by a meeting of creditors may not affect the right of a secured creditor of the company except with his consent. Where a proposal is approved by the creditors, a voluntary arrangement will follow and the procedures for such an arrangement are in

clauses 25 to 29. Clause 34 and Schedule 8 make consequential amendments, in particular to the Companies Ordinance.

32. Clause 8 of Schedule 8 adds new sections 295A to 295G to the Ordinance to implement the proposals on insolvent trading. Section 295B empowers the liquidator of a company to make an application to the court to seek declaration that a “responsible person”, i.e. a director or a member of senior management, is liable for insolvent trading. The grounds on which the court may declare a responsible person liable for insolvent trading are set out in new section 295C. New section 295E provides that where the court makes a declaration of insolvent trading in respect of a responsible person or former responsible person, it may order that person to pay compensation to the company.

PUBLIC CONSULTATION

33. The LRC Sub-Committee on Insolvency carried out a public consultation on the concept of corporate rescue in 1995. A consultation exercise on certain proposals of the LRC (in relation to the treatment of outstanding wages and other entitlements owed to employees) was conducted by Financial Services Bureau in 1998 with 26 major business/professional and employer/employee bodies. The consultation exercise and the results were reported on two occasions to the Legislative Council Panel on Financial Affairs in February and June 1999 respectively.

34. The Standing Committee on Company Law Reform (SCCLR) expressed support for the introduction of a statutory corporate rescue at one of its meetings in 1996. Subsequently, at the meeting on 14 December 1999, the SCCLR examined the draft provisions on corporate rescue and insolvent trading. Concern was expressed over a possible conflict of interest that might arise if a provisional supervisor is allowed to become the liquidator of the company should creditors resolve to wind up that company. However, we believe it makes commercial sense to leave the choice of liquidator to the creditors themselves if they consider that the provisional supervisor is the most appropriate person to become the liquidator of the company in the circumstances. A provisional supervisor turned liquidator would save time and money as he would by then have grasped a fair amount of knowledge of the affairs of the company to quickly proceed with the winding up.

35. We consulted the LAB and the PWIF Board in late 2000 on the

Bills Committee's suggestion that flexibility should be added to the trust account arrangement. The outcome of such consultation was reported to the Legislative Council Panel on Financial Affairs in February 2001.

BASIC LAW IMPLICATIONS

36. The Department of Justice advises that the Bill is consistent with those provisions of the Basic Law carrying no human rights implications.

HUMAN RIGHTS IMPLICATIONS

37. The Department of Justice advises that the Bill is consistent with the human rights provisions of the Basic Law.

BINDING EFFECT OF THE LEGISLATION

38. The Hong Kong Special Administrative Region Government will be bound by the moratorium when it is acting in its capacity as creditor of the company.

FINANCIAL AND STAFFING IMPLICATIONS

39. With the introduction of the new statutory corporate rescue procedure, the Official Receiver's Office will need to maintain a panel of provisional supervisors which may generate additional workload to the department. Any additional resources required will be absorbed by the OR through internal re-deployment and from within the global allocation of the Secretary for Financial Services. Other proposals in the Bill have no financial or staffing implications for Government.

ECONOMIC IMPLICATIONS

40. The corporate rescue procedure would help financially ailing but potentially viable business to survive as a going concern, in whole or in part. It would be beneficial to the company's shareholders and creditors who might in due course get a better return from the success of the rescue than from the outcome of a winding up. It would also be beneficial to the

company's employees as well as suppliers and contractors for that portion of employment and purchases that might be retained by the rescue. The procedure should be particularly helpful in reducing the stress to the economy when a greater number of companies with viable business for the longer term face more immediate, but probably relatively short term, financial difficulties in a cyclical economic downturn.

LEGISLATIVE TIMETABLE

41. The legislative timetable is as follows –

Publication in the Gazette	18 May 2001
First Reading and commencement of Second Reading debate	23 May 2001
Resumption of Second Reading debate, committee stage and Third Reading	to be notified

PUBLICITY

42. A press release will be issued on 17 May 2001 and a spokesman will be available to handle media enquiries.

ENQUIRIES

43. For enquiries, please call Mr L W TING, Assistant Secretary for Financial Services (Companies) at 2527 5543.

Financial Services Bureau
Ref: C2/1/12/1C(2001)IX

COMPANIES (CORPORATE RESCUE) BILL

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A BILL

To

Provide for companies in financial difficulty to be put under the control of a provisional supervisor for the purpose of the provisional supervisor preparing a proposal to creditors of the company for a voluntary arrangement in respect of the company; for the putting into effect of the voluntary arrangement if the proposal is accepted by the creditors; for the winding up of the company as a creditors' voluntary winding up if the proposal is rejected by the creditors; and to provide for matters incidental thereto or connected therewith.

Enacted by the Legislative Council.

PART 1

PRELIMINARY

1. Short title and commencement

(1) This Ordinance may be cited as the Companies (Corporate Rescue) Ordinance.

(2) This Ordinance shall come into operation on a day to be appointed by the Secretary for Financial Services by notice published in the Gazette.

2. Interpretation

(1) In this Ordinance, unless the context otherwise requires -

"costs" (訟費、費用) includes expenses;

"daily penalty" (按日罰款) means a penalty for each day on which an offence is continued after conviction therefor;

"former provisional supervisor" (前任臨時監管人), in relation to a company, means a person who was formerly a provisional supervisor of the company;

"former supervisor" (前任監管人), in relation to a company, means a person who was formerly the supervisor of a voluntary arrangement in respect of the company;

"High Court Registry" (高等法院登記處) means any Registry of the High Court; "Hong Kong Society of Accountants" (香港會計師公會) means the Hong Kong Society of Accountants incorporated by section 3 of the Professional Accountants Ordinance (Cap. 50);

"moratorium" (暫止期), in relation to a company, means the period during which the provisions of section 11(2) shall apply to and in relation to the company by virtue of section 11(1);

"notice" (通知、公告) includes constructive notice;

"panel" (備選團) means the panel appointed under section 4(1);

"practicable" (切實可行) means reasonably practicable;

"professional accountant" (專業會計師) means a professional accountant within the meaning of section 2 of the Professional Accountants Ordinance (Cap. 50);

"property" (財產) includes money, goods, things in action, land and every description of property wherever situated and also obligations and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property;

"proposal" (方案) means a proposal referred to in section 7(1);

"provisional supervisor" (臨時監管人), in relation to a company, means the qualified person appointed under section 6(1) or 20(4)(d) to be the provisional supervisor of the company;

"published in the prescribed manner" (以訂明方式公布), in relation to a notice under this Ordinance, means published in the manner specified in Schedule 1 in relation to the notice;

"qualified person" (合資格人士), in relation to a company, means a person who may be appointed to be the provisional supervisor of the company by virtue of section 5;

"relevant creditor" (有關債權人), in relation to a company to which section 11(2) applies -

- (a) subject to paragraph (b), means a creditor of the company who is affected by the moratorium in his capacity as such a creditor;
- (b) does not include a creditor of the company to the extent that the debts and liabilities owed by the company to the creditor are to be satisfied by a trust account established by the company and mentioned in Schedule 2;

"relevant date" (有關日期), in relation to a company, means the date on which the last document required to be filed under section 8 in respect of the company is filed;

"relevant meeting of creditors" (有關債權人會議), in relation to a company, means a meeting of relevant creditors of the company called under section 21(1) by the provisional supervisor of the company, and includes any adjournment thereof;

"relevant purpose" (有關目的) means a purpose specified in section 7(1);

"solicitor" (律師) means a solicitor within the meaning of section 2(1) of the Legal Practitioners Ordinance (Cap. 159);

"specified" (指明), in relation to a form, means specified under section 30 (or, if no such form is so specified, in such form as is appropriate for the provision of this Ordinance to which the form relates);

"supervisor" (監管人), in relation to a voluntary arrangement in respect of a company, means the person appointed under that arrangement to be the supervisor thereof;

"voluntary arrangement" (自願償債安排), in relation to a company, means an arrangement set out in writing and providing for -

- (a) a composition in satisfaction of the company's debts; or
- (b) a scheme of arrangement of the company's affairs;

"working day" (工作天) means any day other than -

- (a) a public holiday; or
- (b) a black rainstorm warning day or a gale warning day within the meaning of section 71(2) of the Interpretation and General Clauses Ordinance (Cap. 1).

(2) It is hereby declared that the power under section 6(1) or 20(4)(d) to appoint a qualified person as the provisional supervisor of a company may be exercised in such a way as to appoint 2 or more qualified persons to be the provisional supervisor of the company and, in any such case, the provisions of this Ordinance shall be read and have effect with such modifications as are necessary to take into account such an appointment.

(3) Subsection (2) shall, with all necessary modifications, apply to the appointment of the supervisor of a voluntary arrangement in respect of a company as it applies to the appointment of the provisional supervisor of a company.

(4) A notice published in the prescribed manner shall constitute constructive notice to all the creditors of the company to which the notice relates.

(5) Section 2 of the Companies Ordinance (Cap. 32) shall apply to and in relation to the interpretation of this Ordinance as it applies to and in relation to the interpretation of that Ordinance.

3. Application

(1) This Ordinance shall -

- (a) subject to paragraph (b), apply to a company which -
 - (i) is incorporated under Part I of the Companies Ordinance (Cap. 32); or

- (ii) is an oversea company;
- (b) subject to subsection (2), not apply to a company which -
 - (i) is an authorized institution within the meaning of the Banking Ordinance (Cap. 155);
 - (ii) is an authorized insurer within the meaning of the Insurance Companies Ordinance (Cap. 41);
 - (iii) is a clearing house, Exchange Company or registered person within the meaning of section 2(1) of the Securities and Futures Commission Ordinance (Cap. 24);
 - (iv) is a recognized exchange controller within the meaning of section 2(1) of the Exchanges and Clearing Houses (Merger) Ordinance (Cap. 555); or
 - (v) is a licensed leveraged foreign exchange trader within the meaning of section 2(1) of the Leveraged Foreign Exchange Trading Ordinance (Cap. 451).

(2) Without prejudice to the operation of section 11(3), it is hereby declared that this Ordinance binds the Government in its capacity, if any, as a creditor of a company.

PART 2

APPOINTMENT OF PROVISIONAL SUPERVISOR

4. Appointment of panel, etc.

(1) The Official Receiver shall appoint to be a member of a panel any person who -

- (a) is a professional accountant or solicitor;

- (b) advises the Official Receiver in writing that he wishes to be a member of the panel; and
- (c) satisfies the Official Receiver that he complies with such requirements as are specified by the Official Receiver, by notice published in the Gazette, for membership of the panel.

(2) Without prejudice to the operation of section 20 (including section 20(2)), a member of the panel may resign at any time by notice in writing given to the Official Receiver.

(3) The Official Receiver shall revoke the appointment of a member of the panel who -

- (a) ceases to be a professional accountant or solicitor;
- (b) is the subject of a bankruptcy order;
- (c) is the subject of a disqualification order under Part IVA of the Companies Ordinance (Cap. 32); or
- (d) is a patient within the meaning of section 2(1) of the Mental Health Ordinance (Cap. 136).

(4) Any professional accountant or solicitor aggrieved by a decision of the Official Receiver to refuse to appoint him to be a member of the panel may appeal to the Administrative Appeals Board against the decision.

(5) It is hereby declared that a notice published under subsection (1)(c) is not subsidiary legislation.

5. Persons qualified to be provisional supervisor

No person shall be appointed to be the provisional supervisor of a company -

- (a) except -
 - (i) a member of the panel; or

- (ii) a person in respect of whom the Official Receiver has stated in writing that he is satisfied that the person -
 - (A) has particular skills which warrant him being appointed to be the provisional supervisor of the company; and
 - (B) is a fit and proper person to be so appointed; and
- (b) unless he provides such security, and in such form, as is prescribed in regulations made under section 31.

6. Persons who may appoint provisional supervisor

(1) Subject to sections 7 and 8, the persons who may appoint a qualified person to be the provisional supervisor of the company for the purpose of the provisional supervisor examining whether a proposal can be made to the creditors of the company for a voluntary arrangement in respect of the company and, if so, making the proposal are -

- (a) before the commencement of a winding up -
 - (i) the directors of the company by means of a resolution passed by the majority of them for the purpose; or
 - (ii) the members of the company by means of an ordinary resolution passed at a meeting of the company convened for the purpose;
- (b) a provisional liquidator of the company who has the approval of the court to do so; or
- (c) the liquidator of the company who has the approval of the court to do so.

(2) It is hereby declared that the appointment of a qualified person to be the provisional supervisor of the company may be made -

- (a) whether or not the company is able to pay its debts;
- (b) notwithstanding that the qualified person is -
 - (i) the provisional liquidator or liquidator of the company; or
 - (ii) a partner of that provisional liquidator or liquidator.

(3) In subsection (2), "partner" (合夥人), in relation to a provisional liquidator or liquidator, includes a person recognized in writing by the Official Receiver as being equivalent to a partner of the provisional liquidator or liquidator, as the case may be.

7. Purposes of proposal, etc.

(1) The purpose of the appointment of a qualified person to be the provisional supervisor of the company is with a view to the provisional supervisor making a proposal which would achieve one or more of the following purposes -

- (a) a more advantageous realization of the company's property than would be effected on a winding up of the company;
- (b) the survival of the company, and the whole or any part of its undertaking, as a going concern;
- (c) the more advantageous satisfaction, in whole or in part, of the debts and other liabilities of the company.

(2) The proposal, if any, made by the provisional supervisor of the company shall -

- (a) specify which of the purposes referred to in subsection (1) is achievable; and

- (b) provide a short explanation as to why, in the provisional supervisor's opinion, a voluntary arrangement is desirable.

(3) The following matters shall amongst other terms of the voluntary arrangement be stated or otherwise dealt with in the proposal -

- (a) the supervisor of the voluntary arrangement;
- (b) the property of the company that is to be available to pay creditors' claims;
- (c) to what extent the company is to be released from its debts and other liabilities;
- (d) the circumstances in which the voluntary arrangement terminates;
- (e) the proposed duration of the voluntary arrangement;
- (f) the rate proposed to be paid to the supervisor by way of remuneration and, if practicable, an estimate of the total amount to be so paid;
- (g) the duties, powers and liabilities of the supervisor;
- (h) the removal and resignation of the supervisor and his replacement in the event of his removal or resignation, or of his death, mental incapacity or ineligibility to act as supervisor;
- (i) the order in which proceeds of realizing the property referred to in paragraph (b) are to be distributed among relevant creditors of the company.

8. Filing of documents

The appointment of a qualified person to be the provisional supervisor of the company shall not come into effect unless and until the documents specified in Schedule 2 are filed with the Official Receiver, the Registrar and the High Court Registry.

9. Notification

The provisional supervisor of the company shall, as soon as is practicable after the relevant date, cause a notice in the specified form and which complies with the requirements of Schedule 3 to be published in the prescribed manner.

PART 3

DUTIES AND POWERS, ETC. OF PROVISIONAL SUPERVISOR

10. Duties and powers, etc. of provisional supervisor

(1) The provisional supervisor of the company shall have, and shall discharge, in respect of the company, all the duties specified in Part 1 of Schedule 4.

(2) The provisional supervisor of the company shall have, and may exercise, in respect of the company, all the powers specified in Part 2 of Schedule 4.

(3) The provisional supervisor of the company shall have, and may exercise, the power of delegation specified in Part 3 of Schedule 4.

(4) The provisional supervisor of the company shall be entitled to be indemnified as specified in Part 4 of Schedule 4.

(5) The provisional supervisor of the company shall be entitled to be remunerated as specified in Part 5 of Schedule 4.

(6) The provisions of Part 6 of Schedule 4 shall be applicable to and in relation to the provisional supervisor of the company.

(7) The provisional supervisor of the company may apply to the court for directions in relation to any particular matter arising in connection with the discharge of his duties or the exercise of his powers.

PART 4

MORATORIUM

11. Moratorium

(1) Subject to section 12, the provisions of subsection (2) shall apply to and in relation to the company with effect on and after the relevant date.

(2) Subject to subsection (3), during the moratorium and notwithstanding any other law (including any other provision of this Ordinance) -

- (a) no application for the winding up of the company by the court may be commenced or continued;
- (b) no resolution may be passed for the winding up of the company except at a relevant meeting of creditors;
- (c) no receiver of the property of the company may be appointed or, if such a receiver has already been appointed, the receiver shall not exercise any of the powers of his office;
- (d) except with the consent of the provisional supervisor of the company, no steps may be taken to enforce or continue to enforce any security over the company's property or to repossess goods in the company's possession;
- (e) except with the consent of the provisional supervisor of the company, no proceedings (including proceedings for winding up but excluding any criminal proceedings), execution, attachment or other legal process may be commenced or continued against the company or its property, no distress may be levied (or, if distress has already been levied, no sale thereunder may be effected) and no right of forfeiture or entry or re-entry may be exercised against the company's property;

- (f) no set-off may be allowed to any creditor of the company except with the consent of the provisional supervisor of the company or in relation to a contract or other agreement referred to in subsection (3)(d).
- (3) Subsection (2) shall not apply to or in relation to -
- (a) any debt or other liability of the company incurred on or after the relevant date (including any creditor in respect thereof);
 - (b) any property held by the company as trustee;
 - (c) any resumptions by the Government pursuant to a Government lease or otherwise;
 - (d) a contract or other agreement specified in Schedule 5;
 - (e) any proceedings or other legal process in relation to the company arising from the performance of any function or the exercise of any power under section 29A, 30, 31, 33, 37A or 45 of the Securities and Futures Commission Ordinance (Cap. 24);
 - (f) an inquiry or other proceedings under the Securities (Insider Dealing) Ordinance (Cap. 395);
 - (g) a petition under section 168A of the Companies Ordinance (Cap. 32).
- (4) Where -
- (a) a matter (howsoever described, and including the doing of any act and the taking of any step) may not proceed by virtue of the operation of subsection (2)(and whether or not the matter may not proceed on any other ground); and
 - (b) a period is fixed by or under any law or otherwise for the matter to proceed,

then, and notwithstanding howsoever that period is fixed, that period shall not run during the time that that matter may not proceed by virtue of the operation of that subsection.

(5) Where a contract or other agreement referred to in subsection (3)(d) entered into by the company before the relevant date is terminated on or after that date -

- (a) the setting-off of obligations between the company and the other parties to the contract or agreement, in accordance with its provisions, shall be permitted; and
- (b) if net termination values determined in accordance with the contract or agreement are owed by the company to another party to the contract or agreement, that other party shall be deemed for the purpose of this Ordinance and, where applicable, any subsequent winding up of the company to be a creditor of the company with a claim provable in respect of those net termination values.

(6) Where the provisional supervisor of the company is appointed, then, and notwithstanding any other law (including any other provision of this Ordinance) but subject to subsection (8) and sections 19(2)(b) and 22(6), the appointment of the provisional liquidator or liquidator, if any, of the company in force immediately before the relevant date shall terminate, and the winding up proceedings of the company shall be stayed, with effect on the relevant date.

(7) Subsection (6) shall not of itself operate to prevent a person whose appointment as the provisional liquidator or liquidator, if any, of the company has been terminated by that subsection from being appointed as the supervisor of the voluntary arrangement in respect of the company.

(8) It is hereby declared that -

- (a) the operation of this section (including subsection (6)) in relation to a company shall not of itself terminate any proceedings for the winding up of the company

commenced before the relevant date and, accordingly, a resolution referred to in section 22(1)(a)(ii), (2)(b) or (4)(b) shall in effect revive such proceedings;

- (b) any fees, costs and charges owing to or incurred by the provisional liquidator or liquidator, if any, whose appointment is terminated by virtue of subsection (6) shall be charged on and paid out of the property of the company (except any such property subject to a fixed charge) in priority to any qualifying liabilities under section 16.

(9) In this section -

"net termination value" (淨終止值), in relation to a contract or agreement, means the net amount obtained after setting-off the mutual obligations between the parties to the contract or agreement in accordance with its provisions.

12. Cessation of moratorium

(1) Subject to subsection (2) and sections 13(3) and 19(2) and any order of the court under the provisions of Schedule 7, the moratorium shall cease upon the expiration of 30 days immediately following the relevant date unless -

- (a) the moratorium has been extended under section 13(2); or
- (b) a resolution to extend the moratorium has been passed under section 22 at a relevant meeting of creditors.

(2) The moratorium shall cease forthwith -

- (a) on the day an order or appointment is made under section 168A(2)(b), (ba) or (c) of the Companies Ordinance (Cap. 32) in respect of the company;
- (b) on the day an order or appointment is made under section 37A(2)(b), (c) or (d), or a winding up order is made in consequence of a petition under section 45(1), of the

Securities and Futures Commission Ordinance (Cap. 24) in respect of the company;

- (c) where section 20(4)(a) or (b) is applicable, if there is no provisional supervisor of the company upon the expiration of -
 - (i) subject to subparagraph (ii), 14 days immediately following the event specified in that section;
 - (ii) such longer period, not exceeding 30 days after such event, as the court may specify; or
- (d) on the day a resolution under section 22(1)(a)(ii), (2)(b) or (4)(b) is passed in relation to the company.

(3) Without prejudice to the operation of subsection (2) or section 19(2) or any order of the court under the provisions of Schedule 7, the moratorium shall cease forthwith where a resolution is passed to approve the proposal, or a resolution is passed or deemed to be passed to wind up the company, or a resolution is passed to reject the proposal concerned, at a relevant meeting of creditors.

- (4) The moratorium shall cease to apply -
 - (a) to 1 or more creditors of the company who have been excluded from the proposal by the provisional supervisor of the company at any time prior to the first relevant meeting of creditors if, but only if, the provisional supervisor -
 - (i) has made alternative arrangements in writing to satisfy their claims (whether in whole or in part) against the company; and
 - (ii) has filed a notice in the specified form of such exclusion with the Official Receiver, the Registrar and the High Court Registry; and

- (b) to any creditor exempted from section 11(2) pursuant to an order under section 13(4).

13. Extension of moratorium, etc.

(1) Where the provisional supervisor of the company is unable to complete the proposal before the expiration of the moratorium (including the moratorium as extended under this section), then he may, before that expiration, make an application to the court for an extension of the moratorium.

(2) Subject to subsection (5), the court may determine an application made under subsection (1) by granting an extension of the moratorium for a further period if, but only if, it is satisfied that -

- (a) the provisional supervisor of the company is and has been acting in good faith and with due diligence in discharging his duties and exercising his powers as the provisional supervisor;
- (b) the provisional supervisor of the company will be likely to complete the proposal within the period of the extension; and
- (c) the creditors as a whole of the company would not be materially prejudiced by the extension.

(3) Where an application has been made under subsection (1) in respect of the company, the moratorium shall not cease before the determination of the application.

(4) Without prejudice to the operation of the other provisions of this section, any creditor affected by the moratorium may make an application to the court (a copy of which shall be served on the provisional supervisor of the company) to be exempted from the application of section 11(2) on the ground that the moratorium is causing, or will cause, the creditor significant financial hardship and, accordingly, if the court is satisfied that the moratorium is causing, or will cause, the creditor significant financial hardship, it may by order exempt

the creditor from the application of section 11(2) or make such other order as the court thinks fit in all the circumstances of the case.

(5) Subject to any order of the court under the provisions of Schedule 7, the court shall not under subsection (2) extend the moratorium for any period beyond the period of 6 months immediately following the relevant date in respect of the company.

14. Effect of moratorium on directors of company, etc.

(1) Subject to section 20(4)(c), during the moratorium and notwithstanding any other law (including any other provision of this Ordinance or the Companies Ordinance (Cap. 32)) -

- (a) a director of the company shall not discharge a duty or exercise a power imposed or conferred on him in his capacity as such a director;
- (b) the provisional supervisor of the company shall discharge such a duty and may exercise such a power.

(2) The provisional supervisor of the company shall be deemed to act as the company's agent where the provisional supervisor discharges a duty or exercises a power imposed or conferred on the provisional supervisor under subsection (1)(b).

(3) Where a director of the company deals with a person and thereby contravenes subsection (1)(a), then, and notwithstanding that contravention, the director, the provisional supervisor of the company and the company are bound by that dealing if, but only if, that person -

- (a) acted in good faith and for good consideration in relation to that dealing; and
- (b) changed his position or acted to his detriment based on that dealing.

15. Effect of moratorium on certain contracts

(1) Subject to subsection (2) and section 16 and Part 4 of Schedule 4, the provisional supervisor of the company shall not be liable for a contract entered into, or a debt or other liability incurred, by the company before the relevant date.

(2) The acceptance by the provisional supervisor of the company of any goods or services under a contract referred to in subsection (1) shall not prejudice the operation of that subsection if, but only if, the provisional supervisor has, before that acceptance, advised, in writing, the person who under that contract provides those goods or services, as the case may be, that the provisional supervisor will not be liable under that contract.

(3) It is hereby declared that a contract referred to in subsection (1), and notwithstanding the wording of the contract, shall not be determined, or be deemed to be determined, by reason only of the operation of that subsection or of section 11(2).

16. Liability for certain contracts of employment

(1) The provisional supervisor of the company shall be personally liable for the wages, salaries and other entitlements -

(a) under a contract of employment of an employee of the company existing immediately before the relevant date if, but only if, within 14 days immediately following that date, the provisional supervisor accepts in writing that contract;

(b) under a contract of employment entered into by the provisional supervisors on or after the relevant date.

(2) Where a contract of employment referred to in subsection (1)(a) -

(a) has not been accepted under that subsection, or terminated, within the period specified in that subsection, then it shall

be deemed to be terminated by the company immediately upon the expiration of that period;

- (b) is terminated before the expiration of the period referred to in paragraph (a), or deemed to be terminated under that paragraph, then the wages, salaries and other entitlements under the contract shall be -
 - (i) deemed to be liabilities of the company incurred on or after the relevant date; and
 - (ii) charged on and paid out of the property of the company by the provisional supervisor of the company in the same priority as qualifying liabilities under subsection (3).

(3) Any sums payable under subsection (1) in respect of liabilities shall, to the extent that the liabilities are qualifying liabilities, be charged on and paid out of the property of the company (except any such property subject to a fixed charge) in priority to the indemnity given under Part 4 of Schedule 4.

(4) For the purposes of subsection (3), a liability under a contract of employment is a qualifying liability if -

- (a) it is a liability to pay a sum by way of wages or salary or contribution to -
 - (i) an occupational retirement scheme within the meaning of the Occupational Retirement Schemes Ordinance (Cap. 426); or
 - (ii) a provident fund scheme within the meaning of the Mandatory Provident Fund Schemes Ordinance (Cap. 485); and
- (b) it is in respect of services rendered wholly or partly after the relevant date.

(5) For the purposes of subsection (4), wages or salary payable in respect of a period of holiday or absence from work through sickness or other

good cause are deemed to be wages or salary, as the case may be, in respect of services rendered in that period.

(6) In this section, "contract of employment" (僱傭合約) means a contract of employment within the meaning of section 2(1) of the Employment Ordinance (Cap. 57).

(7) For the avoidance of doubt, it is hereby declared that the liability under subsection (1) of the provisional supervisor of the company does not include any debts and liabilities mentioned in paragraph (b) of the definition of "relevant creditor".

17. Statement of affairs, etc.

(1) The provisional supervisor of the company shall, as soon as practicable after the relevant date, by notice in the specified form given to a specified person, require the person to provide the provisional supervisor with a statement of the affairs of the company -

- (a) disclosing -
 - (i) particulars of its property, debts and other liabilities;
 - (ii) the names and addresses of its creditors;
 - (iii) details of any securities held by its creditors, including the dates when the securities were respectively given; and
 - (iv) such further or other information as the provisional supervisor may reasonably require in the notice; and
- (b) not later than 7 days after giving of the notice or such further period, if any, permitted in writing by the provisional supervisor.

(2) The provisional supervisor of the company may, in a notice under subsection (1) given to a specified person or in another notice in the specified form given to that or another specified person, require the person to -

- (a) deliver to the provisional supervisor all documents and records relating to the company in that person's custody or under his control;
- (b) inform the provisional supervisor as to the whereabouts of any such documents and records within the knowledge of that person;
- (c) attend on the provisional supervisor at a place in Hong Kong and at a reasonable time; and
- (d) provide the provisional supervisor with such information about the business, property, affairs or financial circumstances of the company as the provisional supervisor may reasonably request in the notice or at a meeting arising from a requirement referred to in paragraph (c).

(3) Subject to subsection (4), a specified person, the subject of a requirement under subsection (1) or (2), shall be entitled to be paid all reasonable costs incurred or to be incurred in complying with the requirement.

(4) Where a specified person is the subject of a requirement under subsection (1) or (2) -

- (a) the person shall, before incurring any costs mentioned in subsection (3) -
 - (i) apply to the provisional supervisor of the company who made the requirement for his approval of the costs to be incurred; and
 - (ii) submit to the provisional supervisor a statement in writing of the estimated costs to be incurred;

- (b) a person shall not be allowed out of the assets of the company any such costs unless they have been approved by the provisional supervisor of the company before being incurred.

(5) A specified person who, without reasonable excuse, fails to comply with a requirement under subsection (1) or (2) commits an offence and is liable on conviction to a fine at level 5 and, in the case of a continuing offence, to a daily penalty of \$300.

(6) In this section, "specified person" (指明人士), in relation to a company, means 1 or more of the following -

- (a) an officer or employee of the company;
- (b) a person who has taken part in the formation, promotion, administration or management of the company within 1 year before the relevant date;
- (c) a person who -
 - (i) has been an officer or employee of the company within 1 year before the relevant date; and
 - (ii) is, in the reasonable opinion of the provisional supervisor of the company, capable of complying with a requirement under subsection (1) or (2);
- (d) a former provisional supervisor of the company.

18. Priority of funds provided as operating capital during moratorium

(1) Notwithstanding any other law (including any other provision of this Ordinance except subsections (2) and (3) and sections 11 and 16 and Part 4 of Schedule 4), relevant funds shall, in relation to the voluntary arrangement in respect of the company or the winding up of the company, have priority over the debts of the creditors of the company, whether or not those debts are preferential or secured or otherwise.

(2) Subsection (1) shall not apply to a debt of a creditor of the company where the debt is secured by a charge which -

- (a) is a fixed charge;
- (b) was at the time of its creation a fixed charge; and
- (c) was created before the relevant date.

(3) No person shall use relevant funds to discharge, whether in whole or in part, any liability of the company -

- (a) to any person who provided any part of those funds; and
- (b) existing immediately before the relevant date.

(4) A relevant creditor shall be given an opportunity to provide relevant funds to the company before a person (whether or not a creditor of the company) who is not a relevant creditor.

(5) The provisional supervisor of the company shall give a relevant creditor an opportunity referred to in subsection (4) by giving the creditor a notice -

- (a) containing a statement to the effect that relevant creditors are invited to contribute funds as operating capital for the company; and
- (b) specifying the total amount the provisional supervisor is seeking as the minimum operating capital required.

(6) In this section -

"relevant funds" (有關資金), in relation to a company, means funds -

- (a) provided -
 - (i) during the moratorium;
 - (ii) to the company; and
 - (iii) as operating capital for the company; and
- (b) the total amount of which is not less than the amount specified in the notice under subsection (5) as being the minimum operating capital required.

19. Right of major secured creditor to decide whether provisional supervisor proceeds with proposal

(1) The provisional supervisor of the company shall, not later than 3 working days (excluding Saturdays) after the relevant date, give a notice in the specified form ("1st notice") to each major secured creditor, if any, of the company -

- (a) containing a statement to the effect that he has been appointed to be the provisional supervisor of the company for the purposes of examining whether a proposal can be made to the creditors of the company for a voluntary arrangement in respect of the company and, if so, making the proposal;
- (b) requiring the major secured creditor to -
 - (i) decide in the notice in the specified form ("2nd notice") attached to the 1st notice whether or not the major secured creditor agrees with the provisional supervisor proceeding to prepare the proposal; and
 - (ii) give the 2nd notice to the provisional supervisor not later than 3 working days after the major secured creditor receives the 1st notice or 7 days after the relevant date, whichever is the earlier; and
- (c) to which is attached a copy of this section and an address stated to be the address at which the 2nd notice may be received.

(2) Where a major secured creditor decides that he does not agree with the provisional supervisor of the company proceeding to prepare the proposal, then -

- (a) the moratorium shall cease immediately the provisional supervisor receives the 2nd notice concerned at the address referred to in subsection (1)(c);
 - (b) if section 11(6) terminated the appointment of a provisional liquidator or liquidator, if any, of the company and stayed the winding up proceedings of the company, that section shall be deemed never to have so terminated that appointment and stayed those proceedings;
 - (c) the provisional supervisor shall, as soon as practicable after receipt of that notice, cause a notice in the specified form of the cessation of the moratorium to be -
 - (i) filed with the Official Receiver, the Registrar and the High Court Registry; and
 - (ii) published in the prescribed manner; and
 - (d) the provisional supervisor shall vacate his office as soon as practicable.
- (3) Where a major secured creditor -
- (a) decides that he does not agree with the provisional supervisor of the company proceeding to prepare the proposal but fails to give the provisional supervisor the 2nd notice concerned not later than 3 working days after the major secured creditor receives the 1st notice concerned or 7 days after the relevant date, whichever is the earlier; or
 - (b) decides that he agrees with the provisional supervisor of the company proceeding to prepare the proposal,

then, unless subsection (2) applies in the case of any other major secured creditor of the company -

- (c) the provisional supervisor may proceed to prepare the proposal;

- (d) the major secured creditor shall be subject to the provisions of this Ordinance in like manner as any other creditor of the company is so subject.

(4) Any charge on the undertaking or property of the company created at any time within the period of 12 months immediately preceding the relevant date shall, unless it is proved that the company was solvent immediately after the creation of the charge, be invalid for the purposes of this Ordinance except for -

- (a) the amount of any cash paid to the company at the time of or subsequent to the creation of, and in consideration for, the charge; and
- (b) interest on that amount at the rate specified in the charge, or at the rate of 12% per annum, whichever is the less.

(5) In this section, "major secured creditor" (主要有保證債權人), in relation to a company, means -

- (a) the holder of a charge, whether fixed or otherwise, over the whole or substantially the whole of the company's property; or
- (b) the holder of 2 or more charges, whether fixed or otherwise, on the company's property where the property subject to those charges constitutes the whole or substantially the whole of the company's property.

PART 5

REMOVAL AND RESIGNATION OF PROVISIONAL SUPERVISOR

20. Removal and resignation of provisional supervisor

- (1) The court may -

- (a) upon application made to it by a relevant creditor who has the agreement in writing to do so of not less than 50% in value of all relevant creditors (including the first-mentioned relevant creditor), order the termination of the appointment of the provisional supervisor of the company for cause shown;
- (b) in the case of such an application which is refused, order the person who made the application to pay the costs of any other person appearing or represented at the hearing of the application.

(2) The provisional supervisor of the company may only resign his office with the leave of the court.

(3) The court shall not grant the leave referred to in subsection (2) unless it is satisfied that -

- (a) the circumstances are exceptional;
- (b) for the provisional supervisor of the company to continue in office would cause severe personal hardship to him; and
- (c) another qualified person has consented to be appointed to be the provisional supervisor of the company.

(4) Where -

- (a) the court makes an order under subsection (1)(a), or grants the leave referred to in subsection (2), in respect of the provisional supervisor of the company; or
- (b) the provisional supervisor of the company -
 - (i) dies; or
 - (ii) ceases to be a qualified person,

then -

- (c) section 6 shall apply in relation to the appointment of a qualified person to be the next provisional supervisor of the company (in which case section 14(1)(a) shall not

apply in relation to section 6) unless the court has stated that section 6 shall not apply -

- (i) where paragraph (a) applies, in the order under that paragraph;
- (ii) where paragraph (b) applies, upon application made to it by a relevant creditor or the Official Receiver;
- (d) if the court has stated that section 6 shall not apply, the court shall appoint a qualified person to be the next provisional supervisor of the company if the qualified person has consented to the appointment (but the provisions of section 8 shall not apply in relation to any such appointment).

(5) Where subsection (4)(c) or (d) is applicable, the appointment of a qualified person to be the next provisional supervisor of the company shall not come into effect unless and until there is filed with the Official Receiver, the Registrar and the High Court Registry a notice of the consent of the qualified person to the appointment -

- (a) in the specified form; and
- (b) signed by the qualified person.

(6) The provisional supervisor of the company who has become such provisional supervisor by virtue of the operation of subsection (4)(c) or (d) shall, as soon as practicable, cause a notice in the specified form of his appointment to be published in the prescribed manner.

(7) Subject to subsection (8), upon the appointment of a qualified person as the next provisional supervisor of the company taking effect in accordance with subsection (5), the immediately preceding provisional supervisor of the company shall thereupon cease to be the provisional supervisor.

(8) The fact that a person has ceased to be the provisional supervisor of the company by virtue of the operation of this section shall not affect that

person's liability for any act or omission done, caused, permitted or made prior to his ceasing to be the provisional supervisor.

(9) When the moratorium comes to an end under section 12(2)(c), the persons referred to in section 6 who appointed the original provisional supervisor of the company shall, as soon as practicable after the cessation of the moratorium, cause a notice of the cessation in the specified form to be published in the prescribed manner.

(10) The provisional supervisor or former provisional supervisor of the company shall, if the company goes into liquidation after the cessation of the moratorium, pass over all documents and disclose all information -

- (a) obtained by him in his capacity as the provisional supervisor; and
- (b) to the liquidator of the company.

(11) Where in the winding up of a company it appears to the liquidator that the former provisional supervisor of the company was in breach of any of his duties under this Ordinance -

- (a) the liquidator shall prepare a report on the breach;
- (b) where the liquidator is not the Official Receiver, the liquidator shall forward a copy of the report to the Official Receiver; and
- (c) the Official Receiver may forward a copy of the report to the Hong Kong Society of Accountants or The Law Society of Hong Kong if the former provisional supervisor is or was a member of either Society.

PART 6

RELEVANT MEETINGS OF CREDITORS

21. Requirements for relevant meetings of creditors

(1) The provisional supervisor of the company shall call a meeting of relevant creditors of the company where he is satisfied that -

- (a) he will be able to complete the proposal before the expiration of the moratorium (including the moratorium as extended under section 13);
- (b) he will be able to complete the proposal but not before the expiration of 6 months immediately following the relevant date; or
- (c) none of the relevant purposes can be achieved.

(2) Where the date has been set for a relevant meeting of creditors (other than an adjournment thereof), the provisional supervisor of the company shall prepare a report to creditors on the company and shall -

- (a) not less than 7 days before that date, cause a notice in the specified form which complies with the requirements of Part 1 of Schedule 6 to be published in the prescribed manner;
- (b) give a notice in the specified form which complies with the requirements of Part 2 of Schedule 6 to each relevant creditor of the company whose name and address -
 - (i) appears in the statement of affairs of the company provided under section 17 to the provisional supervisor;
 - (ii) is otherwise known to the provisional supervisor.

(3) At any adjournment of a relevant meeting of creditors to which subsection (1)(a) or (b) applies, the provisional supervisor of the company shall -

- (a) not less than 5 days before the date of the meeting, cause a notice in the specified form to be published in the prescribed manner specifying the date, time and place of the meeting;
- (b) give a notice in the specified form which complies with the requirements of Part 3 of Schedule 6 to each relevant creditor referred to in subsection (2)(b).

(4) The chairman of the relevant meeting of creditors concerned shall cause a copy of each resolution passed or proposal for a resolution rejected at the meeting, certified by the chairman to be a true copy of such resolution or proposal, to be filed with the Official Receiver, the Registrar and the High Court Registry.

(5) In this section and Schedule 6 -
"report to creditors" (致債權人報告書), in relation to a company, means a report in the specified form concerning -

- (a) the business, property, affairs, financial circumstances and prospects of the company;
- (b) the result of the investigation of the provisional supervisor of the company on any possible claim that may be taken by the liquidator of the company under any of sections 264B, 266 to 266B, 275, 276 or 295A to 295G of the Companies Ordinance (Cap. 32) if the company is wound up as a creditors' voluntary winding up on the relevant date.

22. Resolutions of relevant meetings of creditors, etc.

- (1) At a relevant meeting of creditors to which section 21(1)(a) is applicable -
- (a) the meeting shall resolve -
 - (i) to approve the proposal (whether with or without modifications); or
 - (ii) the following -
 - (A) to reject the proposal;
 - (B) where the provisional supervisor of the company was appointed by virtue of section 6(1)(a), that the company be wound up as a creditors' voluntary winding up; and
 - (C) to appoint a liquidator at the meeting, and notwithstanding any other law (including any other provision of this Ordinance);
 - (b) no modification to the proposal may be made unless the provisional supervisor consents to the modification; and
 - (c) the proposal shall be deemed to be approved by the creditors when the resolution approving the proposal (whether with or without modifications) is passed.
- (2) At a relevant meeting of creditors to which section 21(1)(b) is applicable, the meeting shall resolve -
- (a) to extend the moratorium for such period and on such terms as the meeting thinks fit (except that the extension shall not commence before the period of 6 months immediately following the relevant date); or
 - (b) not to extend the moratorium and -

- (i) where the provisional supervisor of the company was appointed by virtue of section 6(1)(a), that the company be wound up as a creditors' voluntary winding up; and
- (ii) to appoint a liquidator at the meeting, and notwithstanding any other law (including any other provision of this Ordinance).

(3) Terms imposed under subsection (2)(a) on an extension of the moratorium may require the provisional supervisor of the company to call a subsequent meeting of creditors to review the extension from time to time.

(4) At a relevant meeting of creditors to which section 21(1)(c) is applicable -

- (a) for any resolution to pass there must be in excess of 50% in value of the relevant creditors present in person or by proxy and voting on the resolution;
- (b) the meeting shall resolve -
 - (i) where the provisional supervisor of the company was appointed by virtue of section 6(1)(a), that the company be wound up as a creditors' voluntary winding up; and
 - (ii) to appoint a liquidator at the meeting, and notwithstanding any other law (including any other provision of this Ordinance).

(5) Where subsection (1)(a)(ii), (2)(b) or (4)(b) is applicable to a relevant meeting of creditors -

- (a) the liquidator appointed shall, as soon as practicable after his appointment, cause a notice in the specified form of his appointment to be -
 - (i) filed with the Official Receiver, the Registrar and the High Court Registry; and

- (ii) published in the prescribed manner;
- (b) notwithstanding any other law (including any other provision of this Ordinance), the creditors' voluntary winding up referred to in that subsection shall be deemed to commence on the relevant date (except that, for the purposes of sections 263, 264, 264A and 265 of the Companies Ordinance (Cap. 32), that winding up shall be deemed to commence at the time of the passing of the resolution referred to in that subsection for that winding up); and
- (c) the other provisions of the Companies Ordinance (Cap. 32) applicable to the liquidation of the company shall apply with such modifications as are necessary to take into account the operation of that subsection and paragraphs (a) and (b).

(6) Where subsection (1)(a)(ii)(A), (2)(b) or (4)(b) is applicable to a relevant meeting of creditors and the provisional supervisor of the company was appointed by virtue of section 6(1)(b) or (c), then, if section 11(6) terminated the appointment of a provisional liquidator or liquidator, if any, of the company and stayed the winding up proceedings of the company, that last-mentioned section shall be deemed never to have so terminated that appointment and stayed those proceedings.

23. Effectiveness of resolutions, etc.

(1) A relevant meeting of creditors shall not approve a proposal or modification which affects the right of a secured creditor of the company except with the consent in writing of the creditor concerned.

(2) Subject to subsection (5), a resolution passed by a relevant meeting of creditors shall have effect.

(3) A member of a company who is aggrieved by a resolution passed by a relevant meeting of creditors in relation to the company may make an application to the court on the ground that the resolution substantially prejudices his rights in his capacity as such a member.

(4) An application under subsection (3) shall be made not later than 30 days after the conclusion of the relevant meeting of creditors concerned.

(5) On an application under subsection (3), the court may -

- (a) order the resolution of the relevant meeting of creditors to be varied, or to not have effect, whether in whole or in part, in such manner as is specified in the order; or
- (b) make such other order as it thinks fit.

24. Proceedings and voting at relevant meetings of creditors

The proceedings and voting at relevant meetings of creditors, and matter, related thereto, shall comply with the requirements of Schedule 7.

25. Implementation of relevant creditors' resolutions

(1) Where the proposal has been approved by a resolution passed at a relevant meeting of creditors -

- (a) the appointment of the provisional supervisor of the company shall terminate except for the purpose of concluding the meeting and matters incidental thereto; and
- (b) the terms of the voluntary arrangement shall take effect and shall bind -
 - (i) each relevant creditor who was given notice under section 21(2)(a) or (3)(a) in respect of the meeting (and whether or not the creditor notified the provisional supervisor of any claim against the company or attended the meeting);

- (ii) the company;
- (iii) the members of the company; and
- (iv) the supervisor of the voluntary arrangement.

(2) The supervisor of the voluntary arrangement shall, as soon as practicable after his appointment -

- (a) file copies of the voluntary arrangement with the Official Receiver, the Registrar and the High Court Registry; and
- (b) cause a notice in the specified form to be published -
 - (i) in the prescribed manner; and
 - (ii) containing a statement to the effect that he has been appointed to be the supervisor of the company for the purpose of implementing a voluntary arrangement in respect of the company.

(3) Where the former provisional supervisor of the company does not become the supervisor of the voluntary arrangement in respect of the company, the former provisional supervisor shall deliver to the supervisor all the documents of the company in his custody or under his control.

PART 7

VOLUNTARY ARRANGEMENT

26. Effect of voluntary arrangement

- (1) While the voluntary arrangement is in effect in respect of the company -
 - (a) no creditor bound by the arrangement may commence or continue any winding up proceedings against the company;
 - (b) no resolution may be passed or made by the members or directors of the company for the winding up of the company;

- (c) no receiver of the company may be appointed by a creditor bound by the arrangement or, if already appointed, no receiver may exercise any powers incidental to the office;
- (d) no creditor bound by the arrangement may take any step to enforce or continue to enforce any security over the company's property or to repossess goods in the company's possession; and
- (e) no creditor bound by the arrangement may commence any proceedings, execution, distress or other legal process against the company.

(2) The voluntary arrangement shall cease to have effect in the events specified in the arrangement.

(3) Where the company is subject to the voluntary arrangement, every invoice, order for goods or business letter issued by or on behalf of the company or the supervisor of the voluntary arrangement, being a document on or in which the name of the company appears, shall contain a statement that the company is subject to the voluntary arrangement.

27. Supervisor of voluntary arrangement

(1) No person shall be appointed to be the supervisor of the voluntary arrangement in respect of the company except -

- (a) a member of the panel; or
- (b) a person in respect of whom the Official Receiver has stated in writing that he is satisfied that the person -
 - (i) has particular skills which warrant him being appointed to be the supervisor of the voluntary arrangement; and
 - (ii) is a fit and proper person to be so appointed.

(2) Subject to any directions under subsection (5), the supervisor of the voluntary arrangement shall -

- (a) discharge such duties and exercise such powers as are specified in the arrangement;
 - (b) ascertain on behalf of the creditors of the company that the arrangement is being adhered to and implemented by the company in accordance with its terms; and
 - (c) supervise the arrangement having regard to the interests of -
 - (i) the creditors of the company bound by the arrangement;
 - (ii) the company; and
 - (iii) the members of the company.
- (3) The supervisor of the voluntary arrangement -
- (a) may require an officer or employee of the company to provide such information about the business, property, affairs of financial circumstances of the company as the supervisor may reasonably request;
 - (b) shall have access to the premises (except domestic premises) of the company and all books and records of the company upon reasonable notice; and
 - (c) may, where the supervisor is satisfied that the arrangement is not being adhered to and implemented by the company in accordance with its terms, present a petition to the court for the winding up of the company by the court.
- (4) An officer or employee of the company who, without reasonable excuse, fails to comply with a requirement under subsection (3)(a) commits an offence and is liable on conviction to a fine at level 5 and, in the case of a continuing offence, to a daily penalty of \$300.
- (5) The supervisor of the voluntary arrangement may apply to the court for directions in relation to any particular matter arising in connection with his duties and powers under the arrangement and, without prejudice to the

generality of the foregoing, the court may by such a direction permit a deviation from the arrangement if, but only if, the court is satisfied that the deviation would not affect the substance of the arrangement.

(6) A party to the voluntary arrangement who is aggrieved by any act, omission or decision of the supervisor of the voluntary arrangement may make an application to the court.

(7) The court shall determine an application under subsection (6) by -

- (a) confirming, reversing or modifying any act, omission or decision of the supervisor of the voluntary arrangement;
- (b) giving the supervisor directions;
- (c) removing the supervisor from office; or
- (d) making such other order as it sees fit.

28. Vacation of office, etc. of supervisor

Where -

- (a) it is expedient to appoint a person to discharge the duties of the supervisor of the voluntary arrangement; and
- (b) it is inexpedient, difficult or impracticable for an appointment to be made without the assistance of the court,

the court may, upon the application of the company, the directors of the company or a creditor of the company bound by the arrangement, make an order appointing a supervisor of the voluntary arrangement, either in substitution for the existing supervisor or to fill a vacancy.

29. Notification

Where -

- (a) the supervisor of the voluntary arrangement has replaced a former supervisor of the voluntary arrangement; or
- (b) the voluntary arrangement has ceased to have effect,

the supervisor shall file a notice in the specified form of his appointment, or a notice in the specified form of the cessation of the voluntary arrangement, as the case may be, with the Official Receiver, the Registrar and the High Court Registry not later than 14 days after the date of his appointment or the cessation of the voluntary arrangement, as the case may be.

PART 8

MISCELLANEOUS

30. Power of Official Receiver to specify forms

(1) Subject to subsection (2), the Official Receiver, after consultation with the Registrar, may specify the form of any document required under this Ordinance to be in the specified form and the form of such other documents required for the purposes of this Ordinance as he thinks fit.

(2) The Official Receiver's power under subsection (1) shall be subject to any express requirement under this Ordinance for a form, whether specified or otherwise, to comply with that requirement, but that requirement shall not restrict the exercise of that power in respect of that form to the extent that, in the opinion of the Official Receiver, his exercise of that power in respect of that form does not contravene that requirement.

(3) The Official Receiver's power under subsection (1) may be exercised in such a way as to -

- (a) include in the specified form of any document referred to in that subsection a statutory declaration -
 - (i) to be made by the person completing the form; and
 - (ii) as to whether the particulars contained in the form are true and correct to the best of that person's knowledge and belief;

- (b) specify 2 or more forms of any document referred to in that subsection, whether as alternatives, or to provide for particular circumstances or particular cases, as the Official Receiver thinks fit.
- (4) A form specified under this section shall be -
- (a) completed in accordance with such directions and instructions as are specified in the form;
 - (b) accompanied by such documents as are specified in the form; and
 - (c) if the completed form is required to be provided to -
 - (i) the Official Receiver or the Registrar;
 - (ii) another person on behalf of the Official Receiver or the Registrar; or
 - (iii) any other person,so provided in the manner, if any, specified in the form.

31. Regulations

(1) Without prejudice to the generality of section 33, the Secretary for Financial Services may make regulations prescribing anything that is required or permitted to be prescribed under this Ordinance.

- (2) Regulations made under this section may -
- (a) specify criteria for determining whether or not a company was solvent for the purposes of section 19(4);
 - (b) specify the procedures to be followed at relevant meetings of creditors;
 - (c) without prejudice to the generality of paragraph (b), specify the powers of the chairman of a relevant meeting of creditors, in particular in relation to the adjudication of claims against the company by relevant creditors;

- (d) without prejudice to the generality of paragraph (c), provide that any adjudication referred to in that paragraph (and notwithstanding any other law, including any other provision of this Ordinance) shall not be overturned or otherwise varied by any court unless -
 - (i) the court concludes that the adjudication was manifestly unreasonable; or
 - (ii) the chairman of the relevant meeting of creditors concerned consents thereto;
- (e) specify the Official Receiver as being the person who must be satisfied that a requirement imposed by the regulations has been met;
- (f) make different provisions for different circumstances and provide for a particular case or class of case;
- (g) be made so as to apply only in such circumstances as are specified in the regulations;
- (h) provide for the better carrying into effect of the provisions of this Ordinance;
 - (i) provide for such incidental, consequential, evidential, transitional and supplemental provisions as are necessary or expedient for the purpose of giving full effect to the provisions of this Ordinance.

(3) Any regulations made under this section may prescribe offences in respect of contraventions of the regulations and may provide for the imposition in respect of any such offence of a fine not exceeding level 6 and of imprisonment for a period not exceeding 2 years and, in the case of a continuing offence, to a daily penalty not exceeding \$1,000.

32. General rules and fees

(1) The Chief Justice may, with the approval of the Legislative Council, make general rules for carrying into effect the objects of this Ordinance.

(2) All rules and orders made under this section shall be judicially noticed, and shall have effect as if enacted by this Ordinance.

(3) An answer given by a person to a question put to him in exercise of powers conferred by rules made under this section may be used in evidence against him.

(4) There shall be paid in respect of proceedings under this Ordinance, where no fee is otherwise fixed, such fees as the Chief Justice may, with the approval of the Legislative Council, by order direct, and he may direct by whom and in what manner the same are to be collected and accounted for.

(5) The amount of any fees prescribed under this section shall not be limited by reference to the amount of administrative or other costs incurred or likely to be incurred by the Official Receiver in the winding up of companies or of any particular company.

(6) Without prejudice to the generality of subsection (5), fees referred to in that subsection may be fixed by reference to a scale of fees and percentages.

(7) Rules or orders made under this section may authorize the court to fix any fee or to vary the amount of any fee otherwise prescribed.

(8) No fee prescribed under this section shall be invalid by reason only of the amount of that fee.

(9) Fees required to be paid under rules or orders made under this section shall be recoverable as debt.

33. Amendment of Schedules 1 to 7

The Secretary for Financial Services may, by notice published in the Gazette, amend any of Schedules 1 to 7.

34. Consequential amendments

The enactments specified in Schedule 8 are amended as set out in that Schedule.

SCHEDULE 1

[ss.2 & 33]

**PRESCRIBED MANNER OF
PUBLISHING NOTICES**

1. A notice under section 9 of this Ordinance shall be published in -
 - (a) the Gazette;
 - (b) 1 English language newspaper circulating generally in Hong Kong;
and
 - (c) 1 Chinese language newspaper circulating generally in Hong Kong.

2. A notice under any other provision of this Ordinance shall be published in the Gazette.

SCHEDULE 2[ss.2, 8 & 33
& Sch. 4]**DOCUMENTS REQUIRED TO BE FILED WITH
OFFICIAL RECEIVER, REGISTRAR AND
HIGH COURT REGISTRY
UNDER SECTION 8 OF
THIS ORDINANCE**

1. A notice of -
 - (a) the resolution -
 - (i) in the specified form;
 - (ii) of the directors or members of the company; and
 - (iii) providing for the appointment of the provisional supervisor of the company; or

- (b) the appointment -
 - (i) in the specified form; and
 - (ii) signed by the provisional liquidator or liquidator, if any, of the company.
2. A notice in the specified form of the consent of the qualified person to the appointment signed by the qualified person.
3. A notice in the specified form of an affidavit -
- (a) where the appointment is made by virtue of section 6(1)(a)(i) of the Ordinance, of the directors of the company or, in the case of a company having more than 2 directors, of the majority of them;
 - (b) where the appointment is made by virtue of section 6(1)(a)(ii) of the Ordinance, of not less than 3 members of the company or, in the case of a company with only 2 members, of both those members;
 - (c) setting out the reasons for the appointment and the rate proposed to be paid to the provisional supervisor of the company and, if practicable, an estimate of the total amount to be so paid; and
 - (d) stating that the company -
 - (i) has a trust account -
 - (A) with an authorized institution within the meaning of the Banking Ordinance (Cap. 155);
 - (B) the exclusive purpose of which is to provide money to pay all debts and liabilities owing, by virtue of the Employment Ordinance (Cap. 57), by the

company to its former employees before the relevant date (including those employees whose contracts of employment will be terminated on or after the relevant date) and to pay all wages owing by virtue of that Ordinance to its existing employees up to the relevant date; and

- (C) containing sufficient money to pay all those debts and liabilities; or
 - (ii) has paid all debts and liabilities, or has no debts and liabilities, owing, by virtue of the Employment Ordinance (Cap. 57), to its former employees before the relevant date (including those employees whose contracts of employment will be terminated on or after the relevant date) and owes no wages by virtue of that Ordinance to its existing employees up to the relevant date.

SCHEDULE 3

[ss. 9 & 33]

NOTICE OF APPOINTMENT OF PROVISIONAL SUPERVISOR

1. The notice shall -
 - (a) contain a statement to the effect that the person named in the notice has been appointed to be the provisional supervisor of the company for the purposes of examining whether a proposal can be made to the creditors of the company for a voluntary arrangement in respect of the company and, if so, making the proposal; and
 - (b) advise creditors of the company to give notice in writing -

- (i) to the provisional supervisor at the address specified in the notice;
- (ii) of their claims against the company; and
- (iii) not later than 7 days after the date on which the notice is published.

SCHEDULE 4

[ss. 10, 15, 16, 18
& 33 & Sch. 7]

DUTIES AND POWERS, ETC. OF PROVISIONAL SUPERVISOR

PART 1

DUTIES OF PROVISIONAL SUPERVISOR

1. As soon as practicable, take into custody or under control all the property to which the company is or appears to be entitled.
2. Investigate and assess the business, property, affairs and financial circumstances of the company (including any possible claim that may be taken by the liquidator of the company under any of sections 264B, 266 to 266B, 275, 276 or 295A to 295G of the Companies Ordinance (Cap. 32) if the company is being wound up as a creditors' voluntary winding up on the relevant date).
3. As soon as practicable after complying with section 2, decide whether or not any of the relevant purposes are capable of being achieved.
4. If it is decided that any of the relevant purposes are capable of being achieved, prepare the proposal to achieve any such purpose or purposes.
5. During the moratorium do all things necessary to protect the property of the company.

6. During the moratorium, manage the business, property and affairs of the company for the primary purpose of preserving the property of the company for the creditors of the company as a whole.
7. Subject to section 8, as soon as practicable after the relevant date and except in circumstances where there are good and sufficient reasons, before the relevant creditor meetings, apply the funds, if any, in the trust account mentioned in section 3(d)(i) of Schedule 2 to this Ordinance for the purpose mentioned in that section.
8. Check and verify the genuineness of the debts, liabilities and wages purportedly owed by the company to its former or existing employees referred to in section 3(d)(i) of Schedule 2 to this Ordinance.
9. Subject to sections 1 to 8, act in the supervision of the company in the best interests of the company.
10. Discharge such other duties as may be imposed on the provisional supervisor of the company by this or any other Ordinance.
11. Do such other things as may be necessary for the supervision and management of the business, property and affairs of the company.

PART 2

POWERS OF PROVISIONAL SUPERVISOR

1. Power to appoint any agent or employ any person to do any business and to dismiss the agent or employee.
2. Power to appoint a solicitor, professional accountant or other professionally qualified person to assist in the discharge of duties and the

exercise of powers and to dismiss the solicitor, professional accountant or other professionally qualified person.

3. Power to do all acts and execute in the name and on behalf of the company any deed, receipt or other document.
4. Power to use the company seal and chop.
5. Power to draw, accept, make and endorse any bill of exchange or promissory note in the name and on behalf of the company.
6. Power to make any payment which is necessary or incidental to the discharge of any duty.
7. Power to raise or borrow money and grant security over the property of the company.
8. Power to make any compromise or arrangement on behalf of the company.
9. Power to disclaim onerous contracts or agreements, excluding contracts or other agreements specified in Schedule 5 (and, for the purposes of such power, section 59 of the Bankruptcy Ordinance (Cap. 6) shall, with all necessary modifications, apply to and in relation thereto).
10. Power to form a committee of relevant creditors.
11. Power to -
 - (a) remove any director or officer of the company; or
 - (b) appoint any director or officer of the company, whether to fill a vacancy or otherwise.
12. Power to dispose of any property of the company if, and only if -

- (a) there are reasonable grounds for believing that the disposal will benefit the company; or
- (b) the disposal is in the ordinary course of the company's business.

13. Power to exercise such other powers as may be conferred upon the provisional supervisor of the company by this or any other Ordinance.

14. Power to do all things incidental to his duties.

PART 3

POWER OF DELEGATION OF PROVISIONAL SUPERVISOR

1. Subject to section 2, the provisional supervisor of the company may, with or without restrictions as he thinks fit, delegate in writing to any person any of the duties and powers imposed or conferred on the provisional supervisor under this Ordinance.

2. Section 1 shall not -

- (a) prejudice the duty of the provisional supervisor to supervise and manage the business, property and affairs of the company; and
- (b) apply to the power under that section to delegate.

3. A delegate of the provisional supervisor of the company shall -

- (a) discharge the delegated duties and may exercise the delegated powers as if the delegate were the provisional supervisor; and
- (b) be presumed to be acting in accordance with the terms of the delegation in the absence of evidence to the contrary.

PART 4

INDEMNITY OF PROVISIONAL SUPERVISOR

1. The provisional supervisor of the company shall be entitled to be indemnified out of the property of the company for -

- (a) all contracts, debts and other liabilities for which he is liable as the provisional supervisor in the discharge of his duties and the exercise of his powers as the provisional supervisor; and
- (b) his remuneration and all reasonable fees, costs and charges,

to the extent that such contracts, debts and other liabilities, and such remuneration and reasonable fees, costs and charges, are not attributable to misconduct or negligence on the part of the provisional supervisor.

2. Notwithstanding any other law (including any other provision of this Ordinance except section 11(8)(b) or 16 of this Ordinance), the indemnification given to the provisional supervisor of the company under section 1 shall -

- (a) have priority to all other claims, whether secured or unsecured, against the company except claims which are secured by a fixed charge; and
- (b) be secured by a lien over the property of the company except such property subject to a fixed charge.

PART 5

REMUNERATION OF PROVISIONAL SUPERVISOR

1. Subject to sections 2 and 5 and to section 17 of Schedule 7 to this Ordinance, the provisional supervisor of the company shall be entitled to be remunerated, in discharging his duties and exercising his powers as the

provisional supervisor, in accordance with a scale of fees approved in writing by the Official Receiver for the purposes of this section ("approved scale of fees").

2. The provisional supervisor of the company may make an application to the court to be remunerated at a rate higher than the approved scale of fees.

3. The court shall not grant an application made under section 2 by the provisional supervisor of the company unless the court is satisfied that the grant thereof is warranted because of -

- (a) the complexity (or otherwise) of the particular case;
- (b) any additional responsibilities of an exceptional kind or degree placed on the provisional supervisor; or
- (c) the value and nature of the property with which the provisional supervisor has to deal.

4. If a relevant creditor is of the opinion that the remuneration of the provisional supervisor of the company based on the approved scale of fees is excessive, he may, if he has the agreement in writing to do so of not less than 50% in value of all relevant creditors (including the first-mentioned relevant creditor), make an application to the court to reduce that remuneration in the case of that provisional supervisor and that company.

5. The court shall determine an application made under section 4 by rejecting the application or reducing the remuneration mentioned in that subsection.

6. Nothing in this Ordinance shall be construed as preventing the provisional supervisor of the company from being offered, or accepting, remuneration in accordance with a scale of fees which is lower than the approved scale of fees.

PART 6

SUPPLEMENTARY PROVISIONS APPLICABLE TO
AND IN RELATION TO PROVISIONAL
SUPERVISOR IN CONSEQUENCE OF
DISCHARGING HIS DUTIES AND
EXERCISING HIS POWERS

1. The provisional supervisor of the company shall be personally liable on any contract entered into by the provisional supervisor in the discharge of his duties or the exercise of his powers as the provisional supervisor except in so far as the contract otherwise provides.
2. Subject to section 2 of Part 3 and to Part 4, in exercising his powers the provisional supervisor of the company shall be deemed to act as the agent of the company.
3. Where a person deals with the provisional supervisor of the company in good faith and for good consideration and thereby changes his position or acts to his detriment based on the dealing, the provisional supervisor and the company shall be bound by the provisional supervisor's actions whether or not the provisional supervisor was acting within his powers.

SCHEDULE 5

[ss. 11 & 33
& Sch. 4]

CONTRACTS OR OTHER AGREEMENTS
TO WHICH SECTION 11(2) OF THIS
ORDINANCE SHALL NOT APPLY

1. Currency or interest rate swap agreement.
2. Basis swap agreement.
3. Spot, futures, forward or other foreign exchange agreement.

4. Cap, collar or floor transaction.
5. Commodity swap.
6. Forward rate agreement.
7. Repurchase or reverse repurchase agreement.
8. Spot, futures, forward or other commodity contract and financial futures contract.
9. Agreement to buy, sell, borrow, or lend securities, to clear or settle securities transactions or futures contracts or to act as a depository for securities.
10. Derivative, combination or option in respect of, or agreement similar to, an agreement or contract referred to in any of items 1 to 9.
11. Master agreement in respect of any agreement or contract referred to in any of items 1 to 10.
12. Guarantee of the liabilities under an agreement or contract referred to in any of items 1 to 11.

SCHEDULE 6

[ss. 21 & 33]

REQUIREMENTS APPLICABLE TO NOTICES
UNDER SECTION 21(2)(a) OR (b) OR
(3)(b) OF THIS ORDINANCE

PART 1

NOTICE UNDER SECTION 21(2)(a)
OF THIS ORDINANCE

1. The notice shall advise creditors of the company -
 - (a) of the date, time and place of the first meeting of relevant creditors;
 - (b) to give notice in writing, if they have not already done so -
 - (i) to the provisional supervisor of the company at the address specified in the notice;
 - (ii) of their claims against the company;
 - (iii) not later than 2 days before that date.

PART 2

NOTICE UNDER SECTION 21(2)(b)
OF THIS ORDINANCE

1. The notice shall -
 - (a) set out in full each resolution proposed to be passed at the first meeting of relevant creditors;
 - (b) have attached to it a copy of the report to creditors on the company or, alternatively, stating that such copy -
 - (i) will be supplied upon request made to the provisional supervisor; and
 - (ii) is available for inspection during normal office hours at the address specified in the notice;

- (c) specify the date, time and place of the meeting;
- (d) have attached to it instruments providing for the appointment of a proxy;
- (e) where section 21(1)(a) of this Ordinance is applicable -
 - (i) have attached to it a copy of a summary of the statement of affairs of the company or, alternatively, stating that such copy -
 - (A) will be supplied upon request made to the provisional supervisor; and
 - (B) is available for inspection during normal office hours at the address specified in the notice;
 - (ii) state that the purpose of the meeting is to -
 - (A) approve the proposal (whether with or without modifications);
 - (B) adjourn the meeting in order that the provisional supervisor may submit a modified form of the proposal to the adjourned meeting; or
 - (C) reject the proposal, resolve that the company be wound up as a creditors' voluntary winding up and appoint a liquidator;
 - (iii) contain -
 - (A) a statement, with reasons, as to the decision of the provisional supervisor as to which of the relevant purposes, if any, are capable of being achieved;
 - (B) a statement, with reasons, as to the decision of the provisional supervisor as to which of

- the relevant purposes, if any, are not capable of being achieved; and
- (C) a summary of the proposal containing a statement as to the advantages and disadvantages to the creditors of the company of the proposal as opposed to the advantages and disadvantages to the creditors of a liquidation of the company; and
- (iv) have attached to it a copy of the proposal or, alternatively, stating that such copy -
 - (A) will be supplied upon request made to the provisional supervisor; and
 - (B) is available for inspection during normal office hours at the address specified in the notice;
- (f) where section 21(1)(b) of this Ordinance is applicable -
 - (i) have attached to it a copy of a summary of the statement of affairs of the company or, alternatively, stating that such copy -
 - (A) will be supplied upon request made to the provisional supervisor; and
 - (B) is available for inspection during normal office hours at the address specified in the notice;
 - (ii) have attached to it a statement, with reasons, as to why the provisional supervisor has been unable to complete the proposal before the expiration of the moratorium or, alternatively, stating that a copy of such statement -

- (A) will be supplied upon request made to the provisional supervisor; and
 - (B) is available for inspection during normal office hours at the address specified in the notice;
- (iii) state that the purpose of the meeting is to -
 - (A) consider the statement referred to in subparagraph (ii); and
 - (B) decide whether or not the moratorium should be extended and, if so, for what period and on what terms;
- (g) where section 21(1)(c) of this Ordinance is applicable -
 - (i) have attached to it a statement, with reasons, as to the decision of the provisional supervisor as to why he considers none of the relevant purposes is capable of being achieved or, alternatively, stating that a copy of such statement -
 - (A) will be supplied upon request made to the provisional supervisor; and
 - (B) is available for inspection during normal office hours at the address specified in the notice;
 - (ii) state that the purpose of the meeting is to consider the decision of the provisional supervisor referred to in subparagraph (i) and resolve that the company be wound up as a creditors' voluntary winding up and appoint a liquidator.

PART 3

NOTICE UNDER SECTION 21(3)(b)
OF THIS ORDINANCE

1. The notice shall -
 - (a) comply with the requirements of section 1(a), (c) and (d) of Part 2;
 - (b) where section 21(1)(a) of this Ordinance is applicable -
 - (i) state that the purpose of the meeting is to -
 - (A) approve the proposal as modified;
 - (B) adjourn the meeting in order that the provisional supervisor may submit a further modified form of the proposal; or
 - (C) reject the proposal as modified, resolve that the company be wound up as a creditors' voluntary winding up and appoint a liquidator;
 - (ii) contain a summary of the proposal as modified; and
 - (iii) have attached to it a copy of the proposal as modified or, alternatively, stating that such copy -
 - (A) will be supplied upon request made to the provisional supervisor; and
 - (B) is available for inspection during normal office hours at the address specified in the notice;
 - (c) where section 21(1)(b) of this Ordinance is applicable, state that the purpose of the meeting is to -
 - (i) review the extension; and

- (ii) resolve to continue or terminate the extension and, in the latter case, that the company be wound up as a creditors' voluntary winding up and to appoint a liquidator.

SCHEDULE 7

[ss. 12, 13, 24 & 33
& Sch. 4]REQUIREMENTS APPLICABLE TO PROCEEDINGS
AND VOTING AT RELEVANT MEETINGS OF
CREDITORS AND MATTERS
RELATING THERETO

1. The persons entitled to attend a relevant meeting of creditors are -
 - (a) the provisional supervisor of the company;
 - (b) each creditor of the company who has given notice of his claim against the company in accordance with the requirements of the notice under section 9 or 21(2)(a) of this Ordinance; and
 - (c) the directors of the company.

2. The relevant creditors present and voting at a relevant meeting of creditors shall form one class of voters only.

3. The chairman of a relevant meeting of creditors shall be -
 - (a) the provisional supervisor of the company; or
 - (b) a partner, or employee, of the provisional supervisor -
 - (i) who is, in the opinion of the provisional supervisor, experienced in insolvency matters; and
 - (ii) nominated in writing by the provisional supervisor to be the chairman of the meeting.

4. The chairman of a relevant meeting of creditors, the provisional supervisor of the company or any other person -

- (a) may hold a special proxy or proxies; and
- (b) in the case of any such proxy, shall vote or otherwise as directed by the principal.

5. Any person other than the chairman of a relevant meeting of creditors or the provisional supervisor of the company may hold a general proxy or proxies.

6. The quorum for a relevant meeting of creditors shall be one relevant creditor present and entitled to vote.

7. Where -

- (a) there is no quorum within 30 minutes from the time appointed for a relevant meeting of creditors; or
- (b) at a relevant meeting of creditors the meeting fails to -
 - (i) resolve that the company be wound up as a creditors' voluntary winding up when the meeting is required to do so by virtue of section 22 of this Ordinance;
 - (ii) appoint a liquidator of the company when the meeting is required to do so by virtue of that section; or
 - (iii) both pass the resolution referred to in subparagraph (i) and make the appointment referred to in subparagraph (ii),

then -

- (c) in the case of paragraph (a)(other than where the provisional supervisor of the company was appointed by virtue of section 6(1)(b) or (c) of this Ordinance) or paragraph (b)(i) or (iii), it shall be deemed for all purposes

that the meeting resolved that the company be wound up as a creditors' voluntary winding up;

(d) in the case of paragraph (a) or (b)(i), (ii) or (iii) -

(i) the provisional supervisor of the company shall appoint a liquidator of the company (which may be himself) as soon as is practicable but, in any case, not later than 7 days after the date of the meeting, and notwithstanding any other law (including any other provision of this Ordinance); and

(ii) it shall be deemed for all purposes that the meeting appointed that liquidator.

8. Where the provisional supervisor of the company fails to comply with section 7(d)(i) within the period specified in that section, then, immediately upon the expiration of that period, he shall be deemed to have appointed himself as the liquidator of the company.

9. Where section 21(1)(a) of this Ordinance is applicable to a relevant meeting of creditors, the meeting may only be adjourned to allow the provisional supervisor of the company time to modify the proposal or to apply under section 13 of this Ordinance for an extension of the moratorium.

10. Where section 21(1)(b) of this Ordinance is applicable to a relevant meeting of creditors, the meeting may only be adjourned to a later date, not exceeding 6 months after the date on which the meeting is held, if the meeting resolves to extend the moratorium.

11. A relevant meeting of creditors to which section 21(1)(c) of this Ordinance is applicable shall not be adjourned.

12. Subject to sections 13, 15 and 16, each relevant creditor who is entitled to attend a relevant meeting of creditors shall be entitled to vote at the meeting.

13. Subject to section 14, votes of relevant creditors shall be calculated according to the amount of the creditor's debt on the relevant date.

14. For the purpose of voting, a secured creditor is entitled to vote only in respect of the balance, if any, of the creditor's debt after deducting the value of the creditor's security.

15. At a relevant meeting of creditors to which section 21(1)(a) or (b) of this Ordinance is applicable, for any resolution to pass approving the proposal or a modification of the proposal, there must be a majority in number and in excess of 66 $\frac{2}{3}$ % in value of the creditors present in person or by proxy and voting on the resolution.

16. Section 15 applies in respect of any other resolution proposed at a relevant meeting of creditors to which section 21(1)(a) or (b) of this Ordinance is applicable, but substituting "50%" for "66 $\frac{2}{3}$ %" appearing in that section.

17. At a relevant meeting of creditors to which section 21(1)(a) or (b) of this Ordinance is applicable, a resolution that the provisional supervisor of the company may be remunerated at a rate higher than the approved scale of fees mentioned in section 1 of Part 5 of Schedule 4 to this Ordinance may be passed or rejected.

18. Where -

(a) section 7(c) is applicable -

(i) notwithstanding any other law (including any other provision of this Ordinance), the creditors' voluntary winding up referred to in section 7(c) shall be deemed to commence on the relevant date

- (except that, for the purposes of sections 263, 264, 264A and 265 of the Companies Ordinance (Cap. 32), that winding up shall be deemed to commence at the time that it was deemed for all purposes that the meeting referred to in section 7(c) resolved that the company be wound up as a creditors' voluntary winding up); and
- (ii) the provisions of the Companies Ordinance (Cap. 32) applicable to the liquidation of the company shall be construed with such modifications as are necessary to take into account the operation of that section and subparagraph (i);
- (b) section 7(d) or 8 is applicable -
- (i) the liquidator appointed shall, as soon as practicable after the appointment, cause a notice in the specified form of his appointment to be -
 - (A) filed with the Official Receiver, the Registrar and the High Court Registry; and
 - (B) published in the prescribed manner;
 - (ii) the remuneration of the liquidator as liquidator shall be at the same rate as the remuneration the provisional supervisor of the company was receiving as provisional supervisor immediately before the provisional supervisor vacated his office; and
 - (iii) the provisions of the Companies Ordinance (Cap. 32) applicable to the liquidation of the company shall apply with such modifications as are necessary to take into account the operation of that section and subparagraphs (i) and (ii).

19. At a relevant meeting of creditors -
- (a) a relevant creditor shall not vote in respect of a debt for an unliquidated amount, or any debt the value of which is not ascertained, except where the chairman of the meeting agrees to put upon the debt an estimated reasonable minimum value for the purpose of entitlement to vote;
 - (b) the chairman has power to admit or reject a relevant creditor's claim (whether in whole or in part) for the purpose of the creditor's entitlement to vote;
 - (c) if the chairman is in doubt as to whether a relevant creditor's claim should be admitted or rejected, he shall mark it as objected to and allow the creditor to vote subject to that vote being subsequently declared invalid if the objection to the claim is sustained.
20. An appeal against the chairman's decision on a relevant creditor's entitlement to vote may be made -
- (a) by application to the court not later than 30 days after the conclusion of the relevant meeting of creditors at which the decision was made; and
 - (b) by any relevant creditor of the company.
21. On an appeal under section 20 -
- (a) where section 19(a) is applicable, the court may reverse or vary the chairman's decision concerned (and, if required, declare a relevant creditor's vote invalid) only if it is satisfied that the decision was manifestly unreasonable;
 - (b) where section 19(c) is applicable, the court may declare a relevant creditor's vote invalid if it is satisfied that the creditor had no entitlement to vote;

- (c) in any case, the court may order another relevant meeting of creditors to be summoned or make such other order as it thinks just (including an order to extend the moratorium).

22. The chairman of a relevant meeting of creditors is not personally liable for any costs incurred by any person in respect of an appeal under section 20.

23. A resolution is invalid if more than 50% in value of those creditors who are, to the best of the Chairman's belief, not connected with the company have voted against it.

24. Sections 20, 21 and 22 apply as regards an appeal against the decision of the chairman under section 23.

25. For the purpose of section 23, a person is connected with a company if -

- (a) he is a director or shadow director of the company or an associate, within the meaning of section 51B of the Bankruptcy Ordinance (Cap. 6), of such director or shadow director; or
- (b) he is an associate, within the meaning of section 51B of that Ordinance, of the company.

SCHEDULE 8

[s. 34]

CONSEQUENTIAL AMENDMENTS

Companies Ordinance

1. Interpretation

Section 2 of the Companies Ordinance (Cap. 32) is amended by adding -

"(10) In this Ordinance, unless the context otherwise requires, the terms "former provisional supervisor" (前任臨時監管人), "former supervisor" (前任監管人), "provisional supervisor" (臨時監管人), "supervisor" (監管人) and "voluntary arrangement" (自願償債安排) have the meanings respectively assigned to them in section 2 of the Companies (Corporate Rescue) Ordinance (of 2001).

(11) In this Ordinance, unless the context otherwise requires, the terms "former responsible person" (前任負責人), "insolvent trading" (在無力償債情況下營商) and "responsible person" (負責人) have the meanings respectively assigned to them in section 295A."

2. Disqualification orders: general

Section 168D(1) is amended by adding -

"(aa) be the provisional supervisor of a company;

(ab) be the supervisor of a voluntary arrangement in respect of a company;"

3. Disqualification for fraud, etc., in winding up

Section 168G(1)(b) is repealed and the following substituted -

"(b) has otherwise been guilty, while an officer, provisional supervisor or liquidator of the company, or the supervisor of a voluntary arrangement in respect of the company or receiver or manager of its property, of any fraud in relation to the company or of any breach of his duty as such officer, provisional supervisor, liquidator, supervisor, receiver or manager."

4. Duty of court to disqualify unfit directors of insolvent companies

Section 168H(2)(b) is amended by adding "provisional supervisor or" after "a".

5. Applications to court under section 168H: reporting provisions

Section 168I is amended -

- (a) by repealing subsection (2)(b) and substituting -
 - "(b) in respect of which a provisional supervisor has been appointed or that goes into receivership, with the day on which the provisional supervisor or receiver, as the case may be, vacated his office.";
- (b) in subsection (3), by adding before paragraph (a) -
 - "(aa) the provisional supervisor of a company;
 - (ab) the supervisor of a voluntary arrangement in respect of a company;"
- (c) in subsection (4), by repealing "liquidator or receiver of a company, or the former liquidator or receiver of a company" and substituting "provisional supervisor, liquidator or receiver of a company, the supervisor of a voluntary arrangement in respect of a company, or the former provisional supervisor, liquidator or receiver of a company, or the former supervisor of a voluntary arrangement in respect of a company".

6. Fraudulent trading, etc.

Section 168L(1) is amended by adding "or a declaration under section 295C(1) that a person is liable for insolvent trading," after "company,".

7. Personal liability for company's debts where person acts while disqualified

Section 168O is amended -

- (a) by adding -

"(1A) A person is personally responsible for all the debts of a company if -

- (a) at any time in contravention of a disqualification order or of section 156 he is involved in the management of the company;
 - (b) a declaration under section 295C(1) is made that the person is liable for insolvent trading in respect of the company; and
 - (c) that insolvent trading occurred (whether in whole or in part) during the time referred to in paragraph (a).";
- (b) in subsection (2), by adding "or all the debts" after "relevant debts".

8. Sections added

The following are added after section 295 -

"Insolvent Trading

295A. Interpretation

- (1) In this section and sections 295B to 295G - "company" (公司) means -
- (a) a company within the meaning of section 2; or
 - (b) an unregistered company within the meaning of Part X (other than a partnership, whether limited or not, or an association) -
 - (i) wherever incorporated;
 - (ii) carrying on business in Hong Kong or which has carried on business in Hong Kong; or
 - (iii) which is capable of being wound up under this Ordinance;

"former responsible person" (前任負責人), in relation to a company, means a person who was formerly a responsible person of the company;

"insolvency" (無力償債), in relation to a company, means the company is unable to pay its

debts as when they become due and owing;

"insolvent trading" (在無力償債情況下營商), in relation to a company, means the company incurs debts or liabilities after the company has become insolvent;

"responsible person" (負責人), in relation to a company -

(a) means -

(i) a director or shadow director of the company; or

(ii) a manager of the company who is involved to a substantial or material degree in directing the company's business or affairs and who knows, or ought reasonably to know, the company's solvency position;

(b) does not include a person who is a provisional supervisor or former provisional supervisor of the company except, in the latter case, a former provisional supervisor who is a person referred to in paragraph (a);

"shadow director" (影子董事), in relation to a company, means a person in accordance with whose directions or instructions 1 or more directors of the company are accustomed to act but a person shall not be

considered to be a shadow director by reason only that 1 or more of the directors of the company act on advice given by him in a professional capacity.

(2) For the purposes of sections 295B to 295G, a company goes into liquidation -

- (a) if it passes a resolution for a creditors' voluntary winding up;
or
- (b) an order for its winding up is made by the court.

295B. Liquidator may make application to court to seek declaration that responsible person, etc. is liable for insolvent trading

Where -

- (a) a company goes into liquidation; and
- (b) the liquidator of the company is satisfied that the company engaged in insolvent trading,

the liquidator may make an application to the court to declare that a responsible person or former responsible person is liable for insolvent trading.

295C. Grounds on which court may declare responsible person, etc. liable for insolvent trading

(1) The court shall declare a responsible person or former responsible person liable for insolvent trading if, but only if, it is satisfied that -

- (a) the company engaged in the insolvent trading on or after the date on which this section came into operation;

- (b) the responsible person or former responsible person was a responsible person at the time that the insolvent trading occurred; and
- (c) either -
 - (i) the responsible person -
 - (A) knew or ought reasonably to have known the company was insolvent; or
 - (B) knew or ought reasonably to have known that there was no reasonable prospect that the company could avoid becoming insolvent; or
 - (ii) there were reasonable grounds for suspecting that -
 - (A) the company was insolvent; or
 - (B) there was no reasonable prospect that the company could avoid becoming insolvent,

and the responsible person failed to take any steps to prevent the insolvent trading.

(2) Where, but for this subsection, the court would make a declaration under subsection (1) in respect of a responsible person or former responsible person, it shall not make such a declaration -

- (a) if that person -
 - (i) was, at the time the insolvent trading occurred, a responsible person by virtue of paragraph (a)(ii) of the definition of "responsible person" in section 295A(1); and
 - (ii) satisfies the court that, before the insolvent trading occurred, he issued a notice, in the form specified in the Seventeenth Schedule -

- (A) to the board of directors of the company;
 - (B) stating that the company is engaging in, or is about to engage in, insolvent trading; and
 - (C) to which was attached a copy of section 295B;
- or

- (b) if that person satisfies the court that, after the requirement referred to in subsection (1)(c) was first satisfied in relation to him, he took every step with a view to minimizing the potential loss to the company's creditors as he ought to have taken.

(3) For the purposes of subsections (1) and (2), the facts which a responsible person (including a former responsible person at the time he was a responsible person) ought to know or ascertain, the conclusions which he ought to reach and the steps which he ought to take are those which would be known or ascertained, or reached or taken, by a reasonably diligent person having -

- (a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same duties as are discharged by that responsible person in relation to the company; and
- (b) the general knowledge, skill and experience that that responsible person has.

(4) The reference in subsection (3) to duties discharged in relation to the company by a responsible person (including a former responsible person at the time he was a responsible person) includes any duties which he does not discharge but which have been entrusted to him.

(5) The Official Receiver may, by notice published in the Gazette, amend the Seventeenth Schedule.

295D. Presumption of continued insolvency**in certain circumstances**

(1) Subject to subsection (2), where in any proceedings under section 295C it is shown to the satisfaction of the court that the company, on any date within the 12 months period immediately preceding the date of commencement of the winding up of the company -

- (a) was insolvent; or
- (b) contravened section 121(1) or (3A)(and whether or not any person was convicted of an offence in respect of the contravention),

then it shall be presumed in those proceedings, unless the contrary is shown, that the company remained insolvent from the first-mentioned date to and including the second-mentioned date.

(2) Subsection (1) shall not apply in the case of -

- (a) a contravention of section 121(1) or (3A) where the court is satisfied that the contravention -
 - (i) is minor or of a technical nature; and
 - (ii) did not materially distort the books of account of the company; or
- (b) a contravention of section 121(3A) where the court is satisfied that the responsible person or former responsible person concerned -
 - (i) took all reasonable steps to secure compliance by the company with that section; or
 - (ii) has not -
 - (A) by his own wilful act been the cause (whether in whole or in part) of the contravention; and
 - (B) aided, abetted, counselled or procured the contravention.

295E. Compensation, etc.

(1) Where the court makes a declaration under section 295C(1) in respect of a responsible person or former responsible person, it may -

- (a) order the person to pay such compensation to the company as the court thinks proper in all the circumstances of the case;
- (b) if it is satisfied that a creditor's claim against the company arose at a time when the creditor knew the company was engaging in insolvent trading, order that the compensation shall not be used to satisfy that claim until all other claims by creditors against the company have been satisfied.

(2) Compensation to be paid under subsection (1)(a) to the company may include all or part of the costs of the liquidator of the company arising from seeking the declaration under section 295C(1) to which the order relates.

(3) Compensation to be paid under subsection (1)(a) to the company shall be used by the liquidator of the company in the following order of priority -

- (a) first, any costs of the kind referred to in subsection (2)(and whether or not the compensation includes all or part of any such costs);
- (b) secondly, the costs of the liquidation of the company in accordance with the Companies (Winding-up) Rules (Cap. 32 sub.leg.);
- (c) thirdly, claims of creditors of the company in accordance with their priority unless the court orders a different priority.

295F. Enforcement of order for compensation

An order under section 295E(1)(a) shall be enforceable in all respects as if it were a judgment of the court.

295G. Assignment of action to insolvent trading prohibited

The liquidator of the company shall not assign any cause of action for any insolvent trading engaged in by the company."

9. Seventeenth Schedule added

The following is added -

"SEVENTEENTH SCHEDULE

[s. 295C]

NOTICE OF INSOLVENT TRADING BY RESPONSIBLE
PERSON OR FORMER RESPONSIBLE PERSON OF
COMPANY TO BOARD OF DIRECTORS
NOTICE OF INSOLVENT TRADING UNDER
SECTION 295C(2)(a)(ii) OF COMPANIES
ORDINANCE (CAP. 32)

To: The board of directors of

(name of company)

From:

(name of *responsible person/former responsible person of company)

I hereby advise that the company is *engaging in/about to engage in insolvent trading. A copy of section 295B of the Companies Ordinance is attached.

Dated this day of 20 .

 (Signature of *responsible person/
 former responsible person)

* Delete whichever is inapplicable."

Companies (Disqualification Orders) Regulation

10. Schedule 2 amended

Schedule 2 to the Companies (Disqualification Orders) Regulation (Cap. 32 sub. leg.) is amended, in item (7), by adding -

“Provisional supervision of company		
Supervision of voluntary arrangement in respect of company		”

after –

“Receivership or management of the property of the company"		”
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Companies (Reports on Conduct of Directors) Regulation

11. Reports required under section 168I(3) of the Ordinance

Section 2(1) of the Companies (Reports on Conduct of Directors) Regulation (Cap. 32 sub. leg.) is amended by adding before paragraph (a) -

- "(aa) the provisional supervisor of a company;
- (ab) the supervisor of a voluntary arrangement in respect of a company;"

12. Return by office-holder

Section 3 is amended -

- (a) in subsection (1), by adding "the provisional supervisor of a company as mentioned in section 2(1)(aa)," after "appears to";
- (b) in subsection (4) -
 - (i) by adding before paragraph (a) -

"(aa) in the case of the provisional supervisor of a company, the date of his appointment taking effect;"
 - (ii) by repealing paragraph (b).

13. Schedule amended

The Schedule is amended -

- (a) in Form D1 -
 - (i) by adding "UNDER *PROVISIONAL SUPERVISOR/SUPERVISOR OR" after "INSOLVENT COMPANY";
 - (ii) by adding "appointment of provisional supervisor/appointment of supervisor/" after "Date of*";
 - (iii) by adding "provisional supervisor/supervisor/" after "Name of*";
 - (iv) by adding "Provisional Supervisor's/Supervisor's/" before "Liquidator's/Receiver's address";
 - (v) by adding "provisional supervisor/supervisor/" after "I am the*";
 - (vi) by adding "Provisional Supervisor's/Supervisor's/" before "Liquidator's/Receiver's signature" wherever it appears;

- (vii) in Annex B, in paragraph 15(a), by repealing "liquidator or receiver" and substituting "provisional supervisor of that company, the supervisor of a voluntary arrangement in respect of that company, or the liquidator or receiver";
- (b) in Form D2 -
 - (i) by adding "UNDER PROVISIONAL SUPERVISOR OR" after "INSOLVENT COMPANY";
 - (ii) by adding "appointment of provisional supervisor/" after "Date of*";
 - (iii) by adding "provisional supervisor/" after "Name of*";
 - (iv) by adding "Provisional Supervisor's/" before "Liquidator's" where it twice appears.

**Companies (Disqualification of Directors)
Proceedings Rules**

14. Service and acknowledgment

Rule 6(4)(a) of the Companies (Disqualification of Directors) Proceedings Rules (Cap. 32 sub. leg.) is amended -

- (a) in subparagraph (i) -
 - (i) by adding ", provisional supervisor" after "officer";
 - (ii) by adding "the supervisor of a voluntary arrangement in respect of the company or" after "neither was he";
- (b) in subparagraph (ii), by repealing "liquidator" and substituting "provisional supervisor, liquidator, supervisor".

Administrative Appeals Board Ordinance

15. Schedule amended

The Schedule to the Administrative Appeals Board Ordinance (Cap. 442) is amended by adding -

- "32. Companies (Corporate Rescue) Ordinance (of 2001) A decision of the Official Receiver under section 4 to refuse to appoint a professional accountant or solicitor to be a member of the panel."

Mandatory Provident Fund Schemes (General) Regulation

16. Approved trustee to notify Authority of events of significant nature

Section 62(3)(a) of the Mandatory Provident Fund Schemes (General) Regulation (Cap. 485 sub. leg.) is amended by adding "the appointment of a provisional supervisor, within the meaning of section 2 of the Companies (Corporate Rescue) Ordinance (of 2001), of the approved trustee," before "the winding-up".

Explanatory Memorandum

The purpose of this Bill is to give effect to most of the recommendations contained in the Report on Corporate Rescue and Insolvent Trading issued by the Law Reform Commission of Hong Kong.

2. The Bill enables a company in financial difficulty to be put into the hands of a provisional supervisor for the purpose of the provisional supervisor preparing a proposal to creditors of the company for a voluntary arrangement in respect of the company. If that proposal is accepted by the creditors, then the voluntary arrangement is put into effect under a supervisor of the arrangement.

If that proposal is rejected by the creditors, then the company is wound up as a creditors' voluntary winding up.

3. Part 1 (clauses 1, 2 and 3) is preliminary. Clause 2 defines the terms used in the Bill. The definitions of "provisional supervisor", "relevant creditor", "relevant date", "relevant meeting of creditors" and "voluntary arrangement" should, in particular, be noted. Clause 2(2) and (3) make it clear that more than one person may be appointed to be the provisional supervisor of a company or the supervisor of a voluntary arrangement in respect of a company. Clause 3 specifies the companies to which the Bill will apply. It should be noted that the Bill does not, inter alia, apply to banks, restricted licence banks or deposit-taking companies, as the provisions of the Banking Ordinance (Cap. 155) govern such institutions.

4. Part 2 (clauses 4 to 9) relates to the appointment of the provisional supervisor of a company. Clause 4 empowers the Official Receiver to appoint a panel of professional accountants and solicitors. Apart from the exceptions given at clauses 5(a)(ii) and 27(1)(b), no person may be appointed to be the provisional supervisor of a company or the supervisor of a voluntary arrangement except a member of the panel. Clause 6 specifies the persons who may appoint the provisional supervisor of a company. (For example, the directors of the company or a liquidator of the company). However, clause 7 provides that those persons shall not appoint a provisional supervisor unless they are satisfied there is a reasonable likelihood that one or more of the purposes specified in clause 7(1)(a), (b) or (c) could be achieved. (Such a purpose is defined in clause 2 as a "relevant purpose"). Clauses 8 and 9, as read with Schedules 2 and 3, require certain documents relating to the appointment of a provisional supervisor of a company to be filed with the Official Receiver, the Registrar of Companies and the High Court Registry, a notice of the appointment to be published in the prescribed manner (see Schedule 1) inviting creditors of the company to give notice to the provisional supervisor of their claims against the company.

5. Part 3 (clause 10) and Schedule 4 specify, inter alia, the duties and powers of the provisional supervisor (including the power of delegation) and the indemnity and remuneration to which the provisional supervisor is entitled. The provisional supervisor is also entitled to apply to the Court of First Instance ("the court") for directions in relation to any matters arising in connection with the discharge of his duties or the exercise of his powers (clause 10(7)).

6. Part 4 (clauses 11 to 19) relates to the moratorium which arises subsequent to the appointment of the provisional supervisor. (See the definition of "moratorium" in clause 2). Clause 11 is of particular importance as it provides for a stay of proceedings against a company (for example, applications for winding up the company or for enforcing security over the company's property) whilst the company is under the control of the provisional supervisor. (This stay of proceedings is, in fact, the moratorium). The provisional supervisor is thus granted a "breathing space" whilst he attempts to prepare the proposal. The moratorium expires after 30 days unless it is extended by the court or a resolution of creditors of the company (see clause 12(1)). Clauses 12(2) and 19(2) specify the other circumstances in which the moratorium shall cease. Clause 12(4) specifies the creditors who are exempt from the moratorium. (These are creditors in respect of whom the provisional supervisor has entered into a separate arrangement, or whom the court has exempted on the ground of significant financial hardship under clause 13(4)). Clause 13(2) empowers the court to extend the moratorium on specified grounds.

7. Clause 14 states that the effect of the moratorium on the directors of the company are that they are prohibited from discharging a duty or exercising a power in their capacity as directors. (However, the provisional supervisor may delegate such a duty or power to a director, as the provisional supervisor will have all the duties and powers of a director). Clauses 15 and 16 specify the effect of the moratorium on contracts, in particular, contracts of employment.

8. Clause 17 empowers the provisional supervisor to require a specified person (see the definition of "specified person" in clause 17(6)) to submit a

statement of the affairs of the company, and to provide the provisional supervisor with such information about the business and financial circumstances of the company as the provisional supervisor may reasonably request.

9. Clause 18 encourages the injection of fresh funds into the company as operating capital by giving those funds priority, in the event of the winding up of the company, over the debts of other creditors of the company. Clause 19 empowers a major secured creditor of the company (see the definition of "major secured creditor" in clause 19(5)) to decide that he does not agree with the provisional supervisor proceeding to prepare the proposal. If he so decides, then the moratorium ceases and the provisional supervisor vacates his office.

10. Part 5 (clause 20) relates to the removal and resignation of the provisional supervisor, and to the appointment of a replacement provisional supervisor. It should be noted that the provisional supervisor can only be removed from office by the court for cause shown on the application of a creditor of the company who has the support in writing of not less than 50% in value of the total number of creditors.

11. Part 6 (clauses 21 to 25) and Schedules 6 and 7 relate to relevant meetings of creditors of the company called by the provisional supervisor and the resolutions passed or rejected at such meetings. (See the definition of "relevant meeting of creditors" in clause 2). Basically, there are 3 types of meeting - a meeting where the provisional supervisor submits the completed proposal for acceptance, modification or rejection by the creditors, a meeting to seek an extension of the moratorium so that the provisional supervisor may complete the proposal, and a meeting to resolve to wind up the company where the provisional supervisor has decided that none of the relevant purposes is capable of being achieved. It should be noted that if the creditors reject the proposal or refuse to extend the moratorium, then they may also resolve to wind up the company. It should also be noted that a resolution passed by a relevant meeting of creditors may be overturned by the court upon application made by a member of the company (clause 23(3), (4) and (5)).

12. Clause 25 specifies the consequences that ensue where the proposal has been approved at a relevant meeting of creditors. The provisional supervisor vacates office and a supervisor of the voluntary arrangement takes his place. (They may be the same person). It should be noted that all relevant creditors who received notice of the meeting are bound by the voluntary arrangement even if they declined to attend the meeting (clause 25(1)(b)(i)).

13. Part 7 (clauses 26 to 29) relates to the voluntary arrangement arising as a result of the creditors' approval of the proposal. Clause 26 sets out the effect of the voluntary arrangement, in particular that no creditor of the company bound by the arrangement may commence or continue any winding up proceedings against the company or enforce any security over the company's property. Clause 27 relates to the supervisor of the voluntary arrangement and provides, in particular, that he must ascertain on behalf of creditors of the company that the arrangement is being adhered to and implemented in accordance with its terms. Clause 28 empowers the court in certain circumstances to appoint the supervisor of the voluntary arrangement in substitution for an existing supervisor, or to fill a vacancy. Clause 29 requires the supervisor of the voluntary arrangement to file a notice with, *inter alia*, the Official Receiver where he is a replacement supervisor or where the voluntary arrangement has ceased to have effect.

14. Part 8 (clauses 30 to 34) contains miscellaneous provisions. Clause 30 empowers the Official Receiver to specify forms, and clause 31 empowers the Secretary for Financial Services to make regulations, for the purposes of the Bill. Clause 32 empowers the Chief Justice to make rules for the purposes of the Bill, including specifying fees. Clause 33 empowers the Secretary for Financial Services to amend any of Schedules 1 to 7.

15. Clause 34 and Schedule 8 make consequential amendments, in particular to the Companies Ordinance (Cap. 32). In particular, section 8 of Schedule 8 adds new sections 295A to 295G to the Companies Ordinance (Cap. 32) to empower the liquidator of a company to make an application to the court to declare that a responsible person or former responsible person is liable for insolvent trading.

(See the definitions of "former responsible person", "insolvent trading" and "responsible person" in new section 295A(1)). The new provisions are based to some extent on sections 214 and 215 of the Insolvency Act 1986 of the U.K. (c. 45).

16. New section 295C(1) specifies the matters in respect of which the court must be satisfied before it may declare a responsible person or former responsible person liable for insolvent trading. New section 295C(2) provides defences to a declaration of insolvent trading under new section 295C(1). New section 295D provides for a presumption of continued insolvency from a date in the period of 12 months preceding the winding up of the company if it is shown to the satisfaction of the court that the company was insolvent on that date. New section 295E provides that where the court makes a declaration of insolvent trading in respect of a responsible person or former responsible person, it may order that person to pay to the company such compensation as the court thinks proper in all the circumstance of the case. New section 295F specifies how the compensation is to be applied. It should be noted that new section 295G prohibits the liquidator from assigning an action for insolvent trading. Sections 6 and 7 of Schedule 8 consequentially amend sections 168L(1) and 168O of the Companies Ordinance (Cap. 32) to account for the new action of insolvent trading.

**SUMMARY OF
REPORT ON CORPORATE RESCUE
AND INSOLVENT TRADING
ISSUED BY
THE LAW REFORM COMMISSION OF HONG KONG**

Provisional Supervision: (Chapters 1 and 3 of the Report)

1. At present, Hong Kong companies that get into financial difficulties may try to come to an arrangement with their creditors by means of a non-statutory arrangement or by means of the arrangement and reconstruction provisions under section 166 of the Companies Ordinance. The major deficiency of these arrangements is the lack of a moratorium (stay of proceedings) that can bind creditors while an arrangement plan is being formulated.

2. Provisional supervision leading to a voluntary arrangement would be a vehicle which would facilitate a company in avoiding winding up, to survive in whole or in part as a going concern, or satisfy its debts in whole or in part through a more advantageous realisation of the company's assets or a better return for creditors and members than would result from a winding up. These general purposes could be achieved in a variety of ways through voluntary arrangements; such as/by:

- (a) an extension of time for payment of debts,
- (b) a composition in satisfaction of its debts,
- (c) the compromise of any claims against the company,
- (d) the variation or the reordering of the rating for payment of its debts or any class of its debts,
- (e) the conversion of its debts in whole or in part into shares or other securities to be issued by the company, or
- (f) any other scheme or arrangement in relation to the affairs of the company.

3. Provisional supervision would:

- (a) provide a solid basis on which to calculate the costs and time involved in putting a proposal to creditors.
- (b) provide a flexible framework to allow a provisional supervisor to work under court protection from the outset.
- (c) limit the costs of court appearances as the provisional supervisor would only have to go to court after 30 days and after that only when an extension of provisional supervision was sought or the company was deemed to be wound up as a creditors' voluntary winding up.
- (d) set out the role of the provisional supervisor, give the provisional supervisor the power of management, prevent creditors from threatening proceedings as a form of leverage, permit super priority borrowing, allows creditors to vote on the proposal and provide a transition into a company voluntary arrangement or winding-up.
- (e) provide certainty. Creditors could be sure that after not more than six months they would have their say on a proposal.

Benefits of provisional supervision

4. If a company can achieve a voluntary arrangement under supervision, there are good prospects that it can return to profitability. This is attractive to the shareholders, who generally have the lowest priority when it comes to the distribution of the assets of a company that has gone into liquidation from a winding up.

5. The preservation of jobs is of the utmost importance. For additional comment on employees see paragraph 19 below.

6. Unsecured creditors are often considered to have a raw deal in a liquidation. In the fours between 1991/92 and 1994/95 it took an average time of 5.12 years to pay an average rate of 27.78% first and final dividend to ordinary creditors.

7. It is not unusual for there to be multiple secured creditors with varying securities and priorities over the assets of a company. Because of the nature of floating charges in particular, which permit a company to deal with the assets covered by the floating charge in the ordinary course of business, the value of a company's assets can diminish, leaving some or all of the secured creditors under-secured.

Companies To Whom Provisional Supervision Would Apply (Chapter 2 of the Report)

8. The procedure should apply to companies formed and/or registered under Part I and XI of the Companies Ordinance but excluding certain regulated industries. Provisional supervision would apply to both listed and unlisted companies. Companies registered under Part I of the Companies Ordinance account for most companies in Hong Kong, including both private and public companies. Part XI of the Companies Ordinance relates to companies incorporated outside Hong Kong, which are referred to in Part XI as "oversea companies".

9. The inclusion of oversea companies is important as Hong Kong is a major international trading, manufacturing and financial centre and there are a considerable number of international companies operating in Hong Kong in one form or another. Oversea companies operating in Hong Kong have the choice of forming a Hong Kong subsidiary under Part I of the Companies Ordinance or registering as an oversea company under Part XI.

Companies to whom the procedure would not apply

10. The procedure should not apply to industries that were already regulated by statute and which have provision for the relevant authority to assume control of the business or oblige a business to act in a certain manner. The regulatory powers of each industry differ substantially, according to their needs. Provisional supervision should not therefore be imposed on regulated industries but the relevant regulatory bodies should consider whether to apply a remedial procedure through their own legislation. The regulated industries recognised were banking, insurance and securities and futures.

Purposes Of Provisional Supervision (Chapter 3 of the Report)

11. A company should be able to go into provisional supervision whether it was able to pay its debts or not. A solvent company which recognised that it was trading into

difficulties should be able to avail itself of supervision. It would stand a better chance of a successful reorganisation than a company that continued trading until it was insolvent. It would be good management practice to act earlier rather than later in initiating provisional supervision.

Those Who May Initiate The Procedure (Chapter 4 of the Report)

12. In addition to the company or its directors, liquidators and receivers should be able to initiate, or give their consent to initiate, the procedure in appropriate circumstances. The intention is that whoever has power to initiate should do so from a position of knowledge of the company's financial position and prospects. It is for this reason that creditors should not be able to initiate the procedure.

The Moratorium (or Stay of Proceedings): (Chapter 5 of the Report)

13. The moratorium should commence upon the filing of a resolution of the company or the board of directors and the consent of the provisional supervisor to act. The initial moratorium period should be for 30 days from the commencement of provisional supervision after which, if the provisional supervisor has not formulated a proposal for creditors, he may apply to the court for an extension or extensions.

14. The provisional supervisor need only apply to the court for an extension if he is unable to complete an arrangement plan within the initial 30 day period. After that, the court should grant an extension or extensions of 30 days or more. If the provisional supervisor reports that he is likely to be able to complete the plan but not within a further 30 days, the court should have the discretion to extend the moratorium for any period up to a maximum of six months from the commencement of the moratorium.

15. Eligible financial contracts, which occur in certain closed markets such as the central clearing and settlement system of the Stock Exchange of Hong Kong Limited, should be exempted from the moratorium.

16. At the end of six months, the court would cease to have any role in monitoring the provisional supervisor as regards extensions of the moratorium. If the creditors resolved to extend the moratorium beyond six months they could impose such conditions as they wished on the provisional supervisor relating to reviewing the extension.

17. If the court was satisfied that the moratorium was causing significant financial hardship to a creditor, the court could exempt that creditor from the moratorium and any voluntary arrangement and the moratorium would cease to apply to that creditor and the creditor would not be subject to any subsequent voluntary arrangement.

18. The provisional supervisor should have the power to exclude any class or classes of creditors from the moratorium, in which case the moratorium would cease to apply to them.

19. At present, employees who are laid off by a company that does not go into liquidation are not able to make a claim for compensation from the Protection of Wages on Insolvency Fund, as the Fund is only triggered by the winding-up of the company or by advice from Legal Aid that the company is unable to pay its debts. On a provisional supervision, employees could therefore be cut out and left without the prospect of any

interim payment from the Fund. It would be desirable for employees who have been laid off as a consequence of provisional supervision to be accommodated under the provisions of the Protection of Wages on Insolvency Ordinance. Until that happens, a provision similar to section 79 of the Companies Ordinance should be made to the effect that, where a provisional supervisor is appointed to a company the debts of employees which in every winding-up are preferential payments under section 265 of the Companies Ordinance, be paid in priority to all other debts according to their respective priorities under section 265, out of the assets coming into the hands of the provisional supervisor in priority to any other claim.

20. The moratorium should cease upon a resolution being passed either to terminate the provisional supervision or that the company should be wound up or on the approval or rejection by creditors of a voluntary arrangement plan.

Initiating The Procedure (Chapter 6 of the Report)

21. A proposal for a voluntary arrangement should not have any effect until a resolution of the company or the board of directors proposing a voluntary arrangement, or, if appropriate, of the proposal of a liquidator in a compulsory winding up, a consent to act of the provisional supervisor, and an affidavit of the directors setting out the reasons for initiating provisional supervision, have been filed at both the Supreme Court Registry and the Companies Registry. The effect of the filing of the documents would be to put the company into provisional supervision, the commencement date being the date of last filing of the resolution and the consent to act.

22. The affidavit of the board of directors should set out the reasons for initiating provisional supervision and a declaration to the effect that in the opinion of the directors the interests of the company and creditors would be best served by the process of provisional supervision. The affidavit would be useful to the court in considering later applications for extensions of the moratorium and would also give some reassurance to the creditors.

Who May Be The Provisional Supervisor (Chapter 7 of the Report)

23. In most cases provisional supervisors should only be selected from a panel of practitioners which would be operated by the Official Receiver. In addition to appointment of provisional supervisors through a panel the court may approve the appointment of a person who was not on the panel but who was particularly suited to the task of rescuing a particular company. Once a provisional supervisor is appointed he would not only assume control of the company but would also be involved in the day to day business of the company in addition to formulating an arrangement plan.

Role Of The Provisional Supervisor (Chapter 8 of the Report)

24. If the provisional supervisor was to leave the day to day running of a company in the hands of the management and to limit himself with examining the records of the company and working behind the scenes to formulate a plan there would be a danger on two fronts. First, the provisional supervisor might fail to gain the confidence of the creditors if it was perceived that he was not in full control. Second, if a provisional supervisor did not have control over the management of a company, it would increase the

chances of a company's assets being dissipated by unscrupulous directors. It would not therefore be appropriate to allow management retain full control of a company and accordingly the provisional supervisor should have executive functions.

25. The functions of the provisional supervisor would be:

- (a) to assess the financial position of the company, after which he should;
- (b) decide whether or not any of the purposes of a voluntary arrangement were capable of being achieved;
- (c) if he decided that any of the purposes of a voluntary arrangement were capable of being achieved, he should then formulate a plan to achieve the intended purpose;
- (d) once he formulated a plan, he should submit it to a meeting or meetings of creditors for acceptance or otherwise by the creditors within the initial moratorium period in so far as that was possible;
- (e) if the provisional supervisor, having assessed the financial position of the company, decided that none of the purposes of a voluntary arrangement were capable of being achieved he should call a meeting of creditors;
- (f) if the provisional supervisor, having commenced the formulation of an arrangement plan, found that he was unable to complete the formulation of the plan, he should call a meeting of creditors to provide them with a final opportunity to come up with a plan to save the company or to resolve that the company should be wound up;
- (g) during the provisional supervision period he should do all things necessary to protect the assets of the company;
- (h) during the provisional supervision he should manage the affairs, business and property of the company with the primary purpose of preserving the assets of the company for the creditors as a whole;
- (i) he should act in the best interests of the company;
- (j) he should make a report to the Official Receiver if a director was or had been a director of a company which had at any time become insolvent whether while he was a director or subsequently and that his conduct as a director of that company, either taken alone or taken together with his conduct as a director of any other company or companies, made him unfit to be concerned in the management of a company.

Duties, Rights And Liabilities Of The Provisional Supervisor (Chapter 9 of the Report)

26. Subject to his overriding duty to supervise the affairs of the company and to carry out his functions, the provisional supervisor should be under a duty to do all things necessary to protect the assets of a company for the benefit of the creditors. The provisional supervisor should have the right to approach the court for directions. The provisional supervisor should not be liable for any of the debts of the company which arose before his appointment.

27. The provisional supervisor should be entitled to such remuneration as would be agreed between him and whoever initiated the procedure and caused him to act. The level of the remuneration should be specified in a prescribed form in the consent to act.

Ascertaining The Company's Affairs (Chapter 10 of the Report)

28. When a provisional supervisor is appointed he will need to assimilate a great deal of information in a short time, including establishing the extent and whereabouts of the assets of the company and taking control of them. In order to achieve this, the provisional supervisor would need powers to require information to be put at his disposal without undue delay and for assistance to be afforded to him by those who had knowledge of the company's affairs. The provisional supervisor should therefore have the power to obtain a statement of affairs of the company from specified persons, including directors and employees, within a relatively short time after his appointment.

Removal And Resignation Of The Provisional Supervisor (Chapter 11 of the Report)

29. The provisional supervisor should only be capable of removal for cause shown.

30. The provisional supervisor should be able to resign without cause shown where a majority of the creditors and the provisional supervisor himself agree to such a course and another provisional supervisor agrees to be appointed to the position. Resignation should not otherwise be possible other than where a provisional supervisor died or through mental incapacity.

Super Priority (Chapter 12 of the Report)

31. Provision should be made for a company to borrow during provisional supervision and such borrowing should receive priority over all existing debts, with the exception of fixed charges. This is because, in all likelihood, a company in provisional supervision would need to raise capital to fund its operations during the provisional supervision period. Existing lenders should be given first refusal on any super priority lending the company may require. If existing lenders declined to provide the lending, the provisional supervisor should then be able to seek super priority lending from other sources. Super priority lending would apply only to funds provided for working capital for the company and these funds should not be used to discharge, in whole or in part, any liability of the company to the provider of the funds existing at the commencement of the provisional supervision period.

Secured Creditors (Chapter 13 of the Report)

32. Any substantial charge, whether it was fixed or floating, or a combination of both, should carry the right to elect whether to participate in provisional supervision. The effect of an election not to participate and thus effectively end provisional supervision would return a company to the position it was in just a few days previously. Creditors, secured and unsecured, could take the usual forms of action. Other secured creditors, that is, holders of charges whose level of exposure or lending would not warrant a charge over the whole or substantially the whole of a company's assets, would be bound by a moratorium in the same way as unsecured creditors, and would not have the option to elect whether to participate in provisional supervision.

Procedures For Meetings Of Creditors (Chapter 16 of the Report)

33. Any meeting of creditors to consider any matter relating to provisional supervision, creditors should form one class. The quorum for any meeting of creditors should be one creditor present and entitled to vote. For any resolution to pass at a meeting of creditors approving a proposal, there should be a majority in number and in excess of two thirds in value of the creditors present in person or by proxy and voting on the resolution.

34. Where a voluntary arrangement plan is approved by creditors, the provisional supervision should cease and the terms of the voluntary arrangement should take effect. The voluntary arrangement would be binding on every creditor who was entitled to vote at a meeting at which the arrangement plan was approved, and on the company and its members.

Consequences Of The Approval Of A Voluntary Arrangement (Chapter 17 of the Report)

35. Even after a company enters into a voluntary arrangement it would need protection. It should be a condition of every voluntary arrangement that, while it was in effect, the parties to the voluntary arrangement should be prohibited from taking actions that would be to the detriment of the other parties to the arrangement; therefore:

- (a) no creditor bound by the arrangement may commence or continue any winding up proceedings against the company;
- (b) no resolution may be passed or made by the members or the directors of the company for the winding up of the company;
- (c) no receiver of the company may be appointed by a creditor bound by the arrangement or, if already appointed, no receiver may exercise any powers incidental to the office;
- (d) no creditor bound by the arrangement may take any step to enforce or continue to enforce any security over the company's property or to repossess goods in the company's possession;
- (e) no creditor bound by the arrangement may commence any proceedings, execution, distress or other legal process against the company.

The Supervisor Of A Voluntary Arrangement (Chapter 18 of the Report)

36. The supervisor of a voluntary arrangement should only be capable of appointment from the Official Receiver's panel. In most cases he would probably be the provisional supervisor. A supervisor of a voluntary arrangement should perform such duties and functions and have such powers as may be specified in the arrangement and ascertain on behalf of the creditors that the arrangement was being adhered to and implemented by the company in accordance with its terms. The supervisor should supervise the arrangement having regard to the interests of the creditors of the company, the company itself and the shareholders of the company.

Insolvent Trading (Chapter 19 of the Report)

37. Directors of a company should be subject to liability for insolvent trading once a company traded while insolvent or if the company continued to trade when there was no reasonable prospect of preventing the company becoming insolvent. A lesser duty should be imposed on senior management of a company. Directors and senior management, collectively known as "responsible persons" would be liable to pay compensation to the company if they were found by the court to have failed in their respective duties. Insolvent trading provision should encourage responsible persons to face the fact that a company was slipping into insolvency and cause them to take action rather than to trade on regardless of the consequences.

38. Provisional supervision would be a civil remedy only; there should be no criminal element. There is no reason for making an application for insolvent trading unless a company had gone into insolvent liquidation as, in practical terms, if a company remained in business there would be no one, such as a liquidator, who would be in a position to form a view that insolvent trading had taken place. The power to make an application in respect of insolvent trading should vest in a liquidator only.

39. Insolvent trading should apply to all directors whether they were validly appointed directors, persons who held themselves out to be directors though they had not been validly appointed, and shadow directors. Liability for insolvent trading should not be collective and liquidators should take account of a director's actions prior to liquidation. The ability and expertise of a director should be taken into account. A responsible director should, therefore, be able to protect himself by showing that he had warned the board about insolvent trading and that he had opposed the course of action the company had taken which resulted in insolvent liquidation.

40. Senior management should be liable to pay compensation for insolvent trading if they failed to warn the board of directors that the company was trading into insolvency. Senior management's duty would be lower than that of directors as the power to wind-up a company voluntarily or to initiate provisional supervision would only lie in the board of directors. Liability should extend to those in management who would know, who ought to have known or who had reasonable grounds for suspecting that a company was insolvent or would become insolvent and failed to warn the board of directors of the situation.

41. As most companies operate on a cash flow basis and can readily establish whether a company is able to discharge its liabilities as they fall due the cash flow test is the basis on which liability should be founded.

42. In order for a liability for insolvent trading to arise certain factual conditions would have to be established. These are (i) that a director is or has been a director of an insolvent company at the time when the debt or debts were incurred and that (ii) the company was insolvent at that time or there was no reasonable prospect of avoiding becoming insolvent. A liquidator must then consider whether a director, at that time, (i) knew the company was insolvent, or (ii) ought to have known that the company was insolvent or would so become, or (iii) that there were reasonable grounds for suspecting that the company was insolvent or would become insolvent and failed to take action to prevent the company from incurring the debt. The third limb of the factual conditions refers to reasonable grounds for suspecting insolvency. A director would be considered to have suspicions if, (i) he was aware at the time that there were grounds for so suspecting, or (ii) if a director in a like position in a company, in the company's circumstances, would be so aware.

43. In determining whether warning was given in good time the same factual conditions as set out above in respect of directors would be applied to senior management.

Presumptions

44. The effect of a presumption of continuing insolvency is that, if it is proved that a company was insolvent at a particular time during the 12 months ending on the date of commencement of its winding up, it would be presumed that the company was insolvent throughout the period beginning at that time and ending with the winding up of the company. This would prevent responsible persons defending an application for trading while insolvent by claiming that the company was actually solvent at a particular date, or for a certain period, during the period between the date when insolvency is shown and the date of winding up. Where circumstances of insolvency are established as having existed at a particular time within 12 months of winding up, it would shift the burden of proving the contrary on to the responsible persons.

45. If it is proved that a company had, at a particular time during the 12 months ending on the date of commencement of the winding-up, contravened section 121 of the Companies Ordinance by failing to keep proper accounting records there should be a presumption that the company was insolvent throughout the relevant period.

Defences

46. A director should have a defence to an application against him for insolvent trading if he could satisfy the court that, at the time when he knew or ought to have known that the company was insolvent or would become so or that there were reasonable grounds for suspecting that the company was insolvent or would become insolvent, he took every step with a view to minimising the potential loss to the company's creditors as he ought to have taken. For the purposes of the defence, the facts which a director ought to have known or ascertain, or the conclusions which he ought to reach and the steps he ought to take, are those which would be known and ascertained, or reached or taken, by a reasonably diligent person having both the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as are carried out by that director in relation to the company, and the general knowledge, skill and experience that director has.

47. A senior manager would have a defence to an application against him for insolvent trading if he could demonstrate that he had given the board of directors notice in the prescribed form that a company was trading insolvently or was about to trade insolvently.

Responsible persons may be liable to compensate the company

48. If the court finds a responsible person liable for insolvent trading it should be able to order the responsible person to pay compensation to the company for the benefit of the general body of creditors which would equal the general deficiency when it was wound up. It should be left to the discretion of the court to decide the amount of compensation that should be awarded against a responsible person as the actions of each responsible person would have to be judged separately. Compensation recovered should be paid to the company for the benefit of the general body of creditors in accordance with the existing priorities, unless the court orders otherwise.

49. If the court makes a declaration that a responsible person, whether he is a director or senior manager, is liable to pay compensation for insolvent trading, the court should have the discretion to make an order disqualifying that person from being a director of

any company under Part IVA of the Companies Ordinance. If a person acted as a director of a company which went into insolvent liquidation at a time when he was disqualified as a director under Part IVA of the Companies Ordinance, he may be held liable for the debts of the company.

**Introduction of a Statutory Corporate
Rescue Procedure in Hong Kong –
Report on Consultation on the Proposed Flexibility
on the Settlement of Outstanding Wages and Other Entitlements**

This paper summarises the results of the Administration's consultation exercise on the Bills Committee's proposal of providing flexibility to the requirement that before undergoing corporate rescue, a company should first settle all outstanding arrears in wages and other statutory entitlements owed to its employees.

Background

2. The Law Reform Commission (LRC) recommended in 1996 the introduction of a statutory corporate rescue procedure in Hong Kong whereby a moratorium on legal action would be provided to a company in financial difficulty. The moratorium would enable the company to appoint an independent third party, the *provisional supervisor*, to try to work out a *voluntary arrangement* with the company's creditors. Such procedure would assist businesses in financial difficulties to turn round and continue to operate as going concerns.

Consultation on the Proposed Change in Use of the Protection of Wages on Insolvency Fund

3. In preparing the draft legislation to implement the LRC's recommendations, we noted that the LRC's recommendation to use the Protection of Wages on Insolvency Fund (PWIF) to meet the outstanding claims of those employees who are laid off by a company undergoing supervision would come into conflict with the provisions in the Employment Ordinance (the EO) (Cap. 57). As a result, we conducted a public consultation exercise on the issue in 1998.

4. At the end of the consultation exercise, a total of 26 submissions with divergent views were received. Nonetheless, representative bodies of those who would be most directly affected by the proposed rescue procedure, namely, employers and employees, were unanimously against any change to the use of the PWIF, notwithstanding their pledge of "in principle" support for the concept of the proposed procedure. Both the Labour Advisory Board (LAB) and the PWIF Board also expressed strong reservation on making use of the PWIF to bail out private businesses.

The Administration's Approach on the Settlement of Employees' Wages Owed by a Company Undergoing Corporate Rescue

5. Having regard to the strong objection to the proposed change to the use of the PWIF, we decided to depart from the LRC's recommendation and adopt the approach of requiring the company wishing to undergo corporate rescue to clear, if any, all arrears in wages, severance pay and other statutory entitlements due and owing by it to its employees before the corporate rescue procedure could be initiated.

6. In essence, we proposed that the appointment of a provisional supervisor of the company should not come into effect unless and until, among others, an affidavit has been filed with the Official Receiver and the court confirming that either the company has no debts and liabilities owing by virtue of the EO to its employees or former employees; or that the company has a *trust account*, the exclusive purpose of which is to provide funds to pay all debts and liabilities due and owing by the company to its employees and former employees before the commencement of the corporate rescue process.

7. As regards employees who continued to be employed or were newly employed by the provisional supervisor after the commencement of the corporate rescue process, we proposed that the company as well as the provisional supervisor personally should be liable for such employees' wages and other statutory entitlements that the company might owe to them. Where a contract of employment was not accepted or was terminated by the provisional supervisor after the commencement of the corporate rescue process, any outstanding wages, salaries and other emoluments under the contract would be regarded as the liabilities of the company and would be charged on and paid out of the property of the company by the provisional supervisor.

The Companies (Amendment) Bill 2000

8. Legislative proposals based principally on the LRC's recommendations, together with the above modification, were introduced into the Legislative Council in January 2000 as part of the Companies (Amendment) Bill 2000 (the Bill).

9. During the Bills Committee stage, Members of the Bills Committee, having regard to time constraints and the complexity of the proposals, recommended that the draft provisions on corporate rescue be excised from the Bill and be deferred for re-submission to the Legislative

Council at a later stage.

The Bills Committee's Concern

10. Members of the Bills Committee were generally supportive of the proposed statutory corporate rescue procedure. However, some Members expressed doubts on the requirement placed upon a financially troubled company to set aside sufficient funds to settle all arrears of wages, severance pay and other statutory entitlements of its employees as if it were a going concern. They were concerned that the Bill did not provide flexibility in this regard and suggested that the Administration should consult the LAB on its proposal to provide some flexibility.

Flexibility Proposal on the Requirement to Settle all Arrears

11. The intention of setting aside sufficient funds to settle arrears of wages etc. was to protect the statutory rights conferred upon employees under the relevant provisions of the EO. In suggesting that more 'flexibility' should be built into the system, Members of the Bills Committee did not elaborate on how this should be done.

12. Based on the Bills Committee's comments, we developed a proposal to provide for such flexibility and sought the LAB's and PWIF Board's views. The main features of our proposal are set out below.

13. A company that initiates the corporate rescue process would have two types of employees –

- (a) former employees whose employment is terminated before the commencement of the corporate rescue process; and
- (b) continuing employees who would be retained by the company when the corporate rescue procedure starts.

Wages in arrears and other outstanding entitlements under the EO may apply to both types of employees. However, in view of their different disposition, they should be accorded different treatments.

Former Employees

14. Under the proposed corporate rescue process, a moratorium on legal action against the company will be put in place once the process is initiated. The moratorium would directly affect the claims of former employees to whom the company owes wages, etc. against the company for arrears of wages and other outstanding entitlements under the EO and their employment contracts. Moreover, when the moratorium is in effect, these employees would not enjoy the protection under the Protection of Wages on Insolvency Ordinance (Cap 380) (PWIO) since ex-gratia payments under the PWIF may only be made when a winding up petition has been presented against the company. Since these employees would no longer have any ties with the company undergoing corporate rescue, we consider that the employer should be required by law to settle, or to set aside an amount to meet, any wages in arrears and other outstanding entitlements due to his former employees before he could proceed with the corporate rescue process.

Continuing Employees

15. Continuing employees are expected to have continuing ties with the company. Hence, they would have a greater interest in the survival of the company. This group of employees may be entitled to –

- (a) wages and other entitlements (excluding termination benefits which by definition would not be due and payable to continuing employees) that have been outstanding immediately prior to the commencement of the corporate rescue process; and/or
- (b) wages and other entitlements accrued owing since the commencement of the process.

16. In respect of paragraph 15(b) above, the provisions in the corporate rescue legislation will provide that if the provisional supervisor or the company fails to pay the employees their wages accrued owing after the commencement of the corporate rescue process, the employees would be able to present a winding-up petition against the company and make the relevant claims under the PWIO. The moratorium imposed during the corporate rescue process does not apply to such outstanding wages.

Forms of Flexibility Proposed

17. Our proposal would only cover the amounts outstanding in paragraph 15(a) above. Two forms of flexibility have been put forward, namely, a deferral of payment, and payment in lieu of cash (e.g. shares under a trade-in agreement). The specific form would be a matter for the company to negotiate with its employees on an individual basis.

18. Under the deferral of payment arrangement, we proposed that the employer should be allowed to enter into agreement with his continuing employees to defer payment of their arrears in wages and other outstanding entitlements. If the company eventually manages to turn around, the employees would be able to receive the entire amount of wages and entitlements outstanding accumulated before the corporate rescue operation and the employees will be able to enjoy continued employment with a rescued company. Under the payment in lieu of cash arrangement, an employer can enter into agreement with its continuing employees to trade in arrears in wages through payment in considerations other than cash, e.g. by shares.

19. While the employees would be able to enjoy the potential gains from the two proposed flexibility agreements, there is also possible down side risk. A trade-in agreement would effectively discharge the employer's liability for payment of arrears in wages and other entitlements. If the corporate rescue exercise fails and the company goes into liquidation, the employees would not be eligible to make claim to the PWIF in respect of the amounts already traded in. As for the deferred payment arrangement, if the rescue operation eventually fails and the company has to be wound up, there is a real risk that an employee may not be able to recover the full amount of owed wages from the PWIF.¹

¹ Under the PWIO, employees who are owed wages by their insolvent employers may apply to the PWIF for ex-gratia payment to recover arrears of wages not exceeding \$36,000 for arrears of wages accrued during a period of four months preceding the applicant's last day of service. Where an employee has agreed to defer payment of wages in order to help the employer to initiate a company rescue operation which, after a period in excess of four months, eventually failed, he will end up in a position whereby he would not be able to recover through the PWIF arrears in wages accrued prior to the commencement of the rescue operation.

20. To provide the employees with an incentive to accept the two proposed forms of flexibility and thus facilitating the initiation of a rescue operation, we have also proposed certain amendments to the provisions of the PWIF Ordinance to afford the employees greater protection than under the existing provisions, e.g. to amend the PWIF Ordinance to make it possible for employees to claim the PWIF in respect of wages and other entitlements outstanding before the start of the corporate rescue exercise and more than four months from the last day of service or to amend the PWIF Ordinance to allow employees to make a claim in respect of the amounts traded in, if such flexibility agreements are entered into by them.² In this connection, the Education and Manpower Bureau has expressed concern that the proposed amendments especially the idea of allowing employees to make a claim to the PWIF in respect of the amounts traded in would be tantamount to employees using the protection under the PWIF to secure possible benefits from beleaguered employers. The PWIF was not set up for such a purpose and cannot be used in this manner without a change in its mandate. The proposed amendments would also have financial implications for the PWIF.

Consultation with the PWIF Board and the LAB

21. The PWIF Board and the LAB were consulted on the above two forms of flexibility together with the related legislative amendment proposals on 29 November 2000 and 15 December 2000 respectively. While they supported in principle the introduction of a statutory corporate rescue procedure in Hong Kong, both of them have objected to the flexibility proposal as set out in paragraphs 17 to 20 above. The major reasons of their objections are –

- (a) The flexibility proposal would reduce the level of protection accorded to employees under the existing labour legislation which stipulates that, e.g., wage payment should not be made later than seven days upon the expiry of the wage period nor in any form other than in cash.

² Under the proposal, for deferred payment agreements, if the corporate rescue exercise fails and the company goes into liquidation, the employees would still be entitled to make a claim to the PWIF in respect of wages and other entitlements outstanding before the start of the exercise and more than four months from the last day of service, subject to the existing ceiling of \$36,000. For trade in agreements, continuing employees would be allowed to make a claim to the PWIF for the traded in amount in the event the company eventually goes into liquidation, but again subject to the existing ceiling of \$36,000.

- (b) The PWIF has been set up to provide prompt relief in the form of ex-gratia payment to employees of insolvent employers and not to bail out financially troubled companies. The proposal would alter fundamentally the nature and policy intent of the PWIF. The mandate of the PWIF should not be changed to accommodate the proposal.
- (c) The proposal would have financial implications on the PWIF. Given the continued depletion of PWIF due to the upsurge of insolvency cases in recent years, the PWIF should not take on liabilities which would further increase its financial burden.
- (d) The outstanding wages and other entitlements owed to the employees usually constitute only a small proportion of the total amount of debts of the companies concerned. Hence, in most cases, a company undergoing corporate rescue should be able to set aside sufficient funds for clearing its debts to the employees.
- (e) Because of possible impairment of their interests, most employees would not accept deferred payment or payment other than cash. Consequently, even if the proposed flexibility arrangements were incorporated into the statutory procedure, they might not be able to achieve the purpose of relieving the financial burden of the company.

Both the PWIF Board and the LAB have asked the Administration to adhere to the original proposal on settlement of arrears in wages as set out in the Companies (Amendment) Bill 2000.