

## **LEGISLATIVE COUNCIL BRIEF**

The Secretary for Financial Services and the Treasury submits the following note for Members' information :

<b><u>Title of the Note</u></b>	<b><u>Date of ExCo</u></b>	<b><u>Date of Gazette</u></b>
Clearing and Settlement Systems Bill	25 November 2003	28 November 2003

26 November 2003

Financial Services and the Treasury Bureau

## **LEGISLATIVE COUNCIL BRIEF**

### **Clearing and Settlement Systems Bill**

#### **INTRODUCTION**

At the meeting of the Executive Council on 25 November 2003, the Council **ADVISED** and the Chief Executive **ORDERED** that the Clearing and Settlement Systems Bill, (at **Annex A**), should be introduced into the Legislative Council. The objectives of the proposed legislation are to provide express statutory backing –

- (a) for the oversight role of the Monetary Authority (MA) in relation to important clearing and settlement systems<sup>1</sup> in Hong Kong, in line with concerns expressed by the International Monetary Fund (IMF); and
- (b) for the finality of settlements effected through such systems, so as to facilitate the inclusion of the Hong Kong Dollar (HKD) in the Continuous Linked Settlement (CLS) System<sup>2</sup>.

#### **JUSTIFICATIONS**

2. Clearing and settlement systems for funds or securities are essential for the smooth functioning of financial markets. However, under the existing laws in Hong Kong, there are no explicit legal provisions for supervisory oversight of such systems<sup>3</sup>. The MA's present de facto oversight role is drawn from his general powers under sections 3A(1) and 5B of the Exchange Fund

---

<sup>1</sup> (i) "Clearing and settlement system" means a system established for -  
(a) the clearing or settlement of payment obligations; or  
(b) the clearing or settlement of obligations for the transfer of book-entry securities, or the transfer of such securities.

Reference to "clearing and settlement system" in the bill does not include a clearing or settlement system that is or is operated by a company recognised as a clearing house under the Securities and Futures Ordinance.

(ii) An important clearing and settlement system means a clearing and settlement system whose proper functioning is material to the monetary or financial stability of Hong Kong, or to the functioning of Hong Kong as an international financial centre.

<sup>2</sup> "CLS" is a global clearing and settlement system for cross-border foreign exchange transactions.

<sup>3</sup> Other than a clearing and settlement system that is, or is operated by a company recognized as, a clearing house for the purpose of section 37 of the Securities and Futures Ordinance (Cap. 571).

Ordinance, Cap. 66 and from various other non-statutory arrangements, e.g. the MA's holdings in the Hong Kong Interbank Clearing Limited and contractual obligations with certain system operators. Nor is there any statutory provision in Hong Kong confirming the finality of settlements effected through clearing and settlement systems<sup>4</sup>. The possibility of a successful challenge to the finality of such settlements under insolvency and other laws in Hong Kong puts at risk Hong Kong's financial and monetary stability.

*Suggestion from the IMF*

3. These two problems were identified by the IMF in a recent assessment of the financial system in Hong Kong. In its report, the IMF recommended that there should be explicit legislative provisions for oversight of clearing and settlement systems and settlement finality in Hong Kong's important payment systems. Any failure to conform with such recommendations could undermine Hong Kong's standing as an international financial centre. Hence it is in Hong Kong's interest to enact legislation to provide express statutory backing for the MA's oversight of important clearing and settlement systems and to provide for legal certainty of settlement finality.

*Admission into the Continuous Linked Settlement System*

4. The proposed Ordinance will also facilitate the admission of the Hong Kong Dollar (HKD) into the Continuous Linked Settlement (CLS) System which is a global clearing and settlement system for cross-border foreign exchange transactions. Many major international currencies have already been admitted into the system (US dollar, euro, yen, sterling, Swiss franc, Canadian dollar, Australian dollar, Swedish krona, Danish krone, Norwegian krone and Singapore dollar). The participation of HKD in the system would be crucial to Hong Kong's status and functioning as an international financial centre. As in other jurisdictions, the CLS system requires, as a pre-condition for the admission of HKD, that the laws of Hong Kong provide for settlement finality as regards transactions within its system and within the underlying Real Time Gross Settlement System in Hong Kong. It is hoped that HKD can be admitted into the CLS System in 2004. It is therefore necessary to put in place legislative provisions at this stage.

---

<sup>4</sup> Statutory protection exists only in relation to settlement finality in the CCASS in respect of exchange-traded securities or futures contracts settled through the recognised clearing houses by the Securities and Futures Commission under Part III of the recently commenced Securities and Futures Ordinance.

### International precedents

5. Legislation providing for pay-in and settlement finality from all laws can be found in a number of advanced economies, in particular the United States, European Union, New Zealand, Singapore and Canada.

6. Statutory oversight of payment systems is also found elsewhere. For example, (a) the Reserve Bank Act 1959 in Australia gives the Reserve Bank of Australia the responsibility for determining payments system policy; and (b) the Payment Clearing and Settlement Act 1996 in Canada makes the Bank of Canada responsible for the oversight of clearing and settlement systems with a view to controlling systemic risk. Singapore and Switzerland are also in the process of formulating similar legislation.

### **OTHER OPTIONS**

7. We have considered the option of relying on present law or any other option to achieve our policy objectives. However, these are not as good as the proposed Ordinance. The introduction of legislation, instead of relying on the present laws or any other option, will -

- (a) enable us to set explicit standards relating to the safety and efficiency of clearing and settlement systems and give the MA the powers necessary to enforce those standards;
- (b) in relation to finality of settlement, give us a level of certainty not otherwise achievable,

and we see legislation as the only means of achieving those policy objectives.

### **THE BILL**

8. The main provisions of the Bill are highlighted below -

#### Criteria for designation

9. Under clause 3(1) of the Bill, the MA would be empowered to designate any clearing and settlement system (“designated system”) to be subject to the oversight of the MA if the system is, or is likely to become a system whose proper functioning is material to the monetary or financial stability of Hong Kong or to the functioning of Hong Kong as an international financial centre<sup>5</sup>. Some systems are deemed to have been designated (see clause 54 and Schedule 2).

---

<sup>5</sup> Under these criteria, MA will be able to designate all the important payment systems that are currently subject to the de facto oversight of the MA such as HKD Clearing House Automated Transfer System

10. To be eligible for consideration for designation, a clearing and settlement system must be one that

- (a) is in operation in Hong Kong; or
- (b) accepts for clearing and settlement transfer order denominated in HKD.

11. Also, the power to designate will not apply to a clearing and settlement system that is, or is operated by a company recognised as, a clearing house for the purpose of section 37 of the Securities and Futures Ordinance (Cap. 571). This is to avoid regulatory overlap with the Securities and Futures Commission (SFC) under the Securities and Futures Ordinance (clause 3(2)).

12. The MA may revoke the designation of a designated system that no longer meets the criteria for designation under paragraph 9 or no longer meets the requirements described in paragraphs 11 and 12 above (clause 4).

13. The system operator and settlement institution of a designated system are required to inform the MA of their names and addresses (clause 5). There must also be in place within every designated system operating rules ensuring the system's safety (in relation to certainty of settlement, reliability and robustness of operation, proper security control and data integrity) and efficiency (in relation to access by market participants to the system and competition related issues), as well as compliance with the requirements specified in the proposed Ordinance; and no change can be made to a system's operating rules without the prior approval in writing of the MA (clauses 6 and 7).

*Functions and Powers of the MA in respect of designated systems*

14. It shall be the function of the MA under the proposed Ordinance both to monitor compliance with the provisions of the proposed Ordinance and to promote the general safety and efficiency of designated clearing and settlement systems (clause 8). To this end, the MA will have powers that will allow him to exercise continuous oversight of a designated system including, inter alia -

- (a) the power to request information from a designated system (Clause 10) and to give directions to a designated system for

---

(CHATS), USD CHATS, Euro CHATS, Central Moneymarkets Unit (CMU), Cheque Clearing and cash settlement leg of Central Clearing and Settlement System (CCASS). These criteria will also enable MA to designate CLS in the future when it becomes eligible for designation.

the purpose of bringing the system into compliance with the requirements under the proposed Ordinance (clause 11);

- (b) the power to amend a system's operating rules to bring them into compliance with the proposed Ordinance after consultation with the Financial Secretary and the system operator or settlement institution (clause 12); and
- (c) the power to make regulations in relation to the oversight of designated systems to ensure the safety, efficiency and financial soundness of such systems, as well as all other matters for the better carrying out of the object and purpose of the proposed Ordinance (these regulations would be subsidiary legislation subject to vetting of the legislature) (clause 48).

15. The MA will also have the power to exempt from the oversight regime any system that is established in a place outside Hong Kong and is under the supervision of an authority exercising functions in that place similar to the functions of the MA under the proposed Ordinance (clause 9).

16. The MA can also issue guidelines setting out the manner in which he proposes to exercise any power conferred or duty imposed on him, or to perform any function assigned to him, under the proposed Ordinance (clause 53).

#### *Finality of Settlement*

17. Under the proposed Ordinance, if the MA determines that certain criteria have been met as regards a designated system, he shall issue a certificate the effect of which will be to invoke the finality provision of the proposed Ordinance as regards that system (clause 14). The certificate could be revoked or suspended by the MA (clause 15).

#### *Scope of Protection*

18. As proposed under this Ordinance, finality will include both pay-in finality<sup>6</sup> and settlement finality, and will extend to finality for the purpose of all laws or rules of law of Hong Kong (clauses 17-23).

19. Further, it is proposed that a court is not to recognize or give effect to any order of a foreign court, or act of a relevant insolvency office holder,

---

<sup>6</sup> In a multi-currency clearing and settlement system such as CLS, pay-ins are payments into the settlement institution's (CLS Bank's) bank account with a central bank in order to fund a participant's position for settlement purposes and are inextricably linked to settlement.

made or done under the relevant law of insolvency, in so far as making the order or doing of the act would be prohibited under the proposed Ordinance for a court or a relevant insolvency office holder in Hong Kong (clause 24).

20. However, the finality provisions do not affect any rights arising from the underlying transaction in respect of the transaction taking place through the designated system, short of any revocation or reversal of the relevant transaction or disposition through the designated system (clause 25).

21. A relevant insolvency office holder acting in respect of an insolvent participant in a designated system has the right to recover any gain arising from an undervalued transaction, or the amount of any unfair preference in a transaction, to which the insolvent participant was a party before his insolvency (clauses 26 and 27). This provision does not affect the finality of settlements within designated systems.

22. No execution for the enforcement of a judgement or order and no distress shall be levied in respect of property of a participant that has been provided as collateral security in favour of a system operator (clause 30).

### Appeals

23. An independent tribunal known as the "Clearing and Settlement Systems Appeals Tribunal" will be established to hear an appeal by any person who is aggrieved by a decision of the MA to designate a clearing and settlement system (clause 3(1)), or to revoke a designation (clause 4(1)), or to grant, revoke or suspend a certificate of finality in respect of a designated system (clause 14(1) and 15(1)). A person aggrieved may refer the decision to the Tribunal for review within 30 days after the decision is made by the MA or within such further time that the MA thinks fit (clause 33). The Tribunal will consist of a Chairman who is appointed by the Chief Executive on the recommendation of the Chief Justice, and not fewer than two panel members who are appointed by the Financial Secretary with the Chairman's recommendation (clause 32 to clause 38 and Schedule 1).

### Offences

24. It shall be an offence for a person not to comply with the various statutory requirements in this proposed Ordinance, short of establishing the statutory defences provided in the respective provisions (Part 5).

## LEGISLATIVE TIMETABLE

25. The legislative timetable is as follows –

Publication in the Gazette	28 November 2003
First Reading and commencement Of Second Reading debate	10 December 2003
Resumption of Second Reading debate, committee stage and Third Reading	to be notified

## IMPLICATIONS OF THE PROPOSAL

26. This proposed Ordinance will help to strengthen the financial and monetary stability of Hong Kong and also the functioning of Hong Kong as an international financial centre. The proposal is in conformity with the Basic Law, including the provisions concerning human rights. It has no productivity, environmental or civil services implications. The proposal has economic implications, sustainability implication and financial implication for the general revenue as set out in the **Annex B**

27. The proposed Ordinance contains no express provision on binding effect. However, in so far as the settlement finality provisions are concerned, all participants of the designated clearing and settlement systems (unless otherwise expressly excepted under the proposed Ordinance) will be bound by necessary implication or express provision.

## PUBLIC CONSULTATION

28. We have conducted several rounds of consultations with the SFC, the Hong Kong Exchanges and Clearing Ltd., the relevant payment system operators, the Hong Kong Association of Banks, leading insolvency practitioners, the Official Receiver, the Law Society of Hong Kong, the Hong Kong Bar Association and the Hong Kong Society of Accountants. There is general support from the parties consulted and their relevant concerns have been addressed where appropriate.

29. We also briefed the Financial Affairs Panel of the Legislative Council on 5 May 2003. The proposal was generally well received by Members.



**PUBLICITY**

30. A spokesman will be available to answer enquires.

**Financial Services and the Treasury Bureau  
26 November 2003**

# CLEARING AND SETTLEMENT SYSTEMS BILL

## CONTENTS

Clause		Page
PART 1		
PRELIMINARY		
1.	Short title and commencement	1
2.	Interpretation	1
PART 2		
DESIGNATION AND OVERSIGHT		
<b>Division 1 – Designation</b>		
3.	Monetary Authority may designate clearing and settlement systems	5
4.	Revocation of designation	6
<b>Division 2 – Obligations of designated systems</b>		
5.	Obligation to inform Monetary Authority of name and address, etc.	7
6.	Requirements applying to designated systems	8
7.	Safety and efficiency	9
<b>Division 3 – Functions and powers of Monetary Authority in respect of designated systems</b>		
8.	Functions of Monetary Authority	10
9.	Power of Monetary Authority to exempt	11
10.	Monetary Authority may request information	11

11.	Monetary Authority may give directions	12
12.	Monetary Authority may impose operating rules	12

### PART 3

#### FINALITY OF TRANSACTIONS AND PROCEEDINGS

##### **Division 1 – Interpretation**

13.	Interpretation	14
-----	----------------	----

##### **Division 2 – Certificate of finality**

14.	Monetary Authority may issue certificate of finality	14
15.	Suspension or revocation of certificate of finality	15

##### **Division 3 – Finality of transactions and proceedings within designated systems**

16.	Scope of modification of law of insolvency under this Division	16
17.	Transfers and settlements within designated systems are final	17
18.	Proceedings of designated systems take precedence over law of insolvency	17
19.	Abrogation of statutory provisions relating to disclaimer of property, restriction on dispositions of property, etc.	18
20.	Abrogation of statutory powers relating to adjustment of prior transactions	19
21.	Net sum payable on completion of default arrangements provable in insolvency proceedings	19
22.	Transfer orders entered into designated system after insolvency not affected	19

##### **Division 4 – Netting of obligations of insolvent participants**

23.	Netting may be effected	20
-----	-------------------------	----

### **Division 5 – Miscellaneous**

24.	Law of insolvency in other jurisdictions	21
25.	Preservation of rights, etc. in underlying transactions	21
26.	Right of relevant insolvency office holder to recover gain from transaction at undervalue between 2 participants	22
27.	Right of relevant insolvency office holder to recover transfer between 2 participants giving unfair preference	23
28.	Obligation of participant to notify of insolvency	25
29.	Order releasing relevant insolvency office holder from obligations in relation to default proceedings	26
30.	Enforcement of judgments over property of participant as judgment debtor	26

## **PART 4**

### **APPEALS TRIBUNAL**

31.	Interpretation	27
32.	Establishment of Clearing and Settlement Systems Appeals Tribunal	27
33.	Review of decisions by Tribunal	28
34.	Powers of Tribunal	30
35.	Use of incriminating evidence given under compulsion	32
36.	Contempt dealt with by Tribunal	33
37.	Appeal to Court of Appeal	34
38.	Power of Chief Justice to make rules	34

## PART 5

## OFFENCES

39.	Contravention of provisions of Part 2	35
40.	Contravention of provision of Part 3	36
41.	Contravention of provision of Part 4	36
42.	Contravention of provisions of Part 6	36
43.	Giving false information to Monetary Authority	37
44.	Misrepresentation in respect of designated system	37
45.	False entry in document	38
46.	Personal liability of company officers	39

## PART 6

## MISCELLANEOUS

47.	Power of Chief Executive to give directions	39
48.	Power of Monetary Authority to make regulations	40
49.	Confidentiality	41
50.	Immunity	43
51.	Power of Monetary Authority to require information to be given	44
52.	Requirement to give information relating to default	44
53.	Guidelines	45
54.	Systems deemed to have been designated	45
55.	Service of notices	46
56.	Amendment of Schedules	47

Schedule 1	Provisions relating to Tribunal	47
Schedule 2	Clearing and settlement systems deemed to have been designated	50

## A BILL

To

Provide for certain clearing and settlement systems for funds or securities to be subject to oversight by the Monetary Authority; for the modification of the laws of Hong Kong in their application to transactions effected through and proceedings within such clearing and settlement systems so as to ensure finality as regards those transactions and proceedings; and for related purposes.

Enacted by the Legislative Council.

### PART 1

#### PRELIMINARY

##### **1. Short title and commencement**

(1) This Ordinance may be cited as the Clearing and Settlement Systems Ordinance.

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

##### **2. Interpretation**

In this Ordinance, unless the context otherwise requires –  
"book-entry securities" (記帳證券) means any securities issued under any law transferable by a book-entry (whether on a register or of any other kind);  
"certificate of finality" (終局性證明書) means a certificate issued by the Monetary Authority under section 14(3);

"clearing and settlement system" (結算及交收系統) means a system established for –

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

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

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

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

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

"designated system" (指定系統) means a clearing and settlement system that has been designated for the purposes of this Ordinance by the Monetary Authority under section 3(1);

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



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

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

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

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

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

"relevant insolvency office holder" (有關破產清盤人員) means –

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

"settlement account" (交收帳戶), in relation to a clearing and settlement system, means an account at a settlement institution used to hold funds or securities (or both) and

to settle transfer orders between participants in the system;

"settlement institution" (交收機構), in relation to a clearing and settlement system,

means a person providing settlement accounts to the participants and to any central counterparty in the system for the settlement of transfer orders within the system and, as the case may be, for extending credit to such participants and any such central counterparty for settlement purposes;

"system operator" (系統營運者), in relation to a clearing and settlement system, means

any person who, for the purposes of the system's operating rules, is responsible for the operation of the clearing or settlement functions of the system;

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

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

## PART 2

### DESIGNATION AND OVERSIGHT

#### **Division 1 – Designation**

**3. Monetary Authority may designate clearing and settlement systems**

(1) The Monetary Authority may, by notice published in the Gazette, designate for the purposes of this Ordinance any clearing and settlement system described in subsection (2) if, in the opinion of the Monetary Authority, the system is or is likely to become a clearing and settlement system whose proper functioning is material to the monetary or financial stability of Hong Kong or to the functioning of Hong Kong as an international financial centre.

(2) A clearing and settlement system is a system referred to in subsection (1) if –

- (a) it is in operation in Hong Kong; or
- (b) it accepts for clearing or settlement transfer orders denominated in Hong Kong dollars,

and if it is not a system that is, or is operated by, a company recognized as a clearing house for the purposes of section 37 of the Securities and Futures Ordinance (Cap. 571).

(3) For the purposes of subsection (1), a clearing and settlement system shall be regarded as a clearing and settlement system whose proper functioning is material to the monetary or financial stability of Hong Kong, or to the functioning of Hong Kong as an international financial centre, if the occurrence of any significant disruption to, or the presence of any significant inefficiency in, the functioning of the system is likely to result in the monetary or financial stability of Hong Kong, or the functioning of Hong Kong as an international financial centre, being adversely affected; and reference in that subsection to a clearing and settlement system that is likely to become a clearing and settlement system whose proper functioning is material to the monetary or financial stability of Hong Kong, or to the functioning of Hong Kong as an international financial centre, shall be construed accordingly.

(4) Without limiting the effect of subsection (1) or (3), the Monetary Authority may, for the purpose of determining whether a clearing and settlement system is or is likely to become a clearing and settlement system whose proper functioning is material to

the monetary or financial stability of Hong Kong, or to the functioning of Hong Kong as an international financial centre, have regard to any one or more of the following factors as they then apply or appear likely to apply –

- (a) the estimated aggregate value of transfer orders cleared or settled through the system in a normal business day;
- (b) the estimated average value of transfer orders cleared or settled by the system in a normal business day;
- (c) the estimated number of transfer orders cleared or settled by the system in a normal business day;
- (d) the estimated number of participants of the system; and
- (e) whether such system is linked to any designated system or any clearing and settlement system that is or is operated by a company recognized as a clearing house for the purposes of section 37 of the Securities and Futures Ordinance (Cap. 571).

(5) If the Monetary Authority is minded to designate a clearing and settlement system under this section he shall –

- (a) publish in the Gazette notice of his intention to designate the system, stating the grounds on which the designation is to be made; and
- (b) allow such period as is specified in the notice, being a period of not less than 14 days, within which any system operator or settlement institution of the system may be heard, or may make representations, as to why the system should not be designated.

#### **4. Revocation of designation**

(1) The Monetary Authority may at any time, by notice published in the Gazette, revoke the designation of a designated system if –

- (a) he is satisfied that the system is not a clearing and settlement system as is described in section 3(2); or

- (b) the system has ceased to be or to be likely to become, in his opinion, a clearing and settlement system whose proper functioning is material to the monetary or financial stability of Hong Kong, or to the functioning of Hong Kong as an international financial centre, for the purposes of section 3(1).

(2) Not less than 14 days before revoking the designation of a designated system, the Monetary Authority shall by notice published in the Gazette give notice of his intention to revoke the designation and shall specify in the notice the grounds under subsection (1) on which he intends to do so; and any system operator or settlement institution of the designated system who so requests by notice in writing given to the Monetary Authority before the revocation takes effect shall be allowed an opportunity by the Monetary Authority to be heard or to make representations as to why the grounds for revocation specified in the notice given under this subsection have not been made out.

(3) A revocation of the designation of a designated system effected under this section shall not operate so as to affect any settlement of a transfer order effected through the system prior to the revocation taking effect.

## **Division 2 – Obligations of designated systems**

### **5. Obligation to inform Monetary Authority of name and address, etc.**

(1) Every person who, at the time of designation of a clearing and settlement system under this Ordinance, is a system operator or settlement institution of the system shall, within 3 days of the designation, inform the Monetary Authority in writing of –

- (a) his name, his place of business, a postal address and an electronic mail address;
- (b) the aspects of the management or operations of the system for which he is responsible; and

- (c) where the person is a corporation, the names and particulars of the directors and shareholders of the corporation and the name and particulars of the chief executive (if any) of the corporation.

(2) Where, subsequent to the designation of a clearing and settlement system, there is any change to the particulars given or required to be given to the Monetary Authority under subsection (1) in respect of the system, every person to whom such change relates shall within 3 days of the change taking effect inform the Monetary Authority in writing of the change.

## **6. Requirements applying to designated systems**

(1) Every system operator and settlement institution of a designated system shall ensure that the following requirements are complied with in relation to the system, namely –

- (a) that the operations of the system are conducted in a safe and efficient manner calculated to minimize the likelihood of any disruption to the functioning of the system;
- (b) that there are in place operating rules that –
  - (i) comply with the requirements specified in subsection (2) and with any prescribed requirements relating to the operating rules of a designated system; and
  - (ii) provide for the system to be operated in accordance with this Ordinance as it applies in relation to that system;
- (c) that there are in place adequate arrangements to monitor and enforce compliance with the operating rules of the system, including arrangements regarding the resources available to the system operator;
- (d) that there are available to the system financial resources appropriate for the proper performance of the system's particular functions.

(2) The operating rules of a designated system shall –

- (a) impose on participants requirements that are no less stringent than the requirements imposed on participants under the other provisions of this Ordinance;
- (b) provide that if a participant becomes insolvent he may be suspended from the system; and
- (c) provide for default arrangements which are appropriate and adequate for the system in all circumstances.

(3) No change shall be made to the operating rules of a designated system without the prior approval in writing of the Monetary Authority.

## **7. Safety and efficiency**

(1) In this Ordinance, reference to the safety of a clearing and settlement system includes in particular reference to –

- (a) the extent to which the operating rules of the system provide for certainty as to the circumstances under which transfer orders effected through the system are to be regarded as settled for the purposes of the system;
- (b) the reliability and robustness of operation of the system;
- (c) control over access to the operations of the system; and
- (d) the integrity of information held within the system.

(2) In this Ordinance, reference to the efficiency of a clearing and settlement system includes in particular reference to –

- (a) the speed and efficiency with which operations relating to transfer orders within the system are carried out;
- (b) the overall cost to a participant of his participation in the system, having regard to the services provided by the system to its participants;
- (c) the reasonableness of criteria for admission as a participant in the system; and

- (d) generally, the absence of measures having the effect of unfairly limiting, or exploiting the absence of, competition in relation to the functions performed by the system.

### **Division 3 – Functions and powers of Monetary Authority in respect of designated systems**

#### **8. Functions of Monetary Authority**

(1) It shall be the function of the Monetary Authority under this Ordinance to monitor compliance with the obligations imposed under this Ordinance in relation to designated systems, and to promote the general safety and efficiency of designated systems.

(2) Without limiting the generality of subsection (1), it shall be the function of the Monetary Authority –

- (a) to take reasonable steps to satisfy himself that every designated system is operated in a safe and efficient manner;
- (b) to promote and encourage proper standards of operation and sound and prudent practices amongst designated systems;
- (c) whenever appropriate, to co-operate with and assist recognized financial services supervisory authorities of Hong Kong or of any place outside Hong Kong in maintaining and promoting safety and efficiency in the operations of designated systems; and
- (d) to consider and propose reforms of the law relating to clearing and settlement systems and the operations of designated systems.

(3) The Monetary Authority may appoint persons as agents or advisers to assist him in the performance of his functions under this Ordinance.



## **9. Power of Monetary Authority to exempt**

(1) This section applies to a designated system that is established in a place outside Hong Kong and is under the supervision of an authority exercising functions in that place similar to the functions of the Monetary Authority under this Ordinance.

(2) Where the Monetary Authority is satisfied that the scope and nature of the supervision exercised in relation to any designated system to which this section applies by the authority in the place outside Hong Kong is sufficient to achieve any or all of the objectives of this Part in relation to the system, the Monetary Authority may exempt any person from any or all of the obligations imposed on the person under Divisions 2 and 3 of this Part, or from any obligation arising by virtue of the exercise of any power conferred under those Divisions, in relation to the system.

(3) Where the Monetary Authority has granted (or has varied or withdrawn) an exemption under this section in any case, he shall publish in the Gazette notice of the particulars of that grant (or variation or withdrawal) of exemption.

## **10. Monetary Authority may request information**

(1) For the better carrying out of his functions under this Ordinance, the Monetary Authority may by notice in writing given to a system operator or settlement institution of a designated system request information from that person relating to the system.

(2) A request made under subsection (1) –

- (a) shall specify the information requested; and
- (b) may specify a period, being a period that is reasonable in the circumstances, within which the request shall be complied with.

(3) For the avoidance of doubt, the power conferred under subsection (1) to request information relating to a designated system includes the power to request such information as the Monetary Authority considers necessary to allow him to determine whether there is or has been compliance with the provisions of this Ordinance in relation

to the system and, accordingly, a request made under subsection (1) may specify the giving of information on a periodic basis or at any time and regardless of whether the Monetary Authority has reason to suspect that there is, has been or may be any failure to comply with a provision of this Ordinance as regards the system.

#### **11. Monetary Authority may give directions**

(1) The Monetary Authority may by notice in writing given to a system operator or settlement institution of a designated system direct that person to take such action or do such act or thing as the Monetary Authority considers necessary for bringing the designated system into compliance with the requirements set out in section 6(1)(a), (b), (c) or (d).

(2) A direction given under subsection (1) –

- (a) shall specify the action to be taken or the act or thing to be done;
- (b) shall include a statement of the respect in which the Monetary Authority considers the designated system not to be in compliance with a requirement set out in section 6(1)(a), (b), (c) or (d); and
- (c) may specify a period, being a period that is reasonable in the circumstances, within which the direction shall be complied with.

#### **12. Monetary Authority may impose operating rules**

(1) Without affecting the generality of section 11, the Monetary Authority may by notice in writing given to a system operator or settlement institution of a designated system direct that the operating rules of the system be amended in such manner as the Monetary Authority considers necessary to bring the operating rules into compliance with section 6(1)(b).

(2) A direction given under subsection (1) –

- (a) shall specify the amendment to be effected;

- (b) shall include a statement of the respect in which the Monetary Authority considers the operating rules of the system not to be in compliance with section 6(1)(b); and
- (c) may specify a period, being a period that is reasonable in the circumstances, within which the amendment shall be effected, and may require that within a further period of 3 days a copy of the relevant part of the operating rules as so amended shall be provided to the Monetary Authority as confirmation of compliance with the direction.

(3) Without affecting the generality of subsection (1), a direction under that subsection to amend a designated system's operating rules may include a direction to amend those rules by –

- (a) adding a rule specified in the direction;
- (b) amending a particular rule in the manner specified in the direction;
- or
- (c) deleting a rule specified in the direction.

(4) Before giving a direction under subsection (1), the Monetary Authority shall consult the Financial Secretary and the system operator or settlement institution to whom the direction relates.

(5) If there is any failure to comply with a direction given under this section, the Monetary Authority may by notice published in the Gazette declare that the operating rules of the designated system shall be amended in the manner specified in the direction, and the operating rules of the system shall as from the time of publication of such have effect as if they had been so amended.

PART 3

FINALITY OF TRANSACTIONS AND PROCEEDINGS

**Division 1 – Interpretation**

**13. Interpretation**

In this Part, a reference to the law of insolvency shall be construed as a reference to –

- (a) the Bankruptcy Ordinance (Cap. 6);
- (b) Parts V, VI and X of the Companies Ordinance (Cap. 32); and
- (c) any other written law or rule of law whether of Hong Kong or a place outside Hong Kong which is concerned with or in any way related to the bankruptcy, winding up or insolvency of a person.

**Division 2 – Certificate of finality**

**14. Monetary Authority may issue certificate of finality**

(1) Where a clearing and settlement system has been designated under Part 2, the Monetary Authority shall determine in accordance with subsection (2) whether the following criteria are met as regards that system, namely –

- (a) ultimate settlement of transfer orders is effected within the system itself; and
  - (b) there is compliance with the requirements stipulated in section 6(1).
- (2) In making a determination under subsection (1) the Monetary Authority –
- (a) shall have regard to such information relating to the system as may be submitted to him by the system operator for the purposes of this section; and
  - (b) may in addition have regard to such other information in his possession relating to the system as he considers relevant,

but the Monetary Authority shall not be under any obligation to undertake any enquiries for the purpose of making the determination.

(3) If the Monetary Authority determines that the criteria specified in subsection (1) have been met as regards a designated system, he shall issue in respect of the system a certificate certifying to that effect ("certificate of finality").

(4) If the Monetary Authority finds himself unable to make a determination in the terms mentioned in subsection (3) as regards a designated system, he shall inform the system operator in writing accordingly giving particulars of the respect in which any of the criteria specified in subsection (1) have not been met or of the further information he requires in order to make a determination in relation to such criteria.

(5) Except for the period of any suspension under section 15(1), a certificate of finality in respect of a designated system remains in effect until it is revoked or until the designation of the system for the purposes of this Ordinance has been revoked.

(6) Except as otherwise provided, the following provisions of this Part apply to and in relation to any designated system in respect of which a certificate of finality is in effect; and in Divisions 3, 4 and 5 of this Part, a reference to a designated system is a reference to such a designated system.

## **15. Suspension or revocation of certificate of finality**

(1) The Monetary Authority may at any time suspend or revoke a certificate of finality in respect of a designated system if he is of the opinion that, as regards that system –

- (a) any one or more of the criteria specified in section 14(1)(a) or (b) are no longer met; or
- (b) there has been any contravention of section 5(2), 6(3), 10, 11, 12, 43 or 52(4).

(2) Before suspending or revoking a certificate of finality under this section the Monetary Authority shall –

- (a) notify in writing the system operator and settlement institution of his intention to suspend or revoke the certificate of finality and the grounds on which the suspension or revocation is to be made; and
- (b) allow such period as is specified in the notice, being a period of not less than 14 days, within which the system operator or settlement institution may be heard or may make representations as to why the certificate of finality should not be suspended or revoked.

**Division 3 – Finality of transactions and proceedings within designated systems**

**16. Scope of modification of law of insolvency under this Division**

- (1) The general law of insolvency shall have effect in relation to –
  - (a) transfer orders effected through a designated system;
  - (b) action taken under the operating rules of a designated system with respect to such orders; and
  - (c) collateral security,

subject to the provisions of this Division.

(2) This Division shall apply in relation to bankruptcy and winding up proceedings in respect of a participant, but shall not apply in relation to bankruptcy and winding up proceedings in respect of any person who is not a participant.

(3) For the avoidance of doubt, notwithstanding that rights or liabilities arising from transfer orders as mentioned in subsection (1)(a) are or may be dealt with in bankruptcy and winding up proceedings, this Division shall not apply to such proceedings if they are in respect of any person who is not a participant.

**17. Transfers and settlements within designated systems are final**

(1) This section applies to any transfer or settlement of the following description that is effected through a designated system the operating rules of which provide that such a transfer or settlement is final and irrevocable –

- (a) a transfer of funds into or out of an account of a participant;
- (b) a settlement of a payment obligation; or
- (c) a settlement of an obligation for the transfer of book-entry securities, or the transfer of such securities.

(2) Notwithstanding anything to the contrary in any written law or rule of law, a transfer or settlement to which this section applies shall not be liable –

- (a) to be reversed, repaid or set aside; or
- (b) to an order made by a court for the rectification or stay of such transfer or settlement.

**18. Proceedings of designated systems take precedence over law of insolvency**

(1) None of the following shall be regarded as to any extent invalid on the ground of inconsistency with the law of insolvency regarding distribution of the assets of a person on bankruptcy or winding up, or on the appointment of a liquidator, trustee in bankruptcy or equivalent officer over any of the assets of a person –

- (a) a transfer order;
- (b) any disposition of property in pursuance of a transfer order;
- (c) the default arrangements of a designated system;
- (d) the operating rules of a designated system as to the settlement of transfer orders not dealt with under its default arrangements; or
- (e) a contract for the purpose of realizing collateral security in connection with participation in a designated system otherwise than pursuant to its default arrangements.

(2) The powers of a relevant insolvency office holder in his capacity as such and the powers of a court under the law of insolvency, shall not be exercised in such a way as to prevent or interfere with –

- (a) the settlement of a transfer order in accordance with the operating rules of a designated system not dealt with under its default arrangements;
- (b) any action taken under the default arrangements of a designated system; or
- (c) any action taken to realize collateral security in connection with participation in a designated system otherwise than pursuant to its default arrangements.

(3) A debt or other liability arising out of a transfer order which is the subject of action taken under default arrangements may not be proved in a bankruptcy or winding up until the completion of the action taken under default arrangements.

(4) A debt or other liability which by virtue of subsection (3) may not be proved shall not be taken into account for the purposes of any set-off until the completion of the action taken under default arrangements.

**19. Abrogation of statutory provisions relating to disclaimer of property, restriction on dispositions of property, etc.**

Without prejudice to the generality of section 18 –

- (a) section 59 of the Bankruptcy Ordinance (Cap. 6) and section 268 of the Companies Ordinance (Cap. 32) shall not apply to a transfer order; and
- (b) section 42 of the Bankruptcy Ordinance (Cap. 6) and section 182 of the Companies Ordinance (Cap. 32) shall not apply to a transfer order or any disposition of property in pursuance of such an order.



**20. Abrogation of statutory powers relating to adjustment of prior transactions**

Without prejudice to the generality of section 18, no order shall be made by a court under any of the following provisions in relation to a transfer order or any disposition of property in pursuance of such an order –

- (a) section 49 or 50 of the Bankruptcy Ordinance (Cap. 6);
- (b) section 266 of the Companies Ordinance (Cap. 32);
- (c) section 60 of the Conveyancing and Property Ordinance (Cap. 219).

**21. Net sum payable on completion of default arrangements provable in insolvency proceedings**

(1) This section shall apply with respect to any net sum owed by or to a defaulting participant on the completion of the action taken under default arrangements.

(2) Where a court has made an order for bankruptcy or winding up of a participant or a resolution for the voluntary winding up of a participant has been passed, the net sum referred to in subsection (1) shall be –

- (a) provable in the bankruptcy or winding up or, as the case may be, payable to the relevant insolvency office holder; and
- (b) taken into account, where appropriate, under section 35 of the Bankruptcy Ordinance (Cap. 6) or that section as applied in the case of a winding-up order under the Companies Ordinance (Cap. 32).

(3) Subsection (2) applies notwithstanding section 34 or 35 of the Bankruptcy Ordinance (Cap. 6) and section 264 of the Companies Ordinance (Cap. 32).

**22. Transfer orders entered into designated system after insolvency not affected**

(1) This Division shall not apply in relation to any transfer order given by a participant which is entered into a designated system after the occurrence of either of the following, whichever first occurs –

- (a) the expiry of the day on which –
  - (i) a court has made an order for bankruptcy or winding up in respect of the participant; or
  - (ii) a resolution for the voluntary winding up of the participant has been passed; or
- (b) the receipt by the system operator of notice of the making of an order or the passing of a resolution as is mentioned in paragraph (a).

(2) Where the designated system is established in a place other than Hong Kong, being a place in which local time is behind local time in Hong Kong, reference in subsection (1)(a) to the expiry of a day on which an event mentioned in that paragraph occurred is a reference to the expiry of the same calendar day in that place as the calendar day in Hong Kong on which the event occurred.

(3) For the purposes of subsection (1)(b), a system operator shall be taken to have received notice of an event mentioned in subsection (1)(a) if he deliberately failed to make enquiries as to that matter in circumstances in which a reasonable and honest person would have done so.

#### **Division 4 – Netting of obligations of insolvent participants**

### **23. Netting may be effected**

(1) Where a court has made an order for bankruptcy or the winding up of a participant in a designated system, or a resolution for the voluntary winding up of such participant has been passed, then, notwithstanding any provision of the law of insolvency, the system operator of the designated system may effect the netting of all obligations owed to or by the participant incurred up to the time of the occurrence that applies for the purposes of section 22(1).

- (2) Where any netting has been effected as provided in subsection (1), then –
  - (a) the obligations that are netted shall be disregarded in the bankruptcy

or winding up proceedings; and

(b) any net obligation owed to or by the participant that has not been discharged –

(i) is payable to the participant and may be recovered for the benefit of his creditors; or

(ii) is provable in the bankruptcy or winding up, as the case may be.

(3) A netting effected as provided in subsection (1) and any payment made by a participant as provided in subsection (2) shall not be voidable in the bankruptcy or winding up proceedings.

### **Division 5 – Miscellaneous**

#### **24. Law of insolvency in other jurisdictions**

Notwithstanding any law to the contrary, a court shall not recognize or give effect to –

(a) an order of a court exercising jurisdiction under the law of insolvency in a place outside Hong Kong; or

(b) an act of a person appointed in a place outside Hong Kong to perform a function under the law of insolvency there,

in so far as the making of the order or doing of the act would be prohibited under this Part for a court in Hong Kong or a relevant insolvency office holder.

#### **25. Preservation of rights, etc. in underlying transactions**

(1) Except to the extent that it expressly provides, this Part shall not operate to limit, restrict or otherwise affect –

- (a) any right, title, interest, privilege, obligation or liability of a person resulting from the underlying transaction in respect of a transfer order which has been entered into a designated system; or
  - (b) any investigation, legal proceedings or remedy in respect of any such right, title, interest, privilege, obligation or liability.
- (2) Nothing in subsection (1) shall be construed to require –
- (a) the unwinding of any netting effected by the system operator of a designated system, whether pursuant to its default arrangements or otherwise;
  - (b) the revocation of any transfer order given by a participant which is entered into a designated system; or
  - (c) the reversal of a payment or settlement made under the operating rules of a designated system.

**26. Right of relevant insolvency office holder to recover gain from transaction at undervalue between 2 participants**

- (1) This section applies to any transaction between 2 participants in a designated system that –
- (a) is entered into at an undervalue to the gain of one of the participants (“first participant”); and
  - (b) was entered into at any time during the period of 6 months ending with –
    - (i) the presentation of a petition for the bankruptcy or winding up of the other participant (“second participant”) or his principal; or
    - (ii) the passing of a resolution of a creditors’ voluntary winding up of the second participant or his principal.

(2) A relevant insolvency office holder acting in respect of the second participant to a transaction to which this section applies or his principal is hereby entitled to recover from the first participant to the transaction an amount equivalent to the gain made from the transaction.

(3) For the purposes of this section, a transaction is entered into at an undervalue if it is entered into –

- (a) on terms that provide for the second participant or his principal to receive no consideration; or
- (b) for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the second participant or his principal.

(4) At the request of a system operator or settlement institution of a designated system the Monetary Authority may, by notice published in the Gazette, exempt the system operator or settlement institution from the application of this section; and where such an exemption is in effect this section shall not apply in respect of any transaction entered into by the system operator or settlement institution (as the case may be) as first participant in his capacity as such system operator or settlement institution.

(5) For the avoidance of doubt, nothing in this section has the effect of derogating from section 18(2) or 20.

**27. Right of relevant insolvency office holder to recover transfer between 2 participants giving unfair preference**

(1) This section applies to any transfer of funds or securities from one participant in a designated system to another, being –

- (a) a transfer to which section 17 applies (other than a transfer that forms part of a transaction to which section 26 applies);
- (b) a transfer by which the participant who is the recipient of the transfer ("first participant") is given an unfair preference by the participant

making the transfer (“second participant”) or by the principal of the second participant acting through the second participant; and

- (c) a transfer that is effected at any time during the period of 6 months ending with –
  - (i) the presentation of a petition for the bankruptcy or winding up of the second participant or his principal; or
  - (ii) the passing of a resolution of a creditors’ voluntary winding up of the second participant or his principal.

(2) A relevant insolvency office holder acting in respect of the second participant to a transfer to which this section applies or his principal is hereby entitled to recover from the first participant to the transfer an amount equivalent to the value of the transfer.

(3) For the purposes of this section, a transfer is a transfer as described in subsection (1)(b) if –

- (a) the first participant is a creditor of, or is a surety or guarantor for any debts or liabilities of, the second participant or his principal;
- (b) the transfer has the effect of putting the first participant into a position which, in the event of the bankruptcy or winding up of the second participant or his principal, will be a better position than the position he would have been in if the transfer had not been made; and
- (c) the second participant in making the transfer, or the second participant's principal in deciding to cause him to make the transfer, is influenced by a desire to produce in relation to the first participant, the effect described in paragraph (b).

(4) At the request of a system operator or settlement institution of a designated system the Monetary Authority may, by notice published in the Gazette, exempt the system operator or settlement institution from the application of this section; and where such an exemption is in effect this section shall not apply in respect of any transfer

effected by the system operator or settlement institution (as the case may be) as first participant in his capacity as such system operator or settlement institution.

(5) For the avoidance of doubt, nothing in this section has the effect of derogating from section 18(2) or 20.

## **28. Obligation of participant to notify of insolvency**

(1) A participant in a designated system shall notify any system operator of the system and the Monetary Authority forthwith if there comes to his knowledge any of the following circumstances occurring in Hong Kong, or any analogous circumstances occurring outside Hong Kong, namely –

- (a) any indication in writing by a creditor of the participant of his intention to pass a creditor's voluntary winding-up resolution in respect of the participant;
- (b) the presentation of a petition for the bankruptcy or winding up of the participant;
- (c) the making of an order for bankruptcy or winding up of the participant;
- (d) the passing of a resolution for the voluntary winding up of the participant; or
- (e) the making of a statutory declaration as under section 228A(1) of the Companies Ordinance (Cap. 32) by a director of the participant.

(2) A failure by a participant to notify a system operator or the Monetary Authority of a relevant event referred to in subsection (1) within the time required under that subsection is not a contravention of that subsection if the system operator or Monetary Authority (as the case may be) was already aware of the relevant event by that time.

(3) An exemption granted under section 9 in respect of a designated system may in addition exempt the participants in the system from compliance with subsection

(1); and where such an exemption is in effect that subsection shall not apply in relation to such participants.

**29. Order releasing relevant insolvency office holder from obligations in relation to default proceedings**

A court may, on an application by a relevant insolvency office holder, make such order as it considers appropriate altering or releasing him from compliance with the functions of his office to the extent that those functions are affected by the fact that action under default arrangements is being or could be taken, or has been or could have been taken.

**30. Enforcement of judgments over property of participant as judgment debtor**

(1) This section applies to any property of a participant in a designated system that –

- (a) has been provided as collateral security in favour of a system operator or settlement institution of the system; and
- (b) is held by or deposited with that system operator or settlement institution for the purpose of securing liabilities arising directly in connection with the clearing or settlement of those transfer orders issued by the participant.

(2) Except with the consent of the system operator or settlement institution mentioned in subsection (1) –

- (a) no execution or other legal process for the enforcement of a judgment or order shall be commenced or continued; and
- (b) no distress shall be levied,

in respect of property to which this section applies; but this subsection does not apply to a person seeking to enforce any interest in or security over the property.



(3) Where by virtue of subsection (2) a person would not be entitled to enforce a judgment or order against any property, any injunction or other remedy granted with a view to facilitating the enforcement of any such judgment or order shall not extend to that property.

## PART 4

### APPEALS TRIBUNAL

#### **31. Interpretation**

In this Part, unless the context otherwise requires –

"applicant" (申請人), in relation to any proceedings under this Part, means the person who refers a decision to the Tribunal for review under section 33(1);

"Chairman of the Tribunal" (審裁處主席) means the person appointed as such under section 32(3);

"Tribunal" (審裁處) means the Tribunal established under section 32(1).

#### **32. Establishment of Clearing and Settlement Systems Appeals Tribunal**

(1) There is established by this section a tribunal to be known as the "Clearing and Settlement Systems Appeals Tribunal" in English and "結算及交收系統上訴審裁處" in Chinese.

(2) For the purpose of reviewing any decision referred to the Tribunal under this Part, the Tribunal is to consist of –

- (a) the Chairman of the Tribunal; and
- (b) such number of persons, not being fewer than 2, from the panel referred to in subsection (4) as the Financial Secretary may, on the recommendation of the Chairman of the Tribunal, appoint for that purpose.

(3) The Chief Executive shall, on the recommendation of the Chief Justice, appoint to be the Chairman of the Tribunal a person who is –

- (a) a judge, or a deputy judge, of the Court of First Instance;
- (b) a former Justice of Appeal of the Court of Appeal; or
- (c) a former judge, or a former deputy judge, of the Court of First Instance.

(4) The Chief Executive shall appoint a panel of persons, not being public officers, whom he considers suitable for appointment as members of the Tribunal.

(5) The Chairman of the Tribunal (except where the Chairman is a judge, or a deputy judge, of the Court of First Instance), and members, of the Tribunal may be paid, as a fee for their services, such amount as the Chief Executive considers appropriate. Those amounts payable to the Chairman of the Tribunal shall be a charge on the general revenue, and those amounts payable to the members shall be a charge on the Exchange Fund.

(6) Schedule 1 has effect with respect to the Tribunal.

(7) Subject to this section and Schedule 1 and to rules made under section 38, the Chairman of the Tribunal may determine the procedures and practice of the Tribunal.

### **33. Review of decisions by Tribunal**

(1) Any person who is aggrieved by a decision of the Monetary Authority under section 3(1), 4(1), 14(1) or 15(1) may refer the decision to the Tribunal for review.

(2) A reference to the Tribunal under subsection (1) by a person aggrieved is –

- (a) to be made in writing;
- (b) to be made –
  - (i) if the reference relates to a decision of the Monetary Authority under section 3(1) or 4(1), within 30 days after publication in the Gazette of the notice referred to in that section;

(ii) if the reference relates to a decision of the Monetary Authority under section 14(1) or 15(1), within 30 days after receiving notice in writing given by the Monetary Authority informing him of the decision,

or within a further time that the Monetary Authority may, in the circumstances of any particular case, think fit; and

(c) to state the grounds for the review.

(3) The Tribunal shall deliver to the Monetary Authority a copy of any reference under subsection (1) that it has received.

(4) A reference under subsection (1) does not suspend the decision to which the reference relates.

(5) As soon as practicable after receipt of a copy of a reference delivered under subsection (3), the Monetary Authority shall forward a copy of the decision to which the reference relates together with all other relevant papers in his possession to the Tribunal.

(6) On receipt of the copy of the decision, and of the papers, forwarded under subsection (5), the Tribunal shall review the decision in question and, after taking into account the stated grounds for the review, may make its determination to –

(a) confirm, vary or set aside the decision; or

(b) remit the matter to the Monetary Authority with any direction that it considers appropriate.

(7) In reviewing a decision of the Monetary Authority, the Tribunal –

(a) shall afford both the applicant and the Monetary Authority an opportunity of being heard; and

(b) may determine that any matter of fact has been established if it has been established on the balance of probabilities.

(8) As soon as practicable after completing the review, the Tribunal shall deliver its determination made under subsection (6), with the reasons for its determination.

(9) A determination made by the Tribunal shall be recorded in writing and signed by the Chairman of the Tribunal, and shall then be registered in the Court of First Instance; and a determination so registered shall be deemed to be an order of the Court.

(10) The determination of the Tribunal is final and is not subject to appeal except on a point of law.

(11) For the purposes of any proceedings in a court of law, a document purporting to be a determination of the Tribunal that is signed by the Chairman of the Tribunal shall, in the absence of evidence to the contrary, be regarded as a determination of the Tribunal duly made, without proof of its making, or proof of signature, or proof that the person signing the determination was in fact the Chairman of the Tribunal.

### **34. Powers of Tribunal**

(1) In relation to a review of a decision of the Monetary Authority under this Ordinance, the Tribunal may –

- (a) receive and consider any material by way of oral evidence, written statements or documents, whether or not the material would be admissible in a court of law;
- (b) determine the manner in which any such material is received;
- (c) by notice in writing signed by the Chairman of the Tribunal, require a person to attend before it and, subject to subsection (2), to give evidence and produce any article, record or document in his possession or control relating to the subject matter of the review;
- (d) administer oaths;
- (e) examine or cause to be examined on oath or otherwise a person attending before it and require the person to answer truthfully any question which the Tribunal considers appropriate for the purpose of the review;
- (f) order a witness to provide evidence for the purpose of the review by affidavit;

- (g) order a person not to publish or otherwise disclose any material produced to the Tribunal;
  - (h) prohibit the publication or disclosure of any material the Tribunal receives at any sitting, or any part of a sitting, that is held in camera;
  - (i) stay any of the proceedings in the review on such grounds and on such terms and conditions as it considers appropriate having regard to the interests of justice;
  - (j) determine the procedure to be followed in connection with the review;
  - (k) order that costs be paid to any party to the review or any person who is required to attend before it for the purpose of the review;
  - (l) hear an application for stay of proceedings for a review at any time before its determination is made; and
  - (m) exercise such other powers or make such other orders as may be necessary for or ancillary to the conduct of the review or the performance of its functions.
- (2) Subsection (1)(c) does not empower the Tribunal to require –
- (a) the banker or financial adviser of an applicant to disclose any information relating to the affairs of any person other than the applicant; or
  - (b) a solicitor or counsel to disclose any privileged communication, whether oral or written, made to or by him in that capacity.
- (3) No person shall –
- (a) fail to comply with an order, notice, prohibition or requirement of the Tribunal made or given under or pursuant to subsection (1);
  - (b) disrupt any sitting of the Tribunal or otherwise misbehaves during any such sitting;

- (c) having been required by the Tribunal under subsection (1) to attend before the Tribunal, leave the place where his attendance is so required without the permission of the Tribunal;
- (d) hinder or deter any person from attending before the Tribunal, giving evidence or producing any article, record or document, for the purpose of a review;
- (e) threaten, insult or cause any loss to be suffered by any person who has attended before the Tribunal, on account of such attendance; or
- (f) threaten, insult or cause any loss to be suffered by the Chairman, or any member, of the Tribunal at any time on account of the performance of his functions in that capacity.

(4) A person is not excused from complying with an order, notice, prohibition or requirement of the Tribunal made or given under or pursuant to subsection (1) only on the ground that to do so might tend to incriminate the person.

### **35. Use of incriminating evidence given under compulsion**

Notwithstanding any other provisions of this Ordinance, where the Tribunal –

- (a) requires a person to give evidence under section 34(1)(c);
- (b) requires a person to answer any question under section 34(1)(e);
- (c) orders a person to provide evidence under section 34(1)(f); or
- (d) otherwise requires or orders a person to provide any information under section 34(1)(m),

and the evidence, answer or information might tend to incriminate the person, then the requirement or order as well as the evidence, the question and answer, or the information shall not be admissible in evidence against the person in criminal proceedings in a court of law other than those in which the person is charged with an offence under section 34(3)(a), or under Part V of the Crimes Ordinance (Cap. 200), or for perjury, in respect of the evidence, answer or information.

**36. Contempt dealt with by Tribunal**

(1) The Tribunal has the same powers as the Court of First Instance to punish for contempt.

(2) Without limiting the generality of the powers of the Tribunal under subsection (1), the Tribunal has the same powers as the Court of First Instance to punish for contempt, as if it were contempt of court, a person who, without reasonable excuse, commits any conduct falling within section 34(3).

(3) The Tribunal shall, in the exercise of its powers to punish for contempt under this section, adopt the same standard of proof as the Court of First Instance in the exercise of the same powers to punish for contempt.

(4) Notwithstanding anything in this section or any other provision of this Ordinance, no power may be exercised under or pursuant to this section to determine whether to punish any person for contempt in respect of any conduct in the following case, namely –

- (a) if criminal proceedings have previously been instituted against the person under section 34(3) in respect of the same conduct; and
- (b) if –
  - (i) those criminal proceedings remain pending; or
  - (ii) by reason of the previous institution of those criminal proceedings, no criminal proceedings may again be lawfully instituted against that person under that section in respect of the same conduct.

(5) Notwithstanding anything in this section or any other provision of this Ordinance, no criminal proceedings may be instituted against any person under section 34(3) in respect of any conduct in the following case, namely –

- (a) if any power has previously been exercised under or pursuant to this section to determine whether to punish the person for contempt in respect of the same conduct; and

- (b) if –
  - (i) proceedings arising from the exercise of such power remain pending; or
  - (ii) by reason of the previous exercise of such power, no power may again be lawfully exercised under or pursuant to this section to determine whether to punish the person for contempt in respect of the same conduct.

### **37. Appeal to Court of Appeal**

(1) An applicant or the Monetary Authority may, if dissatisfied with a determination delivered under section 33(8), appeal to the Court of Appeal against the determination on a point of law.

(2) The Court of Appeal may affirm, reverse or vary the determination appealed against.

(3) The Rules of the High Court (Cap. 4 sub. leg. A) apply in relation to such an appeal to the extent that those Rules are not inconsistent with this Ordinance.

(4) In an appeal under this section, the Court of Appeal may make such order for payment of costs as it considers appropriate.

### **38. Power of Chief Justice to make rules**

The Chief Justice may make rules –

- (a) providing for matters of procedure, or other matters, relating to requests for review, or reviews, under this Part, which are not provided for in this Part or section 4 of Schedule 1;
- (b) providing for the issue or service of any document (however described) for the purposes of this Part or section 4 of Schedule 1; or
- (c) prescribing anything required to be prescribed under this Part or section 4 of Schedule 1.



PART 5  
OFFENCES

**39. Contravention of provisions of Part 2**

(1) A person who, without reasonable excuse, contravenes section 5(1) or (2) commits an offence and is liable –

- (a) on conviction upon indictment, to a fine of \$400,000 and to imprisonment for 2 years; and
- (b) in the case of a continuing offence, to a further fine of \$10,000 for every day during which the offence continues.

(2) Where there is a contravention of a requirement set out in section 6(1) as regards any designated system, every system operator and settlement institution of the system commits an offence and is liable on conviction upon indictment to a fine of \$400,000.

(3) A person who contravenes section 6(3) commits an offence and is liable on conviction upon indictment to a fine of \$400,000.

(4) A person who fails to comply with a request made under section 10(1) commits an offence and is liable –

- (a) on conviction upon indictment, to a fine of \$400,000 and to imprisonment for 2 years; and
- (b) in the case of a continuing offence, to a further fine of \$10,000 for every day during which the offence continues.

(5) A person who fails to comply with a direction given under section 11(1) commits an offence and is liable –

- (a) on conviction upon indictment, to a fine of \$400,000 and to imprisonment for 2 years; and
- (b) in the case of a continuing offence, to a further fine of \$10,000 for every day during which the offence continues.

(6) It is a defence for a person charged with an offence under subsection (2), (4) or (5) to prove that –

- (a) the requirement, request or direction (as the case may be) to which the charge relates concerns an aspect of the management or operations of the designated system other than an aspect for which the person is responsible; or
- (b) he took all reasonable steps to ensure that the requirement, request or direction (as the case may be) to which the charge relates was complied with.

**40. Contravention of provision of Part 3**

A person who contravenes section 28 commits an offence and is liable on conviction upon indictment to a fine of \$400,000 and to imprisonment for 2 years.

**41. Contravention of provision of Part 4**

A person who, without reasonable excuse, contravenes section 34(3) commits an offence and is liable on conviction upon indictment to a fine of \$1,000,000 and to imprisonment for 2 years.

**42. Contravention of provisions of Part 6**

(1) A person who contravenes section 49(1) commits an offence and is liable on conviction upon indictment to a fine of \$1,000,000 and to imprisonment for 2 years.

(2) A person who, knowing that a condition referred to in section 49(5) has been attached to a disclosure of information made pursuant to section 49(3) or (4), contravenes, or aids, abets, counsels or procures any person to contravene, that condition commits an offence and is liable on conviction upon indictment to a fine of \$1,000,000 and to imprisonment for 2 years.

(3) A person who, without reasonable excuse, fails to comply with a request made under section 51(1) commits an offence and is liable on conviction upon indictment to a fine of \$200,000 and to imprisonment for 1 year.

#### **43. Giving false information to Monetary Authority**

A person who, in giving information to the Monetary Authority in pursuance of an obligation under Part 2 or section 28 –

- (a) gives information that is false or misleading in a material particular;  
and
- (b) knows or ought to know that the information being given is false or misleading,

commits an offence and is liable on conviction upon indictment to a fine of \$400,000 and to imprisonment for 2 years.

#### **44. Misrepresentation in respect of designated system**

(1) A person shall not describe or otherwise make any representation in respect of a clearing and settlement system that is not a designated system in a manner that indicates, or that could reasonably be construed as indicating, that the system is a designated system.

(2) It is a defence for a person charged with an offence under subsection (1) to prove that he reasonably believed that the system was a designated system.

(3) A person shall not describe or otherwise make any representation in respect of a clearing and settlement system in respect of which a certificate of finality is not in effect in a manner that indicates, or that could reasonably be construed as indicating, that a certificate of finality is in effect in respect of the system.

(4) It is a defence for a person charged with an offence under subsection (3) to prove that he reasonably believed that a certificate of finality was in effect in respect of the system.

(5) Subsections (1) and (3) do not apply in relation to any description or representation contained in information submitted to the Monetary Authority under this Ordinance.

(6) Any person who contravenes subsection (1) or (3) commits an offence and is liable on conviction upon indictment to a fine of \$400,000 and to imprisonment for 2 years.

#### **45. False entry in document**

(1) A person commits an offence if, wilfully and with intent to deceive, he does any act mentioned in subsection (2) and that act results in any information contained in the book of record or relevant document in question being incorrect or misleading in a material respect.

(2) A person does an act referred to in subsection (1) if he –

- (a) makes, or causes to be made, an entry that he knows or ought reasonably to know to be false in any book of record or in any relevant document relating to a designated system;
- (b) omits to make an entry in any book of record or in any relevant document relating to a designated system; or
- (c) alters, abstracts, conceals or destroys an entry in any book of record or in any relevant document relating to a designated system, or causes any such entry to be altered, abstracted, concealed or destroyed.

(3) A person who commits an offence under subsection (1) is liable on conviction upon indictment to a fine of \$1,000,000 and to imprisonment for 5 years.

(4) In this section, "relevant document relating to a designated system" (關乎指定系統的有關文件) means any report, slip, document or statement of the business, affairs, transactions, condition, assets or accounts of a designated system.

**46. Personal liability of company officers**

(1) Where an offence is committed under section 39(1), (2), (3), (4) or (5), 40 or 43 of this Ordinance by a corporation and in committing the offence the corporation is aided, abetted, counselled, procured or induced by, or the offence is committed with the consent or connivance of, or is attributable to any recklessness on the part of, a person mentioned in subsection (2), that person (as well as the corporation) commits the offence and is liable to be proceeded against and punished accordingly.

(2) The persons referred to in subsection (1) are –

- (a) any director, manager or secretary of, or any other person involved in the management of, the corporation;
- (b) where the corporation is a system operator or settlement institution of a clearing and settlement system, the chief executive of the corporation; or
- (c) any person purporting to act in any such capacity as is described in paragraph (a) or (b).

PART 6

MISCELLANEOUS

**47. Power of Chief Executive to give directions**

(1) After consulting the Monetary Authority, the Chief Executive may, on being satisfied that it is in the public interest to do so, give the Monetary Authority such written directions as he thinks fit as to the performance of any function of the Monetary Authority under this Ordinance.

(2) The Monetary Authority shall comply with any direction given under subsection (1).

(3) If a direction is given under subsection (1), a requirement in an Ordinance that the Monetary Authority shall –

- (a) form any opinion;
- (b) be satisfied as to any matter (including the existence of particular circumstances); or
- (c) consult any person,

for the purpose of performing any function to which the direction relates, does not apply for any purpose connected with the performance of that function pursuant to or consequent upon the direction.

#### **48. Power of Monetary Authority to make regulations**

(1) The Monetary Authority may, after consultation with the Financial Secretary, make regulations for the better carrying out of the purposes of this Ordinance.

(2) In particular, regulations made under subsection (1) may provide for all or any of the following –

- (a) measures to be put in place within a designated system for the purposes of monitoring and enforcing compliance with the operating rules of the system and the provisions of this Ordinance;
- (b) measures in relation to the availability to a system of financial resources;
- (c) matters to be provided for under the operating rules of a designated system, including matters conducive to the better safety and efficiency of the system;
- (d) any other matter necessary or desirable for the better safety and efficiency of operation and financial soundness of designated systems;
- (e) any matter that shall or may be prescribed under this Ordinance.

(3) Regulations made for the purpose of this section –

- (a) may be of general or special application and may apply only in specified circumstances;
- (b) may make different provisions for different circumstances and provide for different cases or classes of cases; and
- (c) may provide for the exercise of discretion in such cases as may be specified in those regulations.

#### **49. Confidentiality**

(1) Except in so far as is necessary for the performance of any function under this Ordinance or for carrying into effect any provision of this Ordinance, every person to whom this subsection applies –

- (a) shall preserve and aid in preserving secrecy with regard to all matters relating to the affairs of any person that come to his knowledge in the performance of any function under this Ordinance;
- (b) shall not communicate any such matter to any person other than the person to whom such matter relates; and
- (c) shall not suffer or permit any person to have access to any records in his possession, custody or control.

(2) Subsection (1) applies to –

- (a) the Monetary Authority and any person appointed by the Financial Secretary under section 5A(3) of the Exchange Fund Ordinance (Cap. 66) to assist the Monetary Authority; and
- (b) any person appointed by the Monetary Authority under section 8(3).

(3) Subsection (1) does not apply –

- (a) to the disclosure of information in summary form that is so framed as to prevent particulars relating to the business of any particular system or person being ascertained from it;
- (b) to the disclosure of information –

- (i) with a view to the institution of, or otherwise for the purpose of, any criminal proceedings, whether under this Ordinance or otherwise; or
- (ii) in connection with any other legal proceedings arising out of this Ordinance;
- (c) to the disclosure of information to the police or the Independent Commission Against Corruption, at the request of the Secretary for Justice, relevant to the proper investigation of any criminal complaint;
- (d) to the disclosure of information to the Chief Executive or the Financial Secretary for the purpose of enabling or assisting the Monetary Authority to perform his functions under this Ordinance;
- (e) to the disclosure of information to any person within the category of persons specified in subsection (2), where the disclosure will enable or assist that person to assist the Monetary Authority in the performance of any of the functions referred to in section 5A(2) of the Exchange Fund Ordinance (Cap. 66);
- (f) to the disclosure of information with the consent of the person from whom the information was obtained or received or, where the information does not relate to such person, with the consent of the person to whom it relates; or
- (g) to the disclosure of information which has been made available to the public by virtue of being disclosed in any circumstances in which, or for any purpose for which, disclosure is not precluded by this section.

(4) Subsection (1) does not apply to any disclosure of information, being a disclosure that is not contrary to the public interest, of the following description –

- (a) disclosure to the Securities and Futures Commission referred to in section 3(1) of the Securities and Futures Ordinance (Cap. 571) ("the



- Commission") if, in the opinion of the Monetary Authority, such disclosure will assist the Commission in exercising its functions; or
- (b) disclosure to an authority in a place outside Hong Kong exercising in that place functions similar to the functions of the Monetary Authority under this Ordinance, being an authority that is subject to secrecy provisions in that place that in the opinion of the Monetary Authority are adequate, if in the opinion of the Monetary Authority such disclosure will –
- (i) assist that authority in exercising those functions; and
  - (ii) help maintain and promote safety and efficiency in the operation of designated systems.

(5) The Monetary Authority may attach to any disclosure of information to a person made pursuant to subsection (3)(b), (c), (d) or (e) or (4) a condition that neither the person to whom the information has been disclosed nor any person obtaining or receiving the information (whether directly or indirectly) from such person shall disclose that information to any other person without the consent of the Monetary Authority.

## **50. Immunity**

(1) No liability shall be incurred by any of the following persons as a result of anything done or omitted to be done by him in good faith in the exercise or purported exercise of any functions conferred or imposed by or under this Ordinance, namely –

- (a) any public officer;
- (b) any person appointed under section 5A(3) of the Exchange Fund Ordinance (Cap. 66) to assist the Monetary Authority; or
- (c) any person appointed under section 8(3).

(2) No liability shall be incurred by any of the following persons as a result of anything done or omitted to be done by him in good faith in the carrying out or purported carrying out of any directions given to him by the Monetary Authority, namely –

- (a) any system operator or settlement institution of a clearing and

- settlement system, or any employee of such person; and
- (b) where the system operator or settlement institution of a clearing and settlement system is a corporation, any officer of or other person involved in the management of the corporation.

**51. Power of Monetary Authority to require information to be given**

(1) Where there are reasonable grounds for believing that a clearing and settlement system exists, but the Monetary Authority is unable on the basis of the information before him to determine whether the system is eligible to be designated or, if eligible to be, should be designated under this Ordinance, the Monetary Authority may by notice in writing request any person who is or whom he reasonably believes to be a system operator or settlement institution of the system or a participant in the system, to give the Monetary Authority such information or documents regarding the system as the Monetary Authority considers may assist him in making that determination.

- (2) A request under subsection (1) –
  - (a) shall specify the information or documents to be given; and
  - (b) may specify a period, being a period that is reasonable in the circumstances, within which the information or documents shall be given.

**52. Requirement to give information relating to default**

(1) The Monetary Authority may, by notice in writing given to any system operator or settlement institution of a designated system, direct the system operator or settlement institution to give to any of the following persons who are named in the notice, namely –

- (a) the Official Receiver;
- (b) any other person having responsibility for any matter arising out of or

connected with the default of a participant in the system, ("nominated official") such information as the nominated official may request relating to the default of a participant in the system or to any matter arising out of or connected with such default.

(2) A notice given under subsection (1) shall specify the nominated official and the participant to whom the direction relates.

(3) A request for information made by a nominated official shall be in writing and shall state –

- (a) the information requested; and
- (b) a period, being a period that is reasonable in the circumstances, within which the information shall be given.

(4) A system operator or settlement institution to whom a request is made in accordance with subsection (3) shall comply with the request by giving the information to the nominated official within the period specified.

(5) An exemption granted under section 9 in respect of a designated system may in addition exempt the system operator or settlement institution from the application of this section and, where such an exemption is in effect, the foregoing provisions of this section shall not apply in relation to such system operator or settlement institution.

### **53. Guidelines**

The Monetary Authority may, for the purpose of making available relevant information, issue guidelines setting out the manner in which he proposes to exercise any power conferred or duty imposed on him, or to perform any function assigned to him, under this Ordinance.

### **54. Systems deemed to have been designated**

(1) The clearing and settlement systems specified in Schedule 2 shall be deemed to have been designated for the purposes of this Ordinance under section 3(1).

(2) It shall also be deemed that a certificate of finality has been issued in

respect of each of the systems referred to in subsection (1).

(3) Except as provided in subsection (1), Part 2 shall not apply in relation to a clearing and settlement system that is specified in Schedule 2.

## **55. Service of notices**

(1) A notice that is to be or may be given to any person by the Monetary Authority under this Ordinance is taken to have been given if it is given according to the following –

- (a) the notice may be delivered to him (if the person is an individual) or to any officer of the corporation (if the person is a corporation) by hand;
- (b) if a place of business has been given by the person under section 5(1)(a), the notice may be left at that place;
- (c) if a postal address has been given by the person under section 5(1)(a), the notice may be sent by post to that address; or
- (d) if an electronic mail address has been given by the person under section 5(1)(a), the notice may be sent by electronic mail transmission to that electronic mail address.

(2) A notice taken to have been given under subsection (1)(b), (c) or (d) shall be taken to be given, and as coming to the notice of the person to whom it is given, at the following time –

- (a) if the notice is left at the place of business given under section 5(1)(a), when it is so left;
- (b) if the notice is sent by post to the postal address given under section 5(1)(a), when it would in the ordinary course of post be delivered to that address; or
- (c) if the notice is sent by electronic mail transmission to the electronic mail address given under section 5(1)(a), when it would in the ordinary course of such transmission be received at that address.

(3) In this section, reference to a notice being given includes reference to any

notice, any document or information of any kind being given, served, sent or provided.

## **56. Amendment of Schedules**

The Chief Executive in Council may, by notice published in the Gazette, amend Schedule 1 or 2.

### SCHEDULE 1

[ss. 32, 38 & 56]

### PROVISIONS RELATING TO TRIBUNAL

#### **1. Interpretation**

In this Schedule –

"panel member" (小組成員) means a member of the panel referred to in section 32(4) of this Ordinance;

"parties" (各方), in relation to a review of a decision of the Monetary Authority, means the applicant and the Monetary Authority;

"Tribunal member" (審裁處成員) means a member of the Tribunal appointed under section 32(2)(b) of this Ordinance.

#### **2. Tenure of Chairman of the Tribunal**

(1) The Chairman of the Tribunal shall be appointed for a term not exceeding 3 years.

(2) On the expiry of his period of appointment or reappointment, the Chairman of the Tribunal is eligible for reappointment for such further term as the Chief Executive may specify.

(3) The Chairman of the Tribunal may resign from office by giving notice in writing to the Chief Executive. A notice of resignation takes effect on the date specified

in the notice or, if no date is specified, on the date of receipt by the Chief Executive of the notice.

- (4) If the Chief Executive is satisfied that the Chairman of the Tribunal –
  - (a) has become bankrupt;
  - (b) is incapacitated by physical or mental illness; or
  - (c) is otherwise unable or unfit to perform the functions of the Chairman of the Tribunal,

the Chief Executive may, after consultation with the Chief Justice, declare his office as Chairman of the Tribunal to be vacant, and shall notify the fact in such manner as the Chief Executive thinks fit; and upon such declaration the office becomes vacant.

(5) If a review has been commenced by the Tribunal but not completed before the expiry of the term of office of the Chairman of the Tribunal, the Chief Executive may extend the term of office of the Chairman until the completion of the review.

### **3. Tenure of panel members**

(1) A panel member shall be appointed for a term not exceeding 3 years.

(2) On the expiry of his period of appointment or reappointment, a panel member is eligible for reappointment for such further term as the Chief Executive may specify.

(3) A panel member may resign from office by giving notice in writing to the Chief Executive. A notice of resignation takes effect on the date specified in the notice or, if no date is specified, on the date of receipt by the Chief Executive of the notice.

- (4) If the Chief Executive is satisfied that a panel member –
  - (a) has become bankrupt;
  - (b) is incapacitated by physical or mental illness;
  - (c) is otherwise unable or unfit to perform the functions of a Tribunal member; or
  - (d) has become a public officer,

the Chief Executive may declare his office as panel member to be vacant, and shall notify the fact in such manner as the Chief Executive thinks fit; and upon such declaration the office becomes vacant.

#### 4. **Sittings**

(1) The Chairman of the Tribunal shall convene such sittings of the Tribunal as are necessary to determine a review.

(2) Before convening a sitting under subsection (1) in respect of a review, the Chairman of the Tribunal may give directions to the parties to the review concerning –

- (a) procedural matters to be complied with by any of the parties; and
- (b) the time within which such procedural matters are to be complied with.

(3) At a sitting of the Tribunal –

- (a) the Chairman of the Tribunal shall preside;
- (b) not fewer than 2 Tribunal members shall also be present; and
- (c) every question before the Tribunal shall be determined by the opinion of the majority of those referred to in paragraphs (a) and (b) except a question of law which shall be determined by the Chairman of the Tribunal alone.

(4) Every sitting of the Tribunal shall be held in public unless the Tribunal, on its own motion or on the application of any of the parties to the review, determines that in the interests of justice a sitting, or any part of a sitting, shall not be held in public in which case it may hold the sitting, or the relevant part of the sitting, as the case may be, in camera.

(5) If an application is made pursuant to subsection (4) for a determination that a sitting, or any part of a sitting, shall not be held in public, a hearing of the application shall be held in camera.

(6) The parties to a review shall, at any sitting of the Tribunal relating to the review, be entitled to be heard –

- (a) in person or, in the case of the Monetary Authority, through a person appointed under section 5A(3) of the Exchange Fund Ordinance (Cap. 66) to assist the Monetary Authority; or
- (b) through counsel or a solicitor or, with the leave of the Tribunal, through any other person.

(7) The Chairman of the Tribunal shall prepare or cause to be prepared a record of the proceedings at any sitting of the Tribunal, which shall contain such particulars relating to the proceedings as he considers appropriate.

#### 5. **Miscellaneous**

Except as otherwise provided in this Ordinance –

- (a) the Tribunal, its Chairman and its members; and
- (b) the parties to, and any witness, counsel, solicitor, or any other person involved in, a review,

shall have the same privileges and immunities in respect of the review as they would have if the review were civil proceedings before the Court of First Instance.

## SCHEDULE 2

[ss. 54 & 56]

### CLEARING AND SETTLEMENT SYSTEMS DEEMED TO HAVE BEEN DESIGNATED

1. Central Moneymarkets Unit.
2. Hong Kong Dollar Clearing House Automated Transfer System.

#### **Explanatory Memorandum**

The purpose of this Bill is to provide for the oversight of certain clearing and settlement systems for funds or securities ("clearing and settlement systems") by the



Monetary Authority, and to provide for finality as regards transactions effected through, and proceedings within, such systems ("finality").

## BACKGROUND

2. For the purposes of the Bill, a clearing and settlement system is a system established for the clearing or settlement of payment obligations, or obligations relating to the transfer of book-entry securities, between participants in the system. Such systems may operate in a number of ways. Transactions between participants may be cleared and settled individually as and when they are entered into the system, or they may be cleared and settled periodically on a net basis. Under the latter arrangement, all obligations pertaining to a given participant for the relevant period are netted into a single obligation for that participant.

3. A clearing and settlement system may also operate on a cross-border, multi-currency basis whereby, for example, a transaction between 2 participants in the system is given effect by means of payments of funds into accounts held in separate clearing and settlement systems located in 2 different jurisdictions outside Hong Kong, being clearing and settlement systems that are utilized by the participants' clearing and settlement system for that purpose.

4. In the context of clearing and settlement systems, finality refers to the abrogation of all rights otherwise existing at law that would allow the setting aside of transactions effected through, or proceedings within, such systems. Such rights would include, for example, rights under the law of bankruptcy by which a transaction involving an insolvent participant could be set aside or otherwise interfered with.

## PROVISIONS OF THE BILL

### PART 1 – PRELIMINARY

5. Clause 2 contains definitions of terms used in the Bill. In addition to the definition of "clearing and settlement system" ("system") in terms as mentioned above, the following related defined terms are of interest –

- (a) a "system operator" is a person who is responsible for the operation of any clearing or settlement functions of a system;
- (b) a "transfer order" is an instruction in relation to a transaction involving a payment obligation or a securities transfer within a system;
- (c) a "settlement institution" is a person that provides account facilities for participants of a system that are used for the settlement of transfer orders within the system;
- (d) "netting" refers to the conversion of various obligations owed to or by a participant in a system (in relation to all the other participants in the system) into one net obligation owed to or by the participant;
- (e) a "relevant insolvency office holder" means the Official Receiver, a liquidator or an equivalent officer in a company liquidation, a trustee in bankruptcy or a person appointed under an order for administering the insolvent estate of a deceased person.

## PART 2 – DESIGNATION AND OVERSIGHT

### **Division 1 – Designation**

6. (1) Clause 3 provides for the designation of clearing and settlement systems by the Monetary Authority. Only a clearing and settlement system that is in operation in Hong Kong or that accepts for clearing or settlement transfer orders denominated in Hong Kong dollars, and that is not a recognized clearing house for the purposes of section 37 of the Securities and Futures Ordinance (Cap. 571), may be considered for designation under the Bill (clause 3(2)).

(2) A clearing and settlement system may be designated if the Monetary Authority considers that the system is or is likely to become a system whose proper functioning is material to the monetary or financial stability of Hong Kong or to the functioning of Hong Kong as an international financial centre (clause 3(1)).

(3) Clause 3(3) expands on the meaning of the reference to "system whose proper functioning is material to the monetary or financial stability of Hong Kong, or to the functioning of Hong Kong as an international financial centre", and clause 3(4) specifies certain factors that the Monetary Authority may have regard to in determining whether a clearing and settlement system can be so regarded.

(4) Clause 3(5) requires the Monetary Authority to publish in the Gazette notice of his intention to designate a system, and to allow a system operator or settlement institution of the system an opportunity to oppose the intended designation.

7. Clause 4 provides for the revocation of designation of a system. Notice of an intended revocation shall be published in the Gazette so as to allow a system operator or settlement institution of the system an opportunity to oppose the intended revocation.

### **Division 2 – Obligations of designated systems**

8. Clause 5 requires every system operator or settlement institution of a newly designated clearing and settlement system to give the Monetary Authority particulars about himself and the aspects of the management or operations of the system for which he is responsible (clause 5(1)). Details of any subsequent change in those particulars shall be given to the Monetary Authority within 3 days of the change taking effect (clause 5(2)).

9. Clause 6(1) sets out the general requirements to be complied with in relation to designated systems, and places responsibility for such compliance on the system operator and settlement institution. Those requirements include the safe and efficient operation of the system, the establishment of appropriate operating rules, the existence of adequate compliance arrangements, and the availability of sufficient financial resources. Clause 6(2) sets out matters that must be included in a designated system's operating rules. Clause 6(3) prohibits any change to a designated system's operating rules without the prior approval in writing of the Monetary Authority.

10. Clause 7 clarifies the meaning of the terms "safety" and "efficiency" as used in Part 2 of the Bill.

### **Division 3 – Functions and powers of Monetary Authority in respect of designated systems**

11. Clause 8 specifies the functions of the Monetary Authority under the Ordinance. In general those functions are to monitor compliance with the Ordinance and to promote the general safety and efficiency of designated clearing and settlement systems in Hong Kong.

12. Clause 9 empowers the Monetary Authority to exempt from the oversight provisions of the Ordinance a designated system that is established in a place outside Hong Kong, if the system is under the supervision of a regulatory authority in that place and if the Monetary Authority is satisfied as to the scope and nature of the supervision being exercised by that regulatory authority.

13. (1) Clauses 10, 11 and 12 provide enforcement powers for the Monetary Authority.

(2) Clause 10 empowers the Monetary Authority to request information relating to a designated system from any system operator or settlement institution of the system.

(3) Clause 11 empowers the Monetary Authority to direct a system operator or settlement institution of a designated system to take any action necessary to bring the system into compliance with the requirements under clause 6(1).

(4) Clause 12 empowers the Monetary Authority to require a system operator or settlement institution of a designated system to amend the operating rules of the system to bring them into compliance with clause 6(1)(b), and further provides that if such a direction is not complied with the operating rules shall have effect as if so amended.

### PART 3 – FINALITY OF TRANSACTIONS AND PROCEEDINGS

14. Part 3 provides for the finality of transactions and proceedings within a designated system.

#### **Division 1 – Interpretation**

15. Clause 13 defines the expression "law of insolvency" as used in Part 3.

#### **Division 2 – Certificate of finality**

16. Clause 14 provides for the issue of a certificate ("certificate of finality") by the Monetary Authority in respect of any designated system that is found to meet the criteria for the application of the finality provisions, and for the consequent application of the finality provisions to such system.

17. Clause 15 provides for the suspension or revocation of a certificate of finality in respect of a designated system, subject to a right on the part of any system operator and settlement institution of the system to oppose the suspension or revocation.

**Division 3 – Finality of transactions and proceedings  
within designated systems**

18. Clause 16 provides that the general law of insolvency shall be subject to Division 3 in its application to certain transactions effected through or proceedings within a designated system, including transfer orders or action taken under the operating rules with respect to such orders, and collateral security (clause 16(1)). Division 3 applies only to bankruptcy and winding up proceedings, and only where those proceedings are in respect of a participant (clause 16(2) and (3)).

19. Clauses 17 and 18 are the main substantive provisions of Part 3. Clause 17 modifies the application of the general law, while clause 18 modifies the application of the law of insolvency in particular, as described in the following 2 paragraphs.

20. Clause 17 declares that transfers and settlements that are effected through a designated system, and that are final and irrevocable under the operating rules of the system, may not be reversed, repaid or set aside, nor may any order be made by a court for their rectification or stay.

21. (1) Clause 18 provides that certain transactions and proceedings within a designated system shall take precedence over the law of insolvency.

(2) Clause 18(1) exempts certain transactions and proceedings within a designated system from the application of the law of insolvency regarding distribution of an insolvent's assets. Such transactions and proceedings include any transfer order or disposition of property in pursuance of such an order, any default arrangements, any

operating rules as to the settlement of transfer orders, and any contract for realizing certain collateral security.

(3) Clause 18(2) removes certain transactions and proceedings within a designated system from the scope of the powers of a relevant insolvency office holder or a court acting under the law of insolvency. Such transactions and proceedings include any settlement of transfer orders, action taken under default arrangements, and action taken to realize collateral security.

(4) Clause 18(3) and (4) provides for action taken under the default arrangements of a designated system to prevail over a debt or other liability arising out of a transfer order which is the subject of action taken under the default arrangements.

22. (1) Clauses 19, 20 and 21 are supplementary to clause 18 and deal with the disapplication or modification of certain statutory provisions forming part of the law of insolvency.

(2) Clause 19 disapplies certain statutory provisions that provide for a relevant insolvency office holder to disclaim any part of an insolvent's property which is burdened with onerous covenants (clause 19(a)), or that make void any disposition of property by an insolvent after the commencement of the insolvency (clause 19(b)).

(3) Clause 20 provides that the powers of a court under certain statutory provisions shall not be exercisable in relation to a transfer order or any disposition of property in pursuance of such order. Those powers include the power to restore the position of an insolvent debtor who has entered into a transaction at an undervalue or has otherwise given an unfair preference (clause 20(a) and (b)), or to declare void any disposition of property made with intent to defraud creditors (clause 20(c)).

(4) Clause 21 provides that where action has been taken under default arrangements within a designated system, only the net sum payable on completion of the action shall be provable or be taken into account in the insolvency of a participant (clause 21(1) and (2)). Certain statutory provisions describing the debts that are provable in bankruptcy, and providing for the manner of taking account of mutual credits and debts between an insolvent person and a person proving a debt, are modified accordingly (clause 21(3)).

23. Clause 22 provides that Part 3 does not apply in relation to transfer orders that are entered into a designated system after a point in time specified in that provision.

#### **Division 4 – Netting of obligations of insolvent participants**

24. Clause 23 provides for recognition at law of any netting, effected by a system operator, of the obligations of an insolvent participant .

#### **Division 5 - Miscellaneous**

25. Clause 24 requires a court in Hong Kong not to recognize or give effect to orders of foreign courts, or acts of foreign insolvency office holders, made or done under foreign laws of insolvency, where the order or act would be prohibited under the Bill if made or done by a court or relevant insolvency office holder in Hong Kong.

26. Clause 25 clarifies that the Bill does not affect rights arising under underlying transactions in respect of transfer orders, except where expressly provided otherwise in the Bill.

27. Clause 26 addresses the situation where a participant who subsequently becomes insolvent has entered into a transaction at an undervalue with another participant. Clause 26(2) confers on a relevant insolvency office holder the right to recover from the other participant the amount of any gain made from the transaction. Under clause 26(4), the



Monetary Authority may exempt from the application of clause 26(2) any system operator or settlement institution of a designated system as regards such transactions entered into in his capacity as a system operator or settlement institution.

28. Clause 27 addresses the situation where a participant who subsequently becomes insolvent has made a transfer that gives an unfair preference to another participant. Clause 27(2) confers on a relevant insolvency office holder the right to recover from the other participant the value of the transfer. Under clause 27(4), the Monetary Authority may exempt from the application of clause 27(2) any system operator or settlement institution of a designated system as regards such transfer made in his capacity as a system operator or settlement institution.

29. Clause 28 requires a participant to notify the system operator and the Monetary Authority forthwith of his insolvency or likely insolvency.

30. Clause 29 allows a relevant insolvency office holder to seek a ruling from the court confirming the scope of his functions as modified by the provisions of the Bill.

31. Clause 30 protects from legal process for the enforcement of a judgment any property of a participant in a designated system that has been provided as collateral security in favour of the system operator or settlement institution.

32. Part 4 deals with the review of certain decisions of the Monetary Authority by the Clearing and Settlement Systems Appeals Tribunal ("the Tribunal"), as described in the following paragraph.

33. (1) Clause 31 defines certain terms as used in Part 4.

(2) Clause 32 establishes the Tribunal and sets out its composition and membership.

(3) Clause 33 provides for the review of certain decisions of the Monetary Authority and for procedural and other matters relating to such review.

(4) Clause 34 sets out the powers of the Tribunal.

(5) Clause 35 gives protection in respect of incriminating evidence given to the Tribunal under compulsion.

(6) Clause 36 confers powers on the Tribunal to deal with contempt.

(7) Clause 37 provides for appeals to the Court of Appeal against determinations of the Tribunal on a point of law.

(8) Clause 38 confers power on the Chief Justice to make rules providing for matters relating to the Tribunal.

## PART 5 – OFFENCES

34. (1) Clause 39 creates offences in respect of any failure to comply with certain obligations imposed under the provisions of Part 2 of the Bill. Those obligations include –

- (a) the obligation on the part of a system operator or settlement institution to give the Monetary Authority the information required under clause 5(1), or on the part of any person to inform the Monetary Authority of any change in that information as required under clause 5(2) (clause 39(1));
- (b) the obligation on the part of a system operator or settlement institution to ensure that any requirement relating to a designated system set out in clause 6(1) is complied with (clause 39(2));
- (c) the prohibition against making any change to the operating rules without the prior approval of the Monetary Authority under clause 6(3) (clause 39(3));
- (d) the obligation on the part of a system operator or settlement institution to comply with a request for information under clause 10(1) (clause 39(4)); and
- (e) the obligation on the part of a system operator or settlement institution to comply with a direction of the Monetary Authority given under clause 11(1) to take action to bring a designated system into compliance with the requirements in clause 6(1) (clause 39(5)).

(2) Clause 39(6) provides for defences, including the defence of having taken all reasonable steps, for the offences created by clause 39(2), (4) and (5).

35. Clause 40 creates an offence in the event of any failure by a participant to notify the system operator and the Monetary Authority of certain events in connection with the participant's insolvency, as required under clause 28.

36. Clause 41 creates an offence in relation to failure to comply with any of the acts or omissions in relation to the proceedings of the Tribunal that are prohibited or required under clause 34(3).

37. Clause 42 creates offences in respect of certain obligations imposed under Part 6 of the Bill, including –

- (a) the obligations under clause 49(1) and (5) to maintain confidentiality; and
- (b) the obligation under clause 51(1) to comply with a request to supply any information requested by the Monetary Authority.

38. Clause 43 makes it an offence for a person giving information to the Monetary Authority under Part 2 or clause 28 to knowingly give information that is false or misleading.

39. Clause 44 makes it an offence for a person to describe as a designated system, or to describe as a system in respect of which a certificate of finality is in effect, a system that is not one.

40. Clause 45 creates offences relating to false entries, omission to make entries, and alteration, abstraction, concealment or destruction of entries in a book of record or in certain documents related to a designated system.

41. Clause 46 attributes personal liability to the officers of a corporation in respect of offences committed under certain provisions of the Bill, where the officer participated in, or is to be taken as having participated in, the act or omission in question.

42. Clause 47 confers power on the Chief Executive to give directions to the Monetary Authority after consulting the Monetary Authority and if satisfied that it is in the public interest to do so. Those directions must be in writing and must relate to the performance of the Monetary Authority's functions under the Ordinance. The Monetary Authority is required to comply with those directions.

43. Clause 48 empowers the Monetary Authority to make regulations, after consultation with the Financial Secretary.

44. Clause 49 requires confidentiality to be maintained in relation to information that comes to a person's knowledge in connection with the performance of functions under the Bill (clause 49(1) to (4)), and further requires that a person who obtains information from the Monetary Authority on terms that the information be kept confidential shall maintain confidentiality in relation to that information (clause 49(5)).

45. Clause 50 confers immunity on persons acting in good faith in the exercise of functions conferred under the Ordinance.

46. Clause 51 empowers the Monetary Authority to require certain persons connected with a presumed clearing and settlement system to give the Monetary Authority information or documents that the Monetary Authority considers may assist him in determining whether the system should be designated.

47. Clause 52 enables the Monetary Authority to direct a system operator or settlement institution of a designated system to give information to a nominated official specified in that clause in connection with the default of a participant in the system.

48. Clause 53 empowers the Monetary Authority to issue guidelines regarding the manner in which he proposes to exercise his powers or perform his functions under the Ordinance.

49. Clause 54 provides for the deemed designation under the Ordinance of a clearing and settlement system that is specified in Schedule 2 to the Bill, and for the deemed issue of a certificate of finality in respect of that system.

50. Clause 55 provides for the manner of service of notices that are to be served on a person by the Monetary Authority under the Ordinance.

51. Clause 56 provides for the amendment of Schedule 1 or 2 to the Bill by the Chief Executive in Council.

## **Economic implication**

By providing statutory backing for the oversight of important clearing and settlement systems, including the finality of settlement, the new legislation will help to strengthen the financial and monetary stability of Hong Kong and also the functioning of Hong Kong as an international financial centre.

## **Financial implication**

As mentioned in the paper, the potential payment systems to be designated under the proposed legislation have been subject to the de facto oversight by the HKMA for years. Therefore it is expected that the additional work arising from this new legislation could be absorbed by the existing staff of the HKMA who are funded by the Exchange Fund.

As regards the setting up of the independent Tribunal, the operating cost of the Tribunal will be charged to the Exchange Fund except the service fee for the Chairman of the Tribunal which will be charged to the General Revenue<sup>(1)</sup>. As we expect the workload of the Tribunal to be minimal, we do not consider it necessary to engage the Chairman on a full-time basis. The Financial Services Branch will absorb any financial resources required in relation to the service provided by the Chairman within its existing resources.

## **Sustainability Implication**

The Bill would bring local law in line with the international practice and contribute positively to the sustainability principle of achieving a competitive market-based economy in Hong Kong.

---

<sup>(1)</sup> The Judiciary advised us that it would not be appropriate for the service fee payable to the Chairman to be funded by the Exchange Fund which is managed by the HKMA whose decision might be subject to appeal.