

C025e-1

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--

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(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 supervisor 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--

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(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 or 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 thinks 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 this 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 this 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 the 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 meetings of creditors, 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 section.
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 66²/₃% 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 "66²/₃%" 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 1680 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.

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 ".

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) A decision of the Official Receiver under section

Ordinance (of 2001) 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.