

CLEARING AND SETTLEMENT SYSTEMS ORDINANCE

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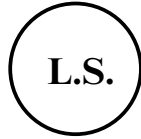
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HONG KONG SPECIAL ADMINISTRATIVE REGION

ORDINANCE NO. 20 OF 2004



TUNG Chee-hwa
Chief Executive
8 July 2004

An Ordinance 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—

- “applicant” (申請人), in relation to any proceedings under Part 4, means the person who refers a decision to the Tribunal for review under section 35(1);
- “book-entry securities” (記帳證券) means any securities issued under any law transferable by a book-entry (whether on a register or of any other kind);
- “certificate of finality” (終局性證明書) means a certificate issued by the Monetary Authority under section 16(3);
- “Chairman of the Tribunal” (審裁處主席) means the person appointed as such under section 34(3);
- “clearing and settlement system” (結算及交收系統) means a system established for—
- (a) the clearing or settlement of payment obligations; or
 - (b) the clearing or settlement of obligations for the transfer of book-entry securities, or the transfer of such securities;
- “collateral security” (附屬抵押品), in relation to a clearing and settlement system, means any realizable assets provided, whether under a charge or a re-purchase or similar agreement or otherwise (including money provided under a charge), for the purpose of securing rights and obligations potentially arising in connection with participation in the system;
- “default arrangements” (違責處理安排), in relation to a clearing and settlement system, means the arrangements in place within the system for limiting systemic and other types of risk in the event of a participant appearing to be, or likely to become, unable to meet his obligations in respect of a transfer order; and, without affecting the generality of the foregoing, includes any arrangements for—
- (a) the netting of obligations owed to or by the participant;
 - (b) the closing out of open positions held by the participant; or
 - (c) the realizing of collateral security securing obligations owed by the participant;
- “defaulting participant” (違責參與者), in relation to a clearing and settlement system, means a participant in respect of whom action has been taken by the system operator or settlement institution under the system’s default arrangements;
- “designated system” (指定系統) means a clearing and settlement system that has been designated for the purposes of this Ordinance by the Monetary Authority under section 4(1);
- “directors’ voluntary winding up statement” (董事自動清盤陳述書) means a statement made under section 228A(1) of the Companies Ordinance (Cap. 32), and a reference to such a statement taking effect is a reference to it being delivered for registration as specified in section 228A(3) of that Ordinance;
- “disposition of property” (財產產權處置), in the context of a disposition made to or by a participant in a designated system, includes a payment made to

or by the participant in the designated system or in a clearing and settlement system, wherever located, that is utilized by the designated system to effect payments;

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

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

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

“officer” (高級人員), in relation to a corporation, means a director, manager or secretary of, or any other person involved in the management of, the corporation and, where the corporation is a system operator or settlement institution of a designated system, means in addition the chief executive of the designated system;

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

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

“relevant insolvency office-holder” (有關破產清盤人員) means—

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

“resolution for voluntary winding up” (自動清盤決議) means a resolution under section 228(1)(c) of the Companies Ordinance (Cap. 32);

“settlement account” (交收帳戶), in relation to a clearing and settlement system, means an account at a settlement institution used to hold funds or securities (or both) and to settle transfer orders between participants in the system;

- “settlement institution” (交收機構), in relation to a clearing and settlement system, means a person providing settlement accounts to the participants and to any central counterparty in the system for the settlement of transfer orders within the system and, as the case may be, for extending credit to such participants and any such central counterparty for settlement purposes;
- “system operator” (系統營運者), in relation to a clearing and settlement system, means any person who, for the purposes of the system’s operating rules, is responsible for the operation of the clearing or settlement functions of the system;
- “transfer order” (轉撥指令), in relation to a clearing and settlement system, means either of the following instructions—
- (a) an instruction—
 - (i) by a participant to place at the disposal of another participant an amount of money by means of a book-entry on the accounts of a settlement institution for the system; or
 - (ii) which results in the assumption or discharge of a payment obligation for the purposes of the operating rules of the system; or
 - (b) an instruction by a participant either to settle an obligation for the transfer of book-entry securities, or for the transfer of such securities;
- “Tribunal” (審裁處) means the Tribunal established under section 34(1).

3. Application

This Ordinance applies to and in relation to—

- (a) a designated system that is established in a place outside Hong Kong;
- (b) a system operator or settlement institution of, or a participant in, a designated system who, being an individual, is outside Hong Kong;
- (c) a system operator or settlement institution of, or a participant in, a designated system that, being a corporation, is incorporated in a place outside Hong Kong; or
- (d) an officer of a corporation that is a system operator or settlement institution of, or a participant in, a designated system who is outside Hong Kong,

as it applies to and in relation to such a system that is established in Hong Kong, such an individual who is in Hong Kong, such a corporation that is incorporated in Hong Kong, or such an officer of a corporation who is in Hong Kong.

PART 2

DESIGNATION AND OVERSIGHT

Division 1—Designation

4. 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 under section 37(1) 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 under section 37(1) 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.

5. 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 4(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 4(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

6. 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 6 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) in addition, 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 6 days of the change taking effect inform the Monetary Authority in writing of the change.

7. 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.

8. 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—Matters pertaining to functions and powers of
Monetary Authority**

9. 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 advisers or consultants to assist him in the performance of his functions under this Ordinance.

10. 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.

11. 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) In addition to any exemption granted under subsection (2) in relation to a designated system, the Monetary Authority may exempt the system operator or settlement institution of the designated system from the application of section 30 or 53, or may exempt the participants of the system from the application of section 31; and where such an exemption in relation to section 30, 31 or 53 is in effect, that section shall not apply in relation to the system operator, settlement institution or participants to whom the exemption applies.

(4) 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.

12. Monetary Authority may request information or documents

(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 the system operator or settlement institution to give him such information or documents relating to the system as may be specified in the notice.

(2) A request made under subsection (1) 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 or documents relating to a designated system includes the power to request such information or documents 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 or documents 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.

13. 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 7(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 7(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.

14. Monetary Authority may impose operating rules

(1) Without affecting the generality of section 13, 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 7(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 7(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

15. Interpretation

(1) In this Part, other than section 26, 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 of Hong Kong which is concerned with or in any way related to the bankruptcy, winding up or insolvency of a person,

or, for the purposes of the application by a court in Hong Kong (in accordance with the rules of private international law) of the laws of a place outside Hong Kong, as a reference to any written law or rule of law of the place outside Hong Kong which is concerned with or in any way related to the bankruptcy, winding up or insolvency of a person.

(2) In this Part, unless the context otherwise requires, a reference to bankruptcy or winding up shall be construed as a reference to bankruptcy or winding up under the laws of Hong Kong.

Division 2—Certificate of finality

16. 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 7(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”) and specifying a date and time from which the certificate shall have effect.

(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 17(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.

(7) The Monetary Authority shall publish in the Gazette notice of any certificate of finality issued under this section.

17. Suspension or revocation of certificate of finality

(1) The Monetary Authority may at any time by notice in writing, with effect from a date and time specified in the notice, 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 16(1)(a) or (b) are no longer met; or
- (b) there has been any contravention of section 6(2), 7(3), 12, 13, 14, 45 or 53(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.

(3) The Monetary Authority shall publish in the Gazette notice of any suspension or revocation of a certificate of finality effected under this section.

Division 3—Finality of transactions and proceedings within designated systems

18. Scope of modification of law of insolvency under this Division

(1) The 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.

19. 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.

20. 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.

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

Without prejudice to the generality of section 20—

- (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.

22. Abrogation of statutory powers relating to adjustment of prior transactions

Without prejudice to the generality of section 20, no order shall be made by a court under any of the following provisions in respect of 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).

23. 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 where a resolution for voluntary winding up of a participant has been passed or a directors' voluntary winding up statement in respect of a participant has taken effect, 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) (as regards the bankruptcy) or under that section as applied under the Companies Ordinance (Cap. 32) (as regards the winding up).

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

24. 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 in a designated system which is entered into the designated system after—

- (a) the expiry of the day on which—
 - (i) a court makes an order for bankruptcy or winding up of the participant;
 - (ii) a resolution for voluntary winding up of the participant is passed; or
 - (iii) a directors' voluntary winding up statement in respect of the participant takes effect; or
- (b) the receipt by the system operator of notice of the event specified in paragraph (a),

whichever first occurs.

(2) Reference in subsection (1) to the expiry of the day on which an event specified in subsection (1)(a) occurs in relation to a participant in a designated system is a reference to—

- (a) the expiry of that day according to Hong Kong time; or

(b) the expiry of the same calendar day according to local time in the place where the designated system is established, whichever is the later.

(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

25. Netting may be effected

(1) Where—

- (a) a court has made an order for bankruptcy or winding up of a participant in a designated system;
- (b) a resolution for voluntary winding up of a participant in a designated system has been passed; or
- (c) a directors' voluntary winding up statement in respect of a participant in a designated system has taken effect,

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 point of time that applies for the purposes of section 24(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

26. Law of insolvency in other jurisdictions

(1) 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.

(2) In subsection (1), “law of insolvency” (破產清盤法), in relation to a place outside Hong Kong, means any written law or rule of law of the place which is concerned with or in any way related to the bankruptcy, winding up or insolvency of a person.

27. Preservation of rights, etc. in underlying transactions

(1) 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.

28. 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;
 - (ii) the passing of a resolution for voluntary winding up of the second participant or his principal; or
 - (iii) the making of a directors’ voluntary winding up statement in respect 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 may, unless a court otherwise orders, 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 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 20(2) or 22.

29. 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 19 applies (other than a transfer that forms part of a transaction to which section 28 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;
 - (ii) the passing of a resolution for voluntary winding up of the second participant or his principal; or
 - (iii) the making of a directors’ voluntary winding up statement in respect 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 may, unless a court otherwise orders, 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 deciding to make 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 20(2) or 22.

**30. Duty to report on completion
of default proceedings**

(1) The system operator and settlement institution of a designated system shall, not later than 6 days after the completion of any action taken under the default arrangements of the system in respect of a defaulting participant, together prepare in writing and give to the persons specified in subsection (3) a report (“default proceedings report”) on such action taken.

(2) A default proceedings report—

(a) shall state the net sum (if any) certified by the system operator or settlement institution to be payable by or to the defaulting participant, or the fact that no sum is so payable (as the case may be); and

(b) may contain such other particulars in respect of the action taken as the system operator and settlement institution consider appropriate.

(3) The persons specified for the purposes of subsection (1) are—

(a) the Monetary Authority; and

(b) any relevant insolvency office-holder acting in relation to the defaulting participant to whom the report relates or that defaulting participant’s estate or, if there is no such relevant insolvency office-holder, the defaulting participant to whom the report relates.

(4) Where the Monetary Authority receives pursuant to subsection (1) a default proceedings report he may publish notice of that fact in such manner as he considers appropriate to bring it to the attention of creditors of the defaulting participant to whom the report relates.

(5) A relevant insolvency office-holder or defaulting participant who has received pursuant to subsection (1) a default proceedings report, shall, if so requested by a creditor of the defaulting participant to whom the report relates—

(a) make the report (or a copy of it) available for inspection by the creditor; and

(b) supply to the creditor all or any part of that report (or a copy of it), subject to receipt of payment of such reasonable fee as the relevant insolvency office-holder or defaulting participant (as the case may be) determines.

31. Obligation of participant to notify of bankruptcy or winding up

(1) A participant in a designated system shall notify the 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) the presentation of a petition for the bankruptcy or winding up of the participant;
- (b) the making of an order for bankruptcy or winding up of the participant;
- (c) the passing of a resolution for voluntary winding up of the participant; or
- (d) the making of a directors' voluntary winding up statement in respect 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.

32. 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.

33. 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

34. 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 established under section 3 of the Exchange Fund Ordinance (Cap. 66).

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

(7) Subject to this section and Schedule 1 and to rules made under section 40, the Chairman of the Tribunal may determine the procedures and practice of the Tribunal.

35. Review of decisions by Tribunal

(1) Any person who is aggrieved by a decision of the Monetary Authority under section 4(1), 5(1), 16(1) or 17(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 4(1) or 5(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 16(1) or 17(1), within 30 days after receiving notice in writing given by the Monetary Authority informing him of the decision,

or within such further time as the Tribunal 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.

36. 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) Nothing in subsection (1)(c), (e) or (f) empowers 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.

37. 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 36(1)(c);
- (b) requires a person to answer any question under section 36(1)(e);
- (c) orders a person to provide evidence under section 36(1)(f); or
- (d) otherwise requires or orders a person to provide any information under section 36(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 36(3)(a), or under Part V of the Crimes Ordinance (Cap. 200), or for perjury, in respect of the evidence, answer or information.

38. 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 36(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 36(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 36(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.

39. Appeal to Court of Appeal

(1) An applicant or the Monetary Authority may, if dissatisfied with a determination delivered under section 35(8), appeal to the Court of Appeal against the determination on a point of law.

(2) Where an appeal has been lodged under subsection (1) the Court of Appeal may, on application made to it, order a stay of execution of the determination of the Tribunal, subject to such conditions as to costs, payment of money into the Tribunal or otherwise as the Court of Appeal considers appropriate; but the lodging of an appeal under subsection (1) does not of itself operate as a stay of execution of the determination of the Tribunal.

(3) The Court of Appeal may affirm, set aside or vary the determination appealed against, or may remit the matter in question to the Tribunal with such directions as it considers appropriate.

(4) 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.

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

40. 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

41. Contravention of provisions of Part 2

(1) A person who, without reasonable excuse, contravenes section 6(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.

(2) A person who, without reasonable excuse, contravenes section 6(2) commits an offence and is liable—

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

(3) Where there is a contravention of a requirement set out in section 7(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.

(4) A person who contravenes section 7(3) commits an offence and is liable on conviction upon indictment to a fine of \$400,000.

(5) A person who fails to comply with a request made under section 12(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) A person who fails to comply with a direction given under section 13(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.

(7) It is a defence for a person charged with an offence under subsection (3), (5) or (6) 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.

42. Contravention of provisions of Part 3

(1) A person who contravenes section 30(1) commits an offence and is liable on conviction upon indictment to a fine of \$200,000 and to imprisonment for 1 year.

(2) A person who contravenes section 31 commits an offence and is liable on conviction upon indictment to a fine of \$400,000 and to imprisonment for 2 years.

43. Contravention of provision of Part 4

A person who, without reasonable excuse, contravenes section 36(3) commits an offence and is liable on conviction upon indictment to a fine of \$1,000,000 and to imprisonment for 2 years.

44. Contravention of provisions of Part 6

(1) A person who contravenes section 50(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 50(5) has been attached to a disclosure of information made pursuant to section 50(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 52(1) commits an offence and is liable on conviction upon indictment to a fine of \$200,000 and to imprisonment for 1 year.

(4) A person who, without reasonable excuse, contravenes section 53(4) commits an offence and is liable on conviction upon indictment to a fine of \$400,000 and to imprisonment for 2 years.

45. 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 31—

(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.

46. 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 terms that indicate, 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 terms that indicate, 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.

47. 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.

48. Liability of company officers

Where an offence under section 41(1), (3), (4), (5) or (6), 42(1) or (2), 44(4) or 45 of this Ordinance is committed by a corporation and—

- (a) in committing the offence the corporation is aided, abetted, counselled, procured or induced by an officer of the corporation or a person purporting to act as such; or
- (b) the offence is committed with the consent or connivance of, or is attributable to any recklessness on the part of, an officer of the corporation or a person purporting to act as such,

then that officer of the corporation or person purporting to act as such (as well as the corporation) commits the offence and is liable to be proceeded against and punished accordingly.

PART 6

MISCELLANEOUS

49. Power of Monetary Authority to make regulations

(1) The Monetary Authority may, after consultation with the Financial Secretary and with the system operators and settlement institutions of designated systems, 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 designated 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.

50. 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 9(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 to the Tribunal;
 - (g) to the disclosure of information to any person or body who may be appointed or established by the Chief Executive to review processes or procedures adopted by the Monetary Authority in making decisions under this Ordinance in so far as those decisions relate to or affect the designated systems specified in Schedule 2 or designated systems in which the Monetary Authority has a legal or beneficial interest;
 - (h) 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

- (i) 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 of information to the Securities and Futures Commission referred to in section 3(1) of the Securities and Futures Ordinance (Cap. 571) if, in the opinion of the Monetary Authority, such disclosure will assist the Securities and Futures Commission in exercising its functions; or
- (b) disclosure of information 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), (e), (f) or (g) 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.

51. Immunity

(1) No civil 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 9(3).

(2) No civil 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 designated system, or any employee of such person; and
- (b) in addition, where the system operator or settlement institution of a designated system is a corporation, any officer of the corporation.

52. 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.

(3) This section applies to and in relation to—

- (a) a clearing and settlement system that is established in a place outside Hong Kong;
- (b) an individual who is outside Hong Kong; or
- (c) a corporation that is incorporated in a place outside Hong Kong,

as it applies to and in relation to such a clearing and settlement system that is established in Hong Kong, such an individual who is in Hong Kong, or such a corporation that is incorporated in Hong Kong.

53. Requirement to give information relating to default

(1) Where any action has been taken under the default arrangements of a designated system in respect of a participant in the system, the Monetary Authority may, by notice in writing given to the system operator or settlement institution of the system, direct the system operator or settlement institution to give to any person who has responsibility for any matter arising out of or connected with the default of the participant (“nominated official”) such

information as the nominated official may request relating to that default or to any matter arising out of or connected with that 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.

54. Guidelines

(1) The Monetary Authority may, for the purpose of making available relevant information, after consultation with the system operators and settlement institutions of designated systems, 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.

(2) The Monetary Authority shall publish in the Gazette any guidelines issued by him under this section.

55. 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 4(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).

56. 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 6(1)(a), the notice may be left at that place;

- (c) if a postal address has been given by the person under section 6(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 6(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 6(1)(a), when it is so left;
- (b) if the notice is sent by post to the postal address given under section 6(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 6(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.

57. Amendment of Schedules

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

58. Notices, etc. as subsidiary legislation

(1) A notice published in the Gazette under section 1(2) or 57 is subsidiary legislation for the purpose of section 34 of the Interpretation and General Clauses Ordinance (Cap. 1).

(2) Except as provided in subsection (1), a notice or guideline published in the Gazette under this Ordinance is not subsidiary legislation for the purpose of section 34 of the Interpretation and General Clauses Ordinance (Cap. 1).

Consequential Amendments

Electronic Transactions Ordinance

59. Proceedings in relation to which sections 5, 5A, 6, 7 and 8 of this Ordinance do not apply under section 13(1) of this Ordinance

Schedule 2 to the Electronic Transactions Ordinance (Cap. 553) is amended—

- (a) in paragraph (zn), by repealing “ ; 或 ” and substituting a semicolon;
- (b) in paragraph (zo), by repealing the full stop and substituting a semicolon;
- (c) by adding—
 - “(zp) the Clearing and Settlement Systems Appeals Tribunal established under the Clearing and Settlement Systems Ordinance (20 of 2004).”.

SCHEDULE 1

[ss. 34, 40 & 57]

PROVISIONS RELATING TO CLEARING AND SETTLEMENT SYSTEMS APPEALS TRIBUNAL

1. Interpretation

In this Schedule—

- “panel member” (小組成員) means a member of the panel referred to in section 34(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 34(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. 50, 55 & 57]

CLEARING AND SETTLEMENT SYSTEMS DEEMED
TO HAVE BEEN DESIGNATED

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