

HONG KONG COMMENTARY AND ANNOTATIONS LIBRARY

FINANCIAL INSTITUTIONS
(RESOLUTION) ORDINANCE
(CAP.628)

COMMENTARY AND ANNOTATIONS

SECOND EDITION

JASON GERBER



SWEET & MAXWELL

CONTENTS

<i>Foreword to this edition</i>	v
<i>Introduction and Overview of the Law</i>	ix
<i>The Financial Institutions (Resolution) Ordinance (Cap. 628) – At a Glance</i>	xix
<i>Table of Legislation</i>	xxxv
<i>Table of Cases</i>	xlix

PART 1 PRELIMINARY

Section 1	Short title and commencement	3
Section 2	Interpretation	4
Section 3	Interpretation: client assets	24
Section 4	Objects of this Ordinance	25
Section 5	When within scope financial institution ceases to be viable	26
Section 6	Power of Financial Secretary to designate or specify certain matters	28
Section 7	Power of Financial Secretary to designate lead resolution authority	30

PART 2 RESOLUTION AUTHORITIES

Section 8	Resolution objectives	33
Section 9	Role of lead resolution authority	35
Section 10	Appointment of entities to assist resolution authority	37
Section 11	General power of resolution authority	37

PART 3 POWERS RELATED TO RESOLUTION

Division 1 – Preparing for Resolution

Subdivision 1 – Resolvability Assessment and Resolution Planning

Section 12	Resolvability assessment	40
Section 13	Resolution planning	42

Subdivision 2 – Removal of Impediments

Section 14	Power to direct removal of impediments	44
Section 15	Safeguards for entity served with notice	45
Section 16	Offence not to comply with notice	46
Section 17	Review of decisions	48
Section 18	Determination of application	49

Subdivision 3 – Loss-absorbing Capacity Requirements

Section 19	Loss-absorbing capacity requirements	50
------------	--------------------------------------	----

Division 2 – Directions

Section 20	Interpretation	55
Section 21	When powers are exercisable	55
Section 22	Power to give directions	56

Division 3 – Removal of Directors etc.

Section 23	When powers are exercisable	58
Section 24	Power to remove directors etc.	59

PART 4 MOVING TO RESOLUTION

Division 1 – Initiation of Resolution

Section 25	Conditions for initiating resolution of financial institution	64
Section 26	Effect on group members and jurisdictions may be considered	65
Section 27	Requirements for consultation and for liaising with regulatory bodies	65
Section 28	Holding companies	66
Section 29	Affiliated operational entities	67
Section 30	Letters of mindedness	69

Division 2 – Mandatory Reduction of Capital Instruments

Section 31	Mandatory write off or conversion of capital instruments	70
Section 32	Capital reduction instruments: supplementary matters	74

PART 5 RESOLUTION

Division 1 – Stabilization Options

Subdivision 1 – Overview

Section 33	Stabilization options	78
Section 34	Application of stabilization options	80
Section 35	Valuation to be made	81
Section 36	Nature of valuation	83
Section 37	Section 10 entity may assist in making valuation	83

Subdivision 2 – Transfer to Purchaser

Section 38	Application of Subdivision	84
Section 39	Transfer instruments	85
Section 40	Report	86

Subdivision 3 – Transfer to Bridge Institution

Section 41	Application of Subdivision	86
Section 42	Transfer instruments	88
Section 43	Bridge institution	88
Section 44	Onward bridge institution	89
Section 45	Bridge institution – onward transfer	89
Section 46	Report	90
Section 47	Winding up of bridge institution	91
Section 48	Disposal of proceeds	92

Subdivision 4 – Transfer to Asset Management Vehicle

Section 49	Application of Subdivision	92
Section 50	Property transfer instruments	93
Section 51	Asset management vehicle	94
Section 52	Management of assets by asset management vehicle	94
Section 53	Asset management vehicle securities transfer	94
Section 54	Onward property transfer from asset management vehicle	95
Section 55	Report	96
Section 56	Disposal of proceeds	97

Subdivision 5 – Bail-in

Section 57	Application of Subdivision	97
Section 58	Bail-in instruments	98
Section 59	Power to exclude additional liabilities	100
Section 60	Rules relating to liabilities	101
Section 61	Provision of bail-in instrument in relation to securities	102
Section 62	Bail-in instrument may include directions	103
Section 63	Business reorganization plans	105
Section 64	Onward transfer of securities	106
Section 65	Report	107

Subdivision 6 – Transfer to TPO Company

Section 66	Application of Subdivision	108
Section 67	Transfer of securities to TPO company	109
Section 68	Special limitation on option	109
Section 69	TPO company	110
Section 70	TPO company – onward transfer	110
Section 71	Transfer instruments	111
Section 72	Report	111
Section 73	Disposal of proceeds	112

Subdivision 7 – Protected Arrangements

Section 74	Interpretation	112
Section 75	Regulations relating to protected arrangements	114

Subdivision 8 – Deferral of Requirements

Section 76	Deferral of requirements under Banking Ordinance	116
Section 77	Deferral of requirements under Securities and Futures Ordinance	117
Section 78	Deferral of requirements under section 8 of Insurance Companies Ordinance	120

Division 2 – Power to Direct Continued Performance of Essential Services

Section 79	Power to direct residual financial institution	121
Section 80	Effect of direction under section 79	123
Section 81	Power to direct affiliated operational entity	124
Section 82	Offences related to directions	126

Division 3 – Suspension of Obligations

Section 83	Suspension of obligations	127
Section 84	Excluded obligations	128
Section 85	When obligation falls due	130

Division 4 – Default Event Provisions

Section 86	Interpretation	130
Section 87	Application of Division	132
Section 88	Qualifying contracts	132
Section 89	Events to be disregarded	132
Section 90	Suspension of termination rights	133
Section 91	Limitations on suspension	135
Section 92	Rules relating to suspension of termination rights	136

Division 5 – General

Section 93	Functions of resolution authority	137
------------	-----------------------------------	-----

PART 6 COMPENSATION**Division 1 – Preliminary**

Section 94	Interpretation	140
------------	----------------	-----

Division 2 – Independent Valuer

Section 95	Appointment of appointing person	141
Section 96	Appointment of independent valuer	142
Section 97	Access to relevant information	143
Section 98	Revocation of appointment of independent valuer	144
Section 99	Appointment of new valuer	146
Section 100	Use of information	148

Division 3 – Valuation

Section 101	Role of independent valuer	149
Section 102	Eligibility for compensation	149
Section 103	What independent valuer must assess	150
Section 104	Decision of independent valuer	151
Section 105	Regulations	152
Section 106	Time when decision takes effect	153

Division 4 – Review of Compensation Decision

Section 107	Application to Resolution Compensation Tribunal	154
Section 108	Determination of application	155

PART 7 TRIBUNALS

Division 1 – Resolvability Review Tribunal

Section 109	Interpretation	160
Section 110	Establishment of Resolvability Review Tribunal	161
Section 111	Establishment of additional tribunals	163
Section 112	Jurisdiction of Tribunal	163
Section 113	Powers of Tribunal	164
Section 114	Sittings of Tribunal to be held in private	168
Section 115	Use of incriminating evidence required by Tribunal	169
Section 116	Contempt dealt with by Tribunal	170
Section 117	Costs	172
Section 118	Notification of determinations or orders of Tribunal	173
Section 119	Form and proof of determinations or orders of Tribunal	173
Section 120	Application for stay of execution of determinations or orders of Tribunal	174
Section 121	No other right of appeal	174
Section 122	Rules by Chief Justice	175
Section 123	Party may appeal to Court of Appeal with leave	176
Section 124	Powers of Court of Appeal	177
Section 125	No stay of execution on appeal	178

Division 2 – Resolution Compensation Tribunal

Section 126	Interpretation	179
Section 127	Establishment of Resolution Compensation Tribunal	179
Section 128	Establishment of additional tribunals	181
Section 129	Jurisdiction of Tribunal	182
Section 130	Powers of Tribunal	183
Section 131	Sittings of Tribunal to be held in public	186
Section 132	Use of incriminating evidence required by Tribunal	187
Section 133	Contempt dealt with by Tribunal	188

Section 134	Costs	189
Section 135	Notification of determinations or orders of Tribunal	190
Section 136	Form and proof of determinations or orders of Tribunal	191
Section 137	Registration of determinations or orders made by Tribunal	192
Section 138	Application for stay of execution of determinations or orders of Tribunal	193
Section 139	No other right of appeal	193
Section 140	Rules by Chief Justice	194
Section 141	Party may appeal to Court of Appeal with leave	195
Section 142	Powers of Court of Appeal	196
Section 143	No stay of execution on appeal	197

PART 8 CLAWBACK OF REMUNERATION

Section 144	Interpretation	199
Section 145	Application to Court	200
Section 146	Clawback order	202
Section 147	Repaid or returned remuneration	203
Section 148	Prohibition of avoidance	204

PART 9 DEFERRAL OF CERTAIN DISCLOSURE REQUIREMENTS

Section 149	Interpretation	205
Section 150	Deferral of requirement to disclose inside information	207
Section 151	Deferral of requirement to disclose interests and short positions	209
Section 152	Suspension of dealings in securities	211
Section 153	Suspension of certain obligations	213

PART 10 INFORMATION GATHERING, INSPECTION AND INVESTIGATION POWERS

Division 1 – Preliminary

Section 154	Interpretation	216
Section 155	When powers are exercisable	217

Section 156	Authorization of persons	217
Section 157	Appointment of investigator	218
	Division 2 – Information Gathering	
Section 158	Power to demand information, records or documents	218
Section 159	Offences in relation to section 158	220
	Division 3 – Inspection	
Section 160	Powers of inspection	222
Section 161	Offences in relation to section 160	223
	Division 4 – Investigation	
Section 162	Powers of investigation	225
Section 163	Powers of investigator to require production of records or documents or attendance for examination	226
Section 164	Offences for non-compliance with requirements imposed under section 163	228
Section 165	Use of incriminating evidence in proceedings	229
	Division 5 – Miscellaneous	
Section 166	Magistrates' warrants	230
Section 167	Lien claimed on records or documents	234
Section 168	Production of information in information systems etc.	234
Section 169	Inspection of records and documents seized etc.	235
Section 170	Destruction of documents etc.	235
Section 171	Recovery of expenses	236

PART 11 CONFIDENTIALITY REQUIREMENTS

Section 172	Interpretation	237
Section 173	Official secrecy	238
Section 174	Confidentiality on the part of financial institutions etc.	242
Section 175	Disclosure of information to authorities in other places	245

PART 12 RESOLUTION FUNDING ARRANGEMENTS

Section 176	Interpretation	248
Section 177	Recovery of costs following application of stabilization option	249

Section 178	Payment from resolution funding account	250
Section 179	Repayment of resolution funds	253
Section 180	Resolution levy	253
Section 181	Regulations	255
Section 182	Rate of levy	256
Section 183	Recovery of levy	256
Section 184	Distribution of surplus	257
Section 185	Audit regulations	257

PART 13 NON-HONG KONG RESOLUTION ACTIONS

Section 186	Interpretation	260
Section 187	Recognition of non-Hong Kong resolution actions	261
Section 188	Effect of recognition of non-Hong Kong resolution actions	263
Section 189	Compensation arrangements	264
Section 190	Incidental provision etc.	265
Section 191	Support measures	265

PART 14 MISCELLANEOUS

Section 192	Notice of intention to present winding up petition to resolution authority	268
Section 193	Restriction on commencement of winding up proceedings	269
Section 194	Disapplication of certain provisions	270
Section 195	Obstruction	270
Section 196	Code of practice	271
Section 197	Reasonable excuse	273
Section 198	Prosecution of offences by resolution authority	274
Section 199	Immunity from civil liability	275
Section 200	Legal professional privilege	276
Section 201	Certain instruments are not subsidiary legislation	276
Section 202	Power of resolution authorities to specify forms	276
Section 203	Amendment of Schedules	277

PART 15 RELATED AND CONSEQUENTIAL AMENDMENTS

Division 1 – Enactments Amended

Section 204	Enactments amended	281
-------------	--------------------	-----

Division 2 – (Omitted as spent—E.R. 4 of 2017)

Section 205	(Omitted as spent—E.R. 4 of 2017)	282
-------------	-----------------------------------	-----

Division 3 – (Omitted as spent—E.R. 4 of 2017)

Section 206	(Omitted as spent—E.R. 4 of 2017)	283
Section 207	(Omitted as spent—E.R. 4 of 2017)	283
Section 208	(Omitted as spent—E.R. 4 of 2017)	284

Division 4 – (Omitted as spent—E.R. 4 of 2017)

Section 209	(Omitted as spent—E.R. 4 of 2017)	285
Section 210	(Omitted as spent—E.R. 4 of 2017)	285
Section 211	(Omitted as spent—E.R. 4 of 2017)	286

Division 5 – (Omitted as spent—E.R. 4 of 2017)

Section 212	(Omitted as spent—E.R. 4 of 2017)	287
Section 213	(Omitted as spent—E.R. 4 of 2017)	288

Division 6 – (Omitted as spent—E.R. 4 of 2017)

Section 214	(Omitted as spent—E.R. 4 of 2017)	289
-------------	-----------------------------------	-----

Division 7 – (Omitted as spent—E.R. 4 of 2017)

Section 215	(Omitted as spent—E.R. 4 of 2017)	290
Section 216	(Omitted as spent—E.R. 4 of 2017)	290
Section 217	(Omitted as spent—E.R. 4 of 2017)	291
Section 218	(Omitted as spent—E.R. 4 of 2017)	291
Section 219	(Omitted as spent—E.R. 4 of 2017)	292
Section 220	(Omitted as spent—E.R. 4 of 2017)	293
Section 221	(Omitted as spent—E.R. 4 of 2017)	294
Section 222	(Omitted as spent—E.R. 4 of 2017)	295

Division 8 – (Omitted as spent—E.R. 4 of 2017)

Section 223	(Omitted as spent—E.R. 4 of 2017)	296
Section 224	(Omitted as spent—E.R. 4 of 2017)	296

Division 9 – (Omitted as spent—E.R. 4 of 2017)

Section 225	(Omitted as spent—E.R. 4 of 2017)	297
Section 226	(Omitted as spent—E.R. 4 of 2017)	298
Section 227	(Omitted as spent—E.R. 4 of 2017)	299

Division 10 – Amendments to Insurance Companies (Amendment) Ordinance 2015 (12 of 2015)

Section 228	Section 5 amended (section 2 amended (interpretation))	299
Section 229	Section 90 amended (Schedules 1A to 1D added)	300
Section 230	Section 99 amended (Schedule amended)	301
Section 231	Part 3, Division 34 added	302
Section 232	Schedule 1 amended (minor amendments to Insurance Ordinance relating to replacement of “Insurance Authority” by “Authority”)	305

Division 11 – (Omitted as spent—E.R. 4 of 2017)

Section 233	(Omitted as spent—E.R. 4 of 2017)	306
Section 234	(Omitted as spent—E.R. 4 of 2017)	307
Section 235	(Omitted as spent—E.R. 4 of 2017)	308
Section 236	(Omitted as spent—E.R. 4 of 2017)	309
Section 237	(Omitted as spent—E.R. 4 of 2017)	309
Section 238	(Omitted as spent—E.R. 4 of 2017)	310
Section 239	(Omitted as spent—E.R. 4 of 2017)	311
Section 240	(Omitted as spent—E.R. 4 of 2017)	312
Section 241	(Omitted as spent—E.R. 4 of 2017)	312
Section 242	(Omitted as spent—E.R. 4 of 2017)	313
Section 243	(Omitted as spent—E.R. 4 of 2017)	314
Section 244	(Omitted as spent—E.R. 4 of 2017)	315

SCHEDULES

Schedule 1	Protective Schemes	317
Schedule 2	Appointment Criteria for Independent Valuer	319
Schedule 3	Securities Transfer Instruments	321
Schedule 4	Property Transfer Instruments	327
Schedule 5	Excluded Liabilities	339
Schedule 6	Bail-in Instruments	343

Schedule 7	Valuation Assumptions and Principles	347
Schedule 8	Resolvability Review Tribunal	349
Schedule 9	Resolution Compensation Tribunal	359

APPENDICES

Appendix 1: Financial Institutions (Resolution) (Protected Arrangements) Regulation (Cap. 628A)	367
Appendix 2: Financial Institutions (Resolution) (Loss-absorbing Capacity Requirements—Banking Sector) Rules (Cap. 628B)	393
Appendix 3: Financial Institutions (Resolution) (Contractual Recognition of Suspension of Termination Rights—Banking Sector) Rules (Cap. 628C)	457
Appendix 4: Hong Kong Monetary Authority: Code of Practice Chapter CI-1 on Resolution Planning – Core Information Requirements	470
Appendix 5: Hong Kong Monetary Authority: Code of Practice Chapter LAC-1 on Resolution Planning – LAC Requirements	502
Appendix 6: Hong Kong Monetary Authority: Code of Practice Chapter ST-1 on Resolution Planning – Contractual Recognition of Suspension of Termination Rights	581
Appendix 7: Financial Stability Board: Key Attributes I-Annex 3: Resolvability Assessments	608
Appendix 8: Financial Stability Board: Key Attributes I-Annex 4: Essential Elements of Recovery and Resolution Plans	614
Appendix 9: Financial Stability Board: Principles on Loss-absorbing and Recapitalisation Capacity of G-SIBs in Resolution – Total Loss-absorbing Capacity (TLAC) Term Sheet	622
Appendix 10: Financial Stability Board: Guiding Principles on the Internal Total Loss-absorbing Capacity of G-SIBs ('Internal TLAC')	653
Appendix 11: Financial Stability Board: Principles for Cross-border Effectiveness of Resolution Actions	685
Index	701

Table of Legislation

All references are to paragraph numbers

Financial Institutions (Resolution) Ordinance (Cap. 628)	4.001, 205.004, 233.002, 234.002, 235.002, 236.002, 237.002, 238.002, 239.002, 240.002, 241.002, 242.002, 243.002, 244.002
Pt.3	86.002, 89.001, 178.003
Pt.4	86.002, 89.001
Pt.5	2.002, 2.010, 9.004, 31.007, 32.001, 87.001, 96.001, 177.001, 178.002, 178.003, 212.002, 213.002
Pt.6	2.002, 31.010, 177.001, 178.002, 178.003, Sch.2.001, Sch.2.003, Sch.7.001
Pt.7	17.002, 18.003, 19.006, 98.002, 107.001, 108.004, Sch.8.001, Sch.9.001
Pt.8	1.003
Pt.9	217.001, 218.001
Pt.10	13.004, 97.002, 178.003, 216.001
Pt.13	7.003, 9.004, 86.002, 89.001, 175.004
Pt.15	1.003
s.2	7.005, 7.006, 31.011, 58.004, 65.002, 87.002
s.2(2)	39.003, 42.003, 50.003, 58.006, 67.002
s.2(7)	31.012
s.5	25.003
s.7	9.001, 9.002
s.8	2.035, 28.003, 187.006
s.8(1)(b)	Sch.1.001
s.9	7.004
s.10	31.013, 37.001, 37.003, 61.004, 93.002, 93.003, 173.004
s.11	11.001
s.12	14.002
s.13	14.002, 214.002
s.14	17.001, Sch.8.001
s.14(2)	14.004, 14.005, 15.001, 15.003, 16.001, 112.002
s.14(3)	14.004

- (k) by a resolution authority with the consent of—
- (i) the person from whom the information was obtained or received; and
 - (ii) if the information does not relate to that person, the person to whom it relates; or
- (l) that 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 subsection or section 175.
- (4) Subsection (3)(k) does not require the resolution authority to disclose, or has disclosed, under that subsection.
- (5) Except as may be necessary for a purpose mentioned in subsection (6), a person who, in the course of performing a function under this Ordinance, receives information or any record, report, return or other document is not required—
- (a) to divulge that information in any court;
 - (b) to produce that record, report, return or other document in any court; or
 - (c) to divulge or communicate to any court any matter or thing that came to the person's knowledge in the course of performing a function under this Ordinance.
- (6) The purpose is—
- (a) a prosecution for an offence;
 - (b) a winding-up by the Court under section 122 of the Banking Ordinance (Cap. 155), Part VI of the Insurance Companies Ordinance (Cap. 41) or section 212 of the Securities and Futures Ordinance (Cap. 571);
 - (c) an application to the Court for a clawback order; or
 - (d) an appeal to the Court of Appeal from a determination of the Resolution Compensation Tribunal or Resolvability Review Tribunal.
- (7) If information is disclosed in any of the circumstances mentioned in subsection (3)(a) to (k), the following persons must not disclose the information, or any part of it, to any other person except with the consent of the resolution authority—
- (a) the person to whom the information is disclosed;
 - (b) any other person obtaining or receiving the information, whether directly or indirectly, from the person mentioned in paragraph (a).
- (8) However, subsection (7) does not require the Financial Secretary, as a person to whom that subsection applies, to obtain the consent of

the resolution authority before disclosing to any other person any information covered by that subsection if, in the opinion of the Financial Secretary, the disclosure is necessary in the interests of promoting and maintaining the stability and effective working of the financial system of Hong Kong.

(9) A resolution authority, in disclosing any information in any of the circumstances mentioned in subsection (3) or in granting any consent under subsection (7), may impose any condition that it considers appropriate.

(10) A person who contravenes subsection (1) or (7) or who fails to comply with a condition imposed under subsection (9) commits an offence and is liable—

- (a) on conviction on indictment to a fine of \$1,000,000 and to imprisonment for 2 years; or
- (b) on summary conviction to a fine at level 6 and to imprisonment for 6 months.

COMMENTARY

Maintaining secrecy

Section 173 sets out a statutory requirement for the maintenance of secrecy. It is broadly comparable with the secrecy requirements contained in section 378 of the Securities and Futures Ordinance (Cap. 571), section 53A of the Insurance Companies Ordinance (Cap. 41), and section 120 of the Banking Ordinance (Cap. 155).

[173.001]

Information to be kept secret

The requirement to maintain secrecy applies to knowledge which arises out of the performance or assisting with the performance of functions under this Ordinance.

[173.002]

The maintenance of secrecy includes exemptions from disclosure in court pursuant to subsections 173(4) – 173(6).

[173.003]

Section 10 entity

The requirement of secrecy is imposed upon all persons listed in subsection 173(2), which includes various persons employed or appointed by resolution authorities or in connection with functions under this Ordinance. Pursuant to this subsection 173(2), a section 10 entity is an entity appointed by a resolution authority to assist with functions under this Ordinance.

[173.004]

Other persons under requirement

- [173.005] The requirement of secrecy is extended to persons receiving the information under subsection 173(3).

Disclosure gateways

- [173.006] Various exceptions to the requirement of secrecy are set out under subsection 173(3), creating gateways for disclosure of secret information in the circumstances or to the persons or institutions set out in that subsection. The resolution authority.

- [173.007] A further exception is created in respect of the Financial Secretary under subsection 173(8) of this Ordinance.

Criminal offence

- [173.008] It is a criminal offence to breach the requirement of secrecy under subsection 173(1), or the extended requirement of secrecy under subsection 173(7) of this Ordinance.

174. Confidentiality on the part of financial institutions etc.

- (1) An entity or person to whom this subsection applies—
 - (a) must preserve, and aid in preserving, secrecy with regard to any matter that comes to the knowledge of the entity or person—
 - (i) in the course of performing a function under, or carrying into effect, any provision of this Ordinance; or
 - (ii) in the course of assisting another person to perform a function under, or carry into effect, any provision of this Ordinance;
 - (b) must not communicate a matter mentioned in paragraph (a) to any person other than the person to whom it relates; or
 - (c) must not suffer or permit any person to have access to any record or document that has come into the possession of the entity or person because of a circumstance mentioned in paragraph (a).
- (2) Subsection (1) applies to—
 - (a) an entity that is or has been a within scope financial institution;
 - (b) an entity that is or has been a group company of an entity mentioned in paragraph (a); or

- (c) a person who is or has been a member, officer, employee or agent of, or a consultant or advisor to, an entity mentioned in paragraph (a) or (b).
- (3) Subsection (1) does not prevent an entity or person to whom that subsection applies from disclosing a matter mentioned in that subsection—
 - (a) for a purpose permitted by section 173(3) in the case of that entity or person; or
 - (b) with the consent of the resolution authority of the entity if it is or has been a within scope financial institution or of the within scope financial institution of which the entity is or has been a group company, to a body corporate that is a member of the same group of companies as the entity.
- (4) If information is disclosed in reliance on subsection (3), the following persons must not disclose the information, or any part of it, to any other person except with the consent of the resolution authority—
 - (a) the person to whom the information is disclosed;
 - (b) any other person obtaining or receiving the information, whether directly or indirectly, from the person mentioned in paragraph (a).
- (5) A resolution authority, in granting any consent under subsection (3) or (4), may impose any condition that it considers appropriate.
- (6) A person who contravenes subsection (4) and at the time of disclosure knew or ought reasonably to have known that the information, or the part of it, was previously disclosed to the person in reliance on subsection (3) commits an offence unless the person proves that the person had reasonable grounds to believe that the disclosure by the person was—
 - (a) with the consent of the resolution authority;
 - (b) for seeking advice from, or the giving of advice by, counsel or a solicitor or other professional advisor acting or proposing to act in a professional capacity in connection with a matter arising under this Ordinance; or
 - (c) of information that was available to the public.
- (7) An entity or person that contravenes subsection (1) or fails to comply with a condition imposed under subsection (5) commits an offence.
- (8) An entity or person that commits an offence under subsection (6) or (7) is liable—
 - (a) on conviction on indictment to a fine of \$1,000,000 and to imprisonment for 2 years; or
 - (b) on summary conviction to a fine at level 6 and to imprisonment for 6 months.

COMMENTARY

Maintaining confidentiality

[174.001] Where section 173 above sets out secrecy requirements in respect of persons in connection with or receiving information from resolution authorities, this section sets out the requirement of confidentiality imposed on within scope financial institutions and connected entities. Its structure largely reflects section 173 above.

Information to be kept secret

[174.002] The requirement to maintain confidentiality applies to knowledge which arises out of the performance or assisting with the performance of functions under this Ordinance.

Persons under confidentiality requirement

[174.003] The requirement of secrecy is imposed upon all persons listed in subsection 174(2), which includes various entities and persons connected with a within scope financial institution.

Other persons under requirement

[174.004] The requirement of confidentiality is extended to persons receiving the information under subsection 174(3).

Disclosure gateways

[174.005] The exceptions to the requirement of confidentiality are set out under subsection 174(3), including the gateways for disclosure of confidential information in the circumstances or to the persons or institutions set out in subsection 173(3) above. The making of such disclosure may be subject to conditions set by the relevant resolution authority.

Criminal offences

[174.006] It is a criminal offence to breach the requirement of confidentiality under subsection 174(1) or to breach conditions imposed on disclosure under subsection 174(5).

[174.007] It is also a criminal offence to breach the extended requirement of secrecy under subsection 174(4), but a defence lies in subsection 174(6) for such persons where they had reasonable grounds to believe that the disclosure was made with the consent of the resolution authority, or for the purposes of seeking legal or professional advice, or if the information disclosed was available to the public.

175. Disclosure of information to authorities in other places

(1) A resolution authority may disclose information to a non-Hong Kong resolution authority if in the opinion of the resolution authority—

(a) the non-Hong Kong resolution authority is subject to adequate secrecy provisions in the non-Hong Kong jurisdiction; and

(b) either—

(i) it is desirable or expedient that information should be so disclosed in the interests of furthering the resolution objectives (in so far as Hong Kong is concerned); or

(ii) the disclosure will enable or assist the non-Hong Kong resolution authority to perform its functions and it is not contrary to the interests mentioned in subparagraph (i) that the information should be so disclosed.

(2) If information is disclosed under subsection (1), the following entities must not disclose the information, or any part of it, to any other person except with the consent of the resolution authority—

(a) the non-Hong Kong resolution authority to which the information is disclosed;

(b) any other person obtaining or receiving the information, whether directly or indirectly, from that non-Hong Kong resolution authority.

(3) A resolution authority, in disclosing any information under subsection (1), may impose any condition that it considers appropriate.

COMMENTARY

Disclosure to overseas authorities

Under the Key Attributes in respect of the “Legal framework conditions for cross-border cooperation”, KA 7.6 states “The resolution authority should have the capacity in law, subject to adequate confidentiality requirements and protections for sensitive data, to share information ... with relevant foreign authorities ...”. The complete copy of the Key Attributes as revised on 15 October 2014 is provided as part of our ProView e-Book exclusive content. [175.001]

Section 175 empowers resolution authorities to make disclosures of information to resolution authorities outside of Hong Kong. It may be compared with the power of disclosure and requirements under section 378(3) of the Securities and Futures Ordinance (Cap. 571) in respect of the Securities and Futures Commission, section 53B of the Insurance Companies Ordinance [175.002]

(Cap. 41) in respect of the Insurance Authority, and section 121 of the Banking Ordinance (Cap. 155) in respect of the Hong Kong Monetary Authority.

Conditions for disclosure

[175.003]

The conditions for disclosing information to non-Hong Kong resolution authorities are set out under subsection 175(1). Where those conditions are satisfied and information disclosed, it must not be further disclosed by recipients without the consent of the resolution authority. The disclosure to non-Hong Kong resolution authorities may be subject to any conditions the resolution authority considers appropriate.

Non-Hong Kong resolution actions

[175.004]

It should be noted that this power of disclosure may be exercised independently of the recognition of non-Hong Kong resolution actions under Part 13 below, and does not require any recognition instrument under that Part nor the notification of the taking of a non-Hong Kong resolution action before disclosure may be made.

Part 12

RESOLUTION FUNDING ARRANGEMENTS

Section 176	Interpretation
Section 177	Recovery of costs following application of stabilization option
Section 178	Payment from resolution funding account
Section 179	Repayment of resolution funds
Section 180	Resolution levy
Section 181	Regulations
Section 182	Rate of levy
Section 183	Recovery of levy
Section 184	Distribution of surplus
Section 185	Audit regulations

Background

The events of the Financial Crisis, in particular, the cost of the bailouts of investment and depository banks by governments, highlighted the risk of systemically important financial institutions to public monies.

The “Key Attributes of Effective Resolution Regimes for Financial Institutions” (KA) published by the Financial Stability Board (FSB) in 2011 deals with this issue under “Funding of firms in resolution”, the starting point of which is “Jurisdictions should have statutory or other policies in place so that authorities are not constrained to rely on public ownership or bail-out funds as a means of resolving firms” (KA 6.1). The complete copy of the Key Attributes as revised on 15 October 2014 is provided as part of our ProView e-Book exclusive content.

The Key Attributes suggest that where temporary public funding is required for resolution purposes, those funds should be recoverable from shareholders and creditors, subject to the principle of “no creditor worse off than in liquidation”, and the wider financial system (KA 6.2), through an *ex post* levy (KA 6.3). Such temporary public funding should be subject to strict conditions in order to minimize the risk of moral hazard, including whether or not such temporary funding is necessary for orderly resolution and private sources of funding cannot achieve the same, and the allocation of losses to

shareholders, creditors, and the wider financial system (KA 6.4). The FSB subsequently published further guidance under the "Guiding Principles on the Temporary Funding Needed to Support the Orderly Resolution of a Global Systemically Important Bank", which deal with the risk of banks lacking sufficient liquidity to maintain critical operations during resolution, and the availability of temporary funding without a public sector bailout.

This Part implements the Key Attributes in respect of resolution funding arrangements. It includes statutory provisions for the recovery of costs by a resolution authority or the Financial Secretary from a financial institution, the matters to be considered before resolution funding is provided, restricts the purposes for which resolution funding may be used, the repayment of such resolution funding, the imposition of resolution levies, and the auditing of accounts in relation to resolution funding.

176. Interpretation

In this Part—

proceeds of resolution (處置收益) means any money payable to the Government as a shareholder of an entity (including a bridge institution, asset management vehicle or TPO company) as a result of, or in connection with, the making of a Part 5 instrument;

public money (公帑) means money in an account that is—

- public moneys as defined by section 2 of the Public Finance Ordinance (Cap. 2); or
- any other money under the control of the Government or a public officer;

resolution funding account (處置資金帳戶) means the account into, and out of which, any of the following are paid—

- resolution funds;
- proceeds of resolution;
- costs recovered under section 177;
- any remuneration provided to a resolution authority under section 147(2);
- any interest or fees received in respect of the use of money standing to the credit of the resolution funding account for a purpose mentioned in section 178(4)(a) or (b);
- any other money received in respect of a use of money standing to the credit of the resolution funding account, including a repayment of money lent as mentioned in section 178(4)(b);

resolution funds (處置資金) means public money paid into the resolution funding account;

resolution levy (處置徵費) means a levy imposed under section 180; **surplus** (餘款), in relation to the resolution funding account, means any money standing to the credit of that account after all resolution funds have been repaid, and interest payable in respect of them has been paid, under section 179.

COMMENTARY

Definitions

This section sets out the definitions of phrases used in this Part, including monies derived from various provisions under this Ordinance. [176.001]

Public moneys

Public moneys are defined under section 2 of the Public Finance Ordinance (Cap. 2) as: [176.002]

- the general revenue;
- any moneys which are accounted for in the books or records of account of the Director of Accounting Services; and
- any other moneys which the Chief Executive may declare in writing to be public moneys for the purposes of this Ordinance"

177. Recovery of costs following application of stabilization option

(1) This section applies if conditions 1, 2 and 3 are met in the case of a within scope financial institution and, as a result, a stabilization option is applied to it or to a holding company or affiliated operational entity of it.

(2) The resolution authority that applied the stabilization option or the Financial Secretary may charge to the financial institution or, if a stabilization option has been applied to a holding company of the financial institution, to both the financial institution and the holding company, all reasonable costs properly incurred by the resolution authority or the Financial Secretary, as the case requires, in or in connection with a matter mentioned in section 178(1)(a) or (b).

(3) However, the resolution authority or the Financial Secretary must not charge costs under subsection (2) if, or to the extent that, the charging of the costs might, in the opinion of the resolution authority or the Financial Secretary (having consulted the resolution authority), undermine the meeting of the resolution objectives.

(4) Any costs charged to an entity under subsection (2) may be recovered from the entity as a civil debt due to the resolution authority

or the Government, as the case requires, in any court of competent jurisdiction.

(5) Any money received in respect of costs charged to an entity under subsection (2) (including under subsection (4)) must be paid into the resolution funding account.

COMMENTARY

Costs

[177.001] Where a stabilization option has been applied to a within scope financial institution or its holding company, this section empowers the Financial Secretary or the resolution authority to charge for the costs incurred in respect of the matters under section 178(1) below – preparation and making of a resolution instrument under Part 5 of this Ordinance or compensation and valuation under Part 6 of this Ordinance.

[177.002] Such costs, however, should not be charged if they undermine the meeting of the resolution objectives under section 8 of this Ordinance.

Civil debt

[177.003] Costs under this section may be recovered as a civil debt, due to the Government of the Hong Kong SAR, in a competent civil court.

178. Payment from resolution funding account

(1) Subject to subsection (6), money standing to the credit of the resolution funding account may only be used by—

- (a) a resolution authority in, or in connection with—
 - (i) preparing for the making of a Part 5 instrument in respect of an entity that, in the opinion of the resolution authority, is likely to be an entity in resolution;
 - (ii) the making of a Part 5 instrument in respect of an entity; or
 - (iii) the resolution of an entity, including payment of any compensation due under Part 6 and any associated costs; or
- (b) the Financial Secretary in, or in connection with, the appointment of an independent valuer to perform functions under Part 6.

(2) Money standing to the credit of the resolution funding account may not be used to meet—

- (a) expenses incurred by a resolution authority in performing functions under, or otherwise carrying out, Division 1 of Part 3 or Part 10; or
- (b) general operational expenses incurred by a resolution authority unrelated to a matter mentioned in subsection (1) (a).

(3) Before a resolution authority may use money standing to the credit of the resolution funding account in applying a stabilization option to an entity, it must have regard to the extent to which the entity's own resources can be utilized, including the extent to which—

- (a) liabilities of the entity can be written off or converted to enable it to absorb losses and re-establish its capital position;
- (b) assets of the entity can be sold; or
- (c) private sector funding can be obtained by the entity.

(4) Without limiting subsection (1)(a), the purposes for which money standing to the credit of the resolution funding account may be used by the resolution authority include—

- (a) providing a guarantee or indemnity in respect of the assets or liabilities of an entity in resolution, a group company of an entity in resolution, a bridge institution, an asset management vehicle or a TPO company;
- (b) lending money to an entity in resolution, a group company of an entity in resolution, a bridge institution, an asset management vehicle or a TPO company; and
- (c) if necessary, providing, or underwriting the provision of, capital to an entity in resolution, a group company of an entity in resolution, a bridge institution, an asset management vehicle or a TPO company.

(5) Without limiting subsection (1)(b), the purposes for which money standing to the credit of the resolution funding account may be used by the Financial Secretary include—

- (a) the payment of professional fees and expenses in connection with the appointment of an independent valuer to perform functions under Part 6; and
- (b) the payment of any fees or other costs properly incurred by the independent valuer in connection with performing those functions.

(6) Any money standing to the credit of the resolution funding account that neither the resolution authority nor the Financial Secretary intends to use for a purpose mentioned in subsection (1) must be used to repay resolution funds and, to that end, must be paid—

- (iv) all clients of participants mentioned in subparagraph (i), (ii) or (iii) or a class of such clients;
- (d) if the entity in resolution is a recognized exchange company—
 - (i) all participants of the recognized exchange company or a class of such participants;
 - (ii) all participants of other recognized exchange companies designated under section 6(1)(b) as within scope financial institutions or a class of such participants;
 - (iii) all participants of financial market infrastructure that are within scope financial institutions or a class of such participants; or
 - (iv) all clients of participants mentioned in subparagraph (i), (ii) or (iii) or a class of such clients.

(4) Any payment of resolution levy received by the Government (including under section 183) must be paid into the account out of which the unrepaid resolution funds, or the unrepaid resolution funds to which the interest relates, were paid into the resolution funding account and if unrepaid resolution funds were paid into the resolution funding account out of more than one account, in proportion to the amounts paid out of those accounts.

COMMENTARY

Scope of levies

[180.001] KA 6.3 states that: “Jurisdictions should have in place privately-financed deposit insurance or resolution funds, or a funding mechanism with ex post recovery from the industry of the costs of providing temporary financing to facilitate the resolution of the firm”. The complete copy of the Key Attributes as revised on 15 October 2014 is provided as part of our ProView e-Book exclusive content.

[180.002] This section sets out the entities on whom a resolution levy may be imposed, and the extent of such a levy – the extent of public money not being fully recovered on completion of the resolution, and the interest under previous section 178(8) repayable under section 179 above.

Civil debt

[180.003] The resolution levy under this section may be recovered as a civil debt, due to the Government of the Hong Kong SAR, in a competent civil court under section 183 below.

181. Regulations

(1) The Financial Secretary may make regulations for or with respect to the imposition of a levy in connection with the resolution of a particular entity.

(2) Without limiting subsection (1), regulations made under that subsection may—

- (a) specify the entities or classes of entities by which the levy is payable;
 - (b) make different provision for different classes of entities, or for different entities within a class of entity;
 - (c) set out the methodology for the assessment of the amount of levy payable by a particular entity or class of entity including the factors on which the methodology relies such as—
 - (i) the size or quantum of the activities of the entity, or of any group company of the entity, measured on the basis of on and off balance sheet assets and liabilities, transaction volumes or other values;
 - (ii) the risks posed by the non-viability of the entity, or of any group company of the entity, to the stability and effective working of the financial system of Hong Kong, based on any factors that the Financial Secretary considers relevant which may include—
 - (A) financial condition;
 - (B) market share;
 - (C) substitutability;
 - (D) stability and variety of sources of funding;
 - (E) structural complexity and resolvability; and
 - (F) interconnectedness within the sector or across sectors; or
 - (iii) the extent to which the entity, or any group company of the entity, has benefitted, or would likely benefit, from the orderly resolution of the entity to which a stabilization option has been applied;
 - (d) prescribe the manner and timing of payment in respect of the levy;
 - (e) prescribe the circumstances in which, and the period for which, payment of the levy may be deferred; or
 - (f) prescribe any other matter relating to the levy or the obligations of entities, or classes of entities, liable to pay it.
- (3) Regulations made under this section may make different provision according to when a financial institution by which a levy is payable became, or ceased to be, a within scope financial institution.

- (4) Before making regulations under subsection (1), the Financial Secretary must consult—
- each sector likely to be affected by the levy;
 - each resolution authority; and
 - the general public.
- (5) Regulations made under subsection (1) may not come into operation earlier than one month after the day on which they are published in the Gazette.

COMMENTARY

Regulations in respect of levy

[181.001] This section empowers the Financial Secretary to make regulations in respect of imposing resolution levies, including the entities covered by such levies, the methodology for assessing the levies payable by entities or classes of entity. Before the Financial Secretary makes such regulations, each sector and resolution authority affected and the general public must be consulted.

182. Rate of levy

(1) The Legislative Council may, on the recommendation of the Financial Secretary, by resolution prescribe the rate of a resolution levy in accordance with the regulations made by the Financial Secretary under section 181.

(2) A resolution made under subsection (1) may not come into operation earlier than one month after the day on which it is published in the Gazette.

COMMENTARY

Prescription by LegCo

[182.001] This section empowers the Legislative Council to prescribe a rate of the resolution levy imposed under previous section 180, pursuant to the regulations made by the Financial Secretary under section 181 above, which shall be published in the Government Gazette.

183. Recovery of levy

Any amount of levy that is due and payable by an entity mentioned in section 180(3) may be recovered from the entity as a civil debt due to the Government in any court of competent jurisdiction.

COMMENTARY

Civil debt

This section provides that a resolution levy may be recovered as a civil debt, due to the Government of the Hong Kong SAR, in a competent civil court. [183.001]

184. Distribution of surplus

(1) The Financial Secretary may make regulations with respect to how any surplus is to be distributed.

(2) Without limiting subsection (1), regulations made under that subsection may—

- specify who is entitled to any share of the surplus;
- specify how the share of any person is to be calculated; or
- provide for any dispute relating to the distribution of the surplus to be determined by the Resolution Compensation Tribunal.

COMMENTARY

Regulations in respect of surplus

This section empowers the Financial Secretary to make regulations in respect of the distribution of surplus remaining in a resolution fund account upon the completion of the resolution of a within-scope financial institution. [184.001]

185. Audit regulations

(1) The Financial Secretary may make regulations—

- for or with respect to providing for the auditing of the accounting records and financial statements of any entity in so far as those records or statements relate to payments into or out of the resolution funding account; or
- for connected purposes.

(2) Regulations made under this section may—

- apply generally or be limited in their application by reference to specified exceptions or factors; or
- apply differently according to different factors of a specified kind.

(3) Regulations made under this section may prescribe offences in respect of contraventions of the regulations, and may provide for the