

REMUNERATION OF PROVISIONAL LIQUIDATORS & LIQUIDATORS UNDER THE OFFICIAL RECEIVER'S CONTRACTING-OUT SCHEMES

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The author would like to dedicate this article to the late Professor Philip St. John Smart, in acknowledgement of his role in leading her to insolvency law research and inspiring her with his wealth of knowledge. At the request of the HKU Law Faculty, Professor Smart applied for and helped secure the funding to create the author's position as a Research Assistant Professor in Insolvency Law. This article constitutes the first part of a joint research project provisionally entitled "A Comparative Study of the Remunerations of Liquidators in Hong Kong and Bankruptcy Administrators in Taiwan", which was planned originally to be engaged and co-authored by Professor Smart and the author.

The Official Receiver of Hong Kong operates two schemes known commonly as the Panel A and Panel T Schemes for the purposes of contracting-out its workload. There was a Panel B Scheme but it has now ceased to operate. It is expected, as a result of the economic impact of the current global financial crisis, that the number of court winding-up cases will continue to rise, and therefore it is imperative to streamline the practices of private-sector provisional liquidators and liquidators and the payment schemes under which they are paid. This article first identifies the different circumstances that call for the appointment of private insolvency practitioners to act as liquidators under the Panel A Scheme, and as provisional liquidators and / or liquidators under the Panel T Scheme. Then, this article will examine whether the percentage basis or the time-cost basis shall be used as the default to determine their fees and remuneration. Finally, the shortfall met out by the government subsidy is available currently for the Panel T Scheme only, not the Panel A Scheme. Whether such subsidy should be removed by cross-subsidising Panel A and Panel T Scheme cases or whether a "cab rank" system should be introduced will also be examined.

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Introduction

In Hong Kong, the Official Receiver (“OR”) has traditionally been responsible for administering and scrutinising court-ordered compulsory winding-up of insolvent companies. But since 1996, the OR has been contracting-out this work to the private sector. Initially this practice was limited to non-summary cases, but later extended to summary cases as well. According to the statistics provided by the OR, the numbers of compulsory winding-up by court order in Hong Kong in the years of 1996–2008 were as follows: 557 (1996), 503 (1997), 723 (1998), 795 (1999), 910 (2000), 1066 (2001), 1292 (2002), 1248 (2003), 1147 (2004), 849 (2005), 552 (2006), 455 (2007), 468 (2008).¹ The number for next year is expected to grow larger than recent years as Hong Kong is affected by the economic impact of the global financial crisis.

During the Asian financial crisis of 1997–1998, when the OR’s workload increased dramatically and Hong Kong experienced a drastic upsurge of winding-up orders for insolvent companies, the OR was forced to contract-out more insolvency cases to the private sector. The global financial crisis and its economic impact are indisputably creating opportunities for the OR to contract-out his duties and responsibilities to private sector insolvency practitioners (“PIPs”) again. Statistics provided by the OR suggested the number of compulsory winding-up orders made and the number of petitions petitioned to the OR in September 2008 had increased by more than 20% when compared to the same one-month period in 2007.²

As the current global financial crisis and its economic impact deepens further, it is imperative to streamline the duties and responsibilities of the PIPs, namely the provisional liquidators and liquidators in Hong Kong, who are the OR’s appointment takers. With appointment comes remuneration. Hence, the fees and remuneration of the liquidators under the Panel A Scheme — and, likewise, the fees and remuneration of the provisional liquidators and liquidators under the Panel T Scheme — will be examined in Part III in order to determine on what basis (the percentage basis or time-cost basis) the payment shall be made. In light of this, the 2006 landmark case *Re Goldlory Restaurant Ltd & Others*³ is important as it not only summarised the matter but also instigated many

¹ The Government of the Hong Kong Special Administrative Region of the People’s Republic of China: The Official Receiver’s Office. Available at http://www.oro.gov.hk/cgi-bin/oro/stat.cgi?stat_type=W&start_year=1996&end_year=2008&end_month=12&Search=Search (visited 31 Jan 2009).

² The Official Receiver’s Office, available at www.oro.gov.hk/cgi-bin/oro/stat.cgi (visited 2 Jan 2009).

³ *Re Goldlory Restaurant Ltd & Others* [2006] 3 HKLRD 331, 2006 WL 1589877 (CFI), [2006] HKEC 1247.

inspirational debates on the liquidation fees for winding-up of small companies. Although the winding-up of insolvent companies by way of summary procedure by the court⁴ often realises insufficient assets to pay the liquidators' fees, the significance of the *Goldlory* case should not be understated, for its decision gives the courts unfettered discretion to determine the appropriate basis of liquidator's remuneration in Panel T Scheme summary cases.

In Hong Kong, the Companies Ordinance (Cap 32) ("CO") prescribes that the OR becomes the provisional liquidator to administer an insolvent company's winding-up, until a liquidator is appointed by the court.⁵ Practically speaking, "the Official Receiver is, in effect, acting as an interim liquidator — between the time the winding-up order is made and the time a liquidator is appointed by the court".⁶

"However, the substantial increase of the caseload led the Official Receiver's Office in consultation with the Hong Kong Society of Accountants ('HKSA') (later renamed as the Hong Kong Institute of Certified Public Accountants ('HKICPA')) in 1996 to establish the Administrative Panel of Insolvency Practitioners for Court Winding-up to outsource some court-ordered compulsory insolvency case management with estimated realization assets of more than HK\$200,000 (known as 'non-summary case')."⁷

In addition to the Panel A Scheme, the OR's contracting-out schemes also include the Panel B and Panel T Schemes, which deal with summary cases. It should be noted that the Panel B Scheme has now ceased to operate.

Circumstances that require the appointment of qualified PIPs to act as liquidators under the Panel A Scheme, and provisional liquidators and liquidators under the Panel T Scheme, are different. The flow chart in Part II illustrates the distinction of both schemes. Through a roster system, liquidators under the Panel A Scheme are appointed when the creditors of an insolvent company which has received a winding-up order cannot find or fail to agree upon a liquidator. On the other hand, provisional liquidators under the Panel T Scheme are appointed by tender. Based on

⁴ See para [227F.02] of *Hong Kong Company Law Handbook: Companies Ordinance (Cap 32)* (Hong Kong: Lexis-Nexis, 9th edn, 2007), p 951.

⁵ Section 194 of the Companies Ordinance (Cap 32) of the Laws of Hong Kong.

⁶ Philip Smart, Charles Booth & Stephen Briscoe, *Hong Kong Corporate Insolvency Manual*, (Hong Kong: The Hong Kong Society of Accountants, 2002), p 60.

⁷ Xianchu Zhang, "Developing a Regulatory Framework for Outsourcing of Insolvency Work in Hong Kong, China", OECD Report. [The original note suggests that this document reproduces a report by the author written after the Fifth Forum for Asian Insolvency Reform (FAIR) which was held on 27–28 Apr 2006 in Beijing, China. It will form part of the forthcoming publication "Legal & Institutional Reforms of Asian Insolvency Systems."]

previous tender exercises (during 2003–2008), it is observed that there would normally be 10 firms to take up the OR's appointments in each of the financial years. The appointee firms will administer qualified cases⁸ on a rotational basis.

The Panel A Scheme is operated in relation to non-summary cases, as opposed to the Panel T Scheme for summary cases. To determine whether a case is summary or non-summary, the threshold is set at whether an insolvent company's assets are worth less or more than HK\$200,000. For insolvent companies which are to be wound-up and have assets estimated at more than HK\$200,000, they are categorised as non-summary cases; conversely, "where the court is satisfied that the assets of the company are not likely to exceed HK\$200,000 — as is the case in the majority of liquidations in Hong Kong — the court may order that the company is to be wound up in a summary manner".⁹ In non-summary cases, members of the Panel A Scheme may be selected to act as liquidators; in summary cases, the OR may appoint members of the Panel T Scheme as provisional liquidators (and thereafter as liquidators) in its place. Nominations of PIPs to act as liquidators under the Panel A Scheme for non-summary cases are subject to the court's approval; in contrast, appointments of provisional liquidators under the Panel T Scheme do not require court approval, as the OR will appoint the PIPs under the Panel T Scheme where the insolvent company's assets are less than HK\$200,000. It should be noted, as well, that appointment of liquidators under the Panel T Scheme will be made by the court as part of the summary procedure order.

In historical context, the OR's establishment of various contracting-out schemes (Panel A, Panel B and Panel T) originated due to the OR facing staff constraint difficulties. The OR is said to be greatly concerned that if the remuneration of liquidators in summary cases is not set to a time-cost basis, it might not be commercially viable for the private sector to take up appointments in summary cases.¹⁰ That concern is because if the remuneration of liquidators were to be made on a percentage basis of the realisations of the insolvent company's assets, summary cases would yield minimal returns. This situation would act as a disincentive for PIPs to take up appointments under s 194(1A) of the CO, and the burden of administering these cases would fall

⁸ "Qualified Case" means the liquidation of a company under compulsory winding-up order by the court and where s 194(1A) of the Companies Ordinance applies. See Part III of the Official Receiver's tender document (used for 8 Jan 2008 tender).

⁹ Smart *et al* (see n 6 above), p 63.

¹⁰ "Summary cases" are prescribed in s 227 of the Companies Ordinance. I will expound upon it further below in Part I, with regards to the Panel T Scheme.

back on the OR, thereby placing great strain on the limited resources of his department.¹¹

As the Panel T Scheme is designed to serve summary cases, in reference to insolvent companies with minimal or negligible assets, in order to encourage PIPs to seek appointment, a government subsidy is available, provided that a summary procedure order has been made in advance. It should be noted that a government subsidy applies only to the Panel T Scheme, not the Panel A Scheme. In Part IV, the interaction between the government subsidy and the “shortfall” from the provisional liquidator’s or liquidator’s fees will be discussed. Some remaining questions and concerns regarding the schemes and the liquidation regime in Hong Kong in general will be addressed in Part V, followed with a conclusion.

I. *Official Receiver’s Contracting-out Schemes*

1. The Panel A Scheme

In 1996, the Administrative Panel of Insolvency Practitioners for Court Winding-up was a scheme (“Panel A Scheme”) first set up by the OR, in conjunction with the then HKSA (later known as the HKICPA) for the purpose of enabling the OR to contract-out “non-summary court winding-up cases to accounting firms with sufficient number of qualified appointment takers, insolvency practitioners and professional accountants”.¹² The Panel A Scheme is operated in relation to non-summary cases, in reference to those insolvent companies with assets estimated to exceed HK\$200,000. According to the OR, “currently there are over 10 Panel A firms on the Panel A list and the number of non-summary court winding-up cases with appointments from the Panel A roster for the past several years is as follows: 6 (2002–2003), 6 (2003–2004), 7 (2004–2005), 6 (2005–2006), 11 (2006–2007), 7 (2007–2008)”.¹³

The Panel A Scheme is administered jointly by the OR and the HKICPA. The Panel A Scheme has worked on a roster system. In a situation where it appears that the insolvent company’s assets are in excess of HK\$200,000, the OR, as provisional liquidator, is required by statute to convene a meeting of creditors; however,

¹¹ *Re Goldlory Restaurant Ltd & Others* (n 3 above).

¹² The reply made by the Official Receiver’s Office to the Registrar of Hong Kong Institute of Certified Public Accountants, dated 8 Nov 2007. Available at http://www.hkicpa.org.hk/professionaltechnical/insolvency/ORO_letter.pdf (visited 5 Jan 2009).

¹³ *Ibid.* According to the Official Receiver’s original note, the number ‘7’ in the financial year 2007–2008 covers only the six-month period from 1 Apr 2007 to 30 Sep 2007.

“if prior to the meeting of creditors, no nomination has been received by the Official Receiver for the appointment of a liquidator, the name of the next person on the roster will be put to creditors at the meeting and, if approved, that person’s nomination will be put to the court for approval.”¹⁴

Participation in the Panel A Scheme is by firm and in order to join the panel, applicant firms must fulfil certain criteria, including having at least two “insolvency practitioners” working in the firm. To qualify for acceptance as a PIP, the basic requirements are as follows: (1) the individual must be qualified as a member of the HKICPA; (2) the individual must have performed in Hong Kong a minimum of 600 chargeable hours of relevant insolvency work (excluding members’ voluntary liquidations) in the last three years or 750 chargeable hours in the last five years, with a minimum of 100 chargeable hours in any one year; or (3) the individual must have had appointments in 10 unconnected insolvency cases (excluding members’ voluntary liquidations) in the last five years.¹⁵ That is, the appointee firms must demonstrate they have sufficient experience of dealing with insolvency cases and must show they have the resources to fulfil the duties required of them as a court-appointed liquidator.

The OR has made available a set of application forms and background material relating to the Panel A Scheme, available at the HKICPA’s office. However, as the OR is reviewing the Panel A Scheme guidelines now that the scheme has been operating for over 10 years, the OR has indicated that during the review, it will not accept or process any new applications, except for replacements of existing appointment takers and PIPs.¹⁶

Participating firms for the Panel A Scheme are all accounting firms. By the same token, PIPs participating in the Panel A Scheme are restricted to accountants only, due to the OR’s agreement with the then HKSA. Although the appointment takers and PIPs registered under the Panel A Scheme may identify themselves as such in their daily business, nevertheless, according to the OR,

“all the appointment takers and insolvency practitioners registered under the Panel A Scheme are incidental to registration of the Panel A firms under which they are employed. That is to say, if the persons are no longer employed by their Panel A firms or if their employing firms are no longer Panel A firms, they

¹⁴ Smart *et al* (see n 6 above), p 61.

¹⁵ See information provided by the Hong Kong Institute of Certified Public Accounts, available at <http://www.hkicpa.org.hk/index.php> (visited 31 Jan 2009).

¹⁶ *Ibid.*

should not identify themselves as the appointment takers and insolvency practitioners of Panel A Scheme any more.”¹⁷

Under the Panel A Scheme, the selected firms can work as liquidators only, not as provisional liquidators. That restriction is because the OR would act as the provisional liquidator. Consequently, the OR is required to convene the first meeting of creditors to appoint a liquidator.

2. The Panel B Scheme

In 1998, the OR set up a pilot scheme, known as the Panel B Scheme, for purposes of contracting-out summary cases to PIPs. By then, there already existed the Panel A Scheme for contracting-out non-summary cases to the private sector. Under the Panel B Scheme, the PIP would act as the agent for the OR on a roster basis.¹⁸ Compared with the Panel A Scheme, lower qualification requirements were set to allow PIPs to deal with summary cases (which is no longer called the Panel B Scheme). Instead of 600 hours of insolvency experience (as required under the Panel A Scheme), it required at least one person of partner level, or partner-equivalent, to have at least 300 hours of insolvency experience in unconnected insolvent liquidations during the previous three years. Like Panel A Scheme firms, there was also a requirement for Panel B Scheme firms to show that they have the resources to undertake these assignments.¹⁹

According to Philip Smart *et al*, after the Panel B Scheme was set up in 1998, “[a] further pilot scheme was run during 1999 which proved to be successful. But shortly afterwards, the court expressed concern about the wholesale contracting out by the Official Receiver of his duties and responsibilities as provisional liquidator...”²⁰ The court’s concern is a mirror to the scheme of the CO that “the liquidator remains generally responsible to the court and to the creditors and contributories of the company for the conduct of the liquidation”.²¹ The wholesale contracting-out was problematic (hence the Panel B Scheme was problematic) as this scheme was operated by the OR pursuant to a purported exercise of his power under s 199(2)(g) of the CO to appoint a third party as agent to do any business which the liquidator (the OR) is unable to do himself.

“[O]n 17 November 1999, Rogers JA, as he then was, wrote to the Official Receiver expressing concern about this practice, since it involved the use of section

¹⁷ The reply made by the Official Receiver’s Office to the Registrar of Hong Kong Institute of Certified Public Accountants (n 12 above).

¹⁸ Smart *et al* (see n 6 above), p 61.

¹⁹ *Ibid*, p 62.

²⁰ *Ibid*.

²¹ *Re Bondfield International Ltd & Another* [2005] HKEC 1706, [2005] WL 1997676 (CFI), para 11.

199(2)(g) [of the Companies Ordinance] to appoint third parties to act, in effect, as liquidators in substitution for the Official Receiver. Rogers JA pointed out that under section 199(2)(g), the agency was intended to be ‘an agency for a specific purpose’ and that it ‘could not involve the handing over of responsibility for acting as a provisional liquidator [or liquidator] to a third party’.²²

Meanwhile, the Standing Committee on Company Law Reform also found the Panel B Scheme to be problematic. That problem was because, under the legislative provisions at the time, the OR was necessarily the provisional liquidator in every case. Hence, a PIP could only act as the OR’s agent. Based on the “Principal-Agent Doctrine”, although the OR (the principal) had authorised the PIP (the agent) to carry out various aspects of the winding-up, the ultimate responsibility still rested with the OR. That fact makes the OR liable vicariously for the acts of his agents, the PIPs. The committee then proposed an amendment to s 194 of the CO to give the OR authority to “appoint directly a suitable person to act as the provisional liquidator on the making of a winding-up order and thereafter the liquidator. This was the background to the enactment of s 194(1A) [of CO] and other consequential provisions in Ordinance No 46 of 2000”.²³ Afterwards, the CO was amended with effect from 1 July 2000 by the introduction of s 194(1A) to the CO, now prescribed as follows:

“Where the Official Receiver—

- (a) is the provisional liquidator of the company by virtue of [s 194](1)(a); and
- (b) is of the opinion that the property of the company is not likely to exceed in value \$200,000 he may, at any time, appoint 1 or more persons as provisional liquidators in his place.”²⁴

According to Philip Smart *et al*, the purpose of this amendment to the CO was to enable the OR to continue with the contracting-out of summary cases. Nonetheless, instead of appointing the PIP as the OR’s agent, they were otherwise appointed as the provisional liquidators, in place of the OR. If, after the provisional liquidator’s assessment, the insolvent company has no assets or its assets are less than HK\$200,000, the same PIP, who has acted first as the provisional liquidator, will become automatically a liquidator for the insolvent company’s winding-up, once a summary order has been made by the court.²⁵

²² *Ibid*, para 10.

²³ *Re Goldlory Restaurant Ltd & Others* (n 3 above).

²⁴ Section 194(1A) of the Companies Ordinance.

²⁵ Smart *et al* (*see* n 6 above), p 62.

It was said that “[s]hortly after receiving Rogers JA’s letter, the Official Receiver discontinued the Panel B scheme”.²⁶ Suffice it to say, since s 194(1A) of the CO came into effect on 1 July 2000, the Panel B Scheme has now ceased to operate.

3. The Panel T Scheme

In 2000, the OR set up the Panel T Scheme to replace the controversial Panel B Scheme. The Panel T Scheme denotes a contracting-out scheme that is based on tender; hence the initial “T.” Under the terms of the OR’s tender, the firms who put in the lowest bids will be successful in netting the qualified cases allocated by the OR. The Panel T Scheme is operated in relation to summary cases.

The statutory definition for “summary cases” is prescribed in s 227F of the CO, which states:

“227F. Application of Ordinance to small winding-up

- (1) Where after the presentation of a winding-up petition -
- (a) the court is satisfied; or
 - (b) the Official Receiver or the provisional receiver reports to the court, that the property of the company is not likely to exceed in value \$200,000, the court may make an order that the company be wound up in a summary manner, and thereupon the provisions of this Ordinance shall apply subject to the following modifications -
 - (i) the Official Receiver or the provisional liquidator, as the case may be, shall be the liquidator but there shall be no meetings of creditors and contributors under section 194 or 206;
 - (ii) there shall be no committee of inspection, and the liquidator may do all things which may be done by a liquidator with the sanction of a committee of inspection;
 - (iii) such other modifications as may be prescribed with a view to saving expense and simplifying procedure.”

Where the insolvent company’s assets are not likely to exceed the HK\$200,000 threshold, the court may make a summary procedure order pursuant to s 227F of the CO to wind-up the company. Practically speaking, once a summary procedure order is made, “no meetings of creditors and contributories will be held and the provisional liquidator shall be the liquidator; also there shall be no committee of inspection”.²⁷ In light of this, the legislative purpose underlying s 227F of the CO is to expedite

²⁶ *Re Bondfield International Ltd & Another* (n 21 above), para 12.

²⁷ Alan C W Tang, *Insolvency in China and Hong Kong—A Practitioner’s Perspective* (Hong Kong, Singapore, Malaysia: Thomson Sweet & Maxwell Asia, 2005), p 439.

and simplify the procedure applicable to the compulsory winding-up of insolvent companies with assets less than HK\$200,000. The threshold was changed in 1985 to its present level of HK\$200,000, from its original of HK\$10,000.²⁸ To that end, the Panel T Scheme was designed for those companies with negligible assets to go cost-effectively into liquidation.

Alan Tang suggested that:

“following the introduction of the Panel T Scheme in 2000, there have been differences in views between creditors, insolvency practitioners and the Official Receiver’s Office as to who ‘determines’ whether the estimated value of assets in a liquidation is likely to exceed HK\$200,000, what ‘evidence’ there should be to support that ‘determination’ and whose ‘onus’ it is to provide any such ‘evidence’.”²⁹

These are of course very legitimate questions. Interestingly enough, Alan Tang concluded by saying that “although there have been many cases in which these differences were raised and even debated, none has become a formal dispute that has required the court to address this issue”.³⁰

It cannot go without notice that “[d]uring the first year when the Panel T Scheme came into effect, there were 280 cases contracted out”,³¹ and the number has grown exponentially. Consequently, the Panel T Scheme is becoming quite significant, through which the majority of the small windings-up in Hong Kong have been resolved. A court decision handed down in July 2006 referred to the statistical data (see below) provided by the OR wherein a summary procedure order under s 227f(1) of the CO was made and the Panel T Scheme was invoked.

“In 2000, the number of winding-up orders made was almost double the number in 1995. In that year there were 910 winding-up orders, and 809 summary procedure orders. The number of insolvency cases continued to rise in the following years. In 2001, there were 1,066 winding-up orders and 1,005 summary procedure orders. In 2002, the numbers were 1,292 winding-up orders and 1,167 summary procedure orders. In 2003, 1,248 winding-up orders and 999 summary procedure orders were made. In 2004, there were 1,147 winding-up orders and 761 summary procedure orders. Out of the 1,147 liquidations in 2004, 1,095 cases were handled by external liquidators under the Panel T Scheme, and 756 of them have summary procedure orders made, the status of the rest is

²⁸ *Re Goldlory Restaurant Ltd & Others* (n 3 above).

²⁹ Tang (see n 27 above), p 439.

³⁰ *Ibid.*

³¹ *Ibid.*, p 436.

not yet known. In 2005, there were 849 winding-up orders and 274 summary procedure orders. Out of the 849 liquidations, 800 are Panel T cases and 274 of them have summary procedure orders made...”³²

One can observe that, according to the latest statistics available, the number of cases being resolved through the Panel T Scheme accounted for about 94% (ie 800 out of 849 cases) of all liquidations in 2005. This high ratio has been kept roughly the same since 2004, at 95% (ie 1095 out of 1147 cases).

In 2001, the tender system (“Panel T Scheme”) was a shift from the original roster system of the Panel A Scheme.³³ The tender process under the newer scheme can be found in paragraph 15 of *Re Bondfield International Ltd*,³⁴ where Barma J explained that:

“Following the introduction of section 194(1A), the Official Receiver introduced a tender process by which it was open to all firms of accountants, solicitors or company secretaries with relevant insolvency expertise to tender for appointments under that section. Tenders were in respect of one year periods, and tenderers could tender for appointment to a pre-set maximum number of cases in that period, either 90 cases (Group A) or 20 cases (Group B). According to the Official Receiver (and I accept this), one objective of this system was to permit both larger and smaller firms to tender for work under the scheme, and to prevent the larger firms from monopolising the work available...”

It should be noted that the tender periods were extended from the original one year to two years in 2004.

Setting out the working terms and conditions in its tender offer, the OR invites the private sector to take up appointments under the Panel T Scheme as provisional liquidators. To construct a fair and easy tender process, the OR makes available a set of application forms and background materials on its website³⁵ or in its office and further sets the deadline.³⁶

Technically, according to HKICPA, to qualify for appointments under the Panel T Scheme, a firm must *inter alia* have at least two “Recognized Professionals”, one of whom must be: (1) a member of the HKICPA, the Law Society of Hong Kong or the Hong Kong Institute of Companies Secretaries; (2) have at least three years of post-qualification experience; and (3) have a minimum of 300 “Qualifying Chargeable Hours” over the past

³² *Re Goldlory Restaurant Ltd & Others* (n 3 above).

³³ Zhang, “Developing a Regulatory Framework” (n 7 above), p 2.

³⁴ *Re Bondfield International Ltd & Another* (n 21 above).

³⁵ <http://www.oro.gov.hk> (visited 16 Feb 2009).

³⁶ Zhang “Developing a Regulatory Framework” (n 7 above), p 2.

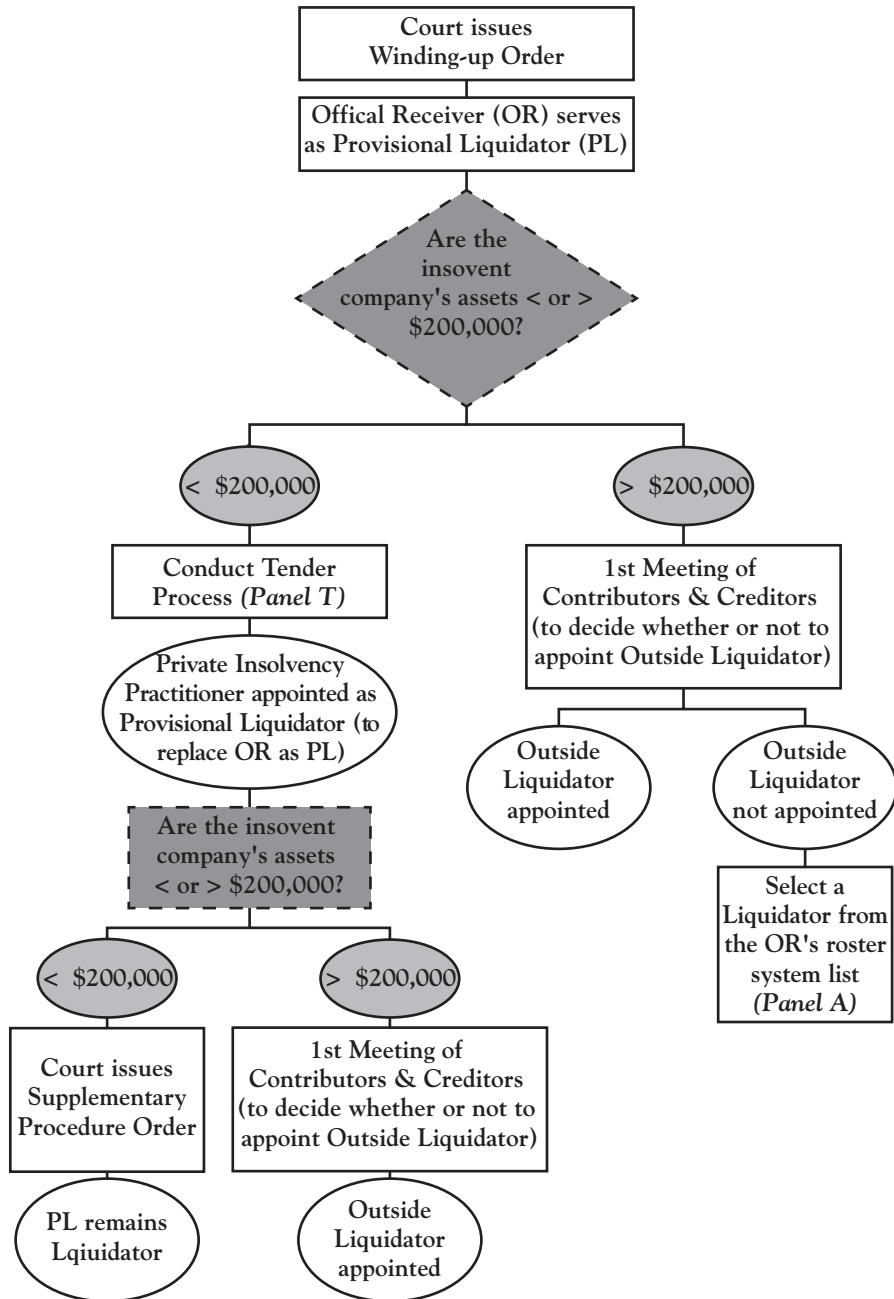
three years. This translates into at least 150 hours of work must be related to insolvency or receiverships. While the remainder may consist of solvent liquidations, time spent on solvent liquidations is discounted by 50%. Furthermore, the qualifying hours must be performed on a minimum of four separate winding-up cases involving unconnected companies.³⁷

The rest of this article will focus only on the Panel A and Panel T Schemes, as the Panel B Scheme no longer operates.

³⁷ Information provided by the Hong Kong Institute of Certified Public Accounts, (n 15 above).

II. Flow Chart — Official Receiver's Selection Process Under the Panel A and Panel T Schemes

The flow chart below illustrates the processes by which the OR selects and delegates to PIPs under the schemes.



With reference to the flow chart above, where an insolvent company has received a court winding-up order but no liquidator has been appointed yet, s 194(1)(a) of the CO prescribes that the OR shall by virtue of his office, become automatically the provisional liquidator for the company (and shall continue to act as such until he or another person becomes the liquidator). There are two situations which may arise from here:

1. **The Company Has Assets Estimated At Over HK\$200,000**
In accordance with s 194(1)(a) of the CO, upon a court's winding-up order, the OR shall, by virtue of his office, become the provisional liquidator. Section 194(1)(b) of the CO further indicates that the foremost task of the OR, acting as the provisional liquidator, is to first hold the statutory "Meeting of Contributors and Creditors", for the purpose of determining whether or not an application is to be made to the court for appointing an outside liquidator. If no outside liquidator is to be appointed, the OR will recommend a liquidator from the OR's roster system list. This will be a Panel A Scheme case and the liquidator will be paid according to the Panel A Scheme rate. That rate is the same for any appointed liquidator and is based on the HKICPA's standard rate.³⁸
2. **The Company Has Assets Estimated At Less Than HK\$200,000**
As mentioned earlier, upon a court's winding-up order, the OR shall by virtue of his office become the provisional liquidator. If, based on the OR's initial assessment, the insolvent company has assets estimated at less than HK\$200,000, there will be a tender.

Following the tender, another provisional liquidator from the private sector will be appointed in place of the OR. The provisional liquidator's main task is to evaluate the insolvent company's assets. It should be noted that even if the OR's initial assessment indicates the company's assets to be worth less than HK\$200,000 it is likely that the company may in fact possess assets worth far more than HK\$200,000 after being evaluated by the provisional liquidator. In the latter circumstance, the provisional liquidator will have to first hold the statutory "Meeting of Contributors and Creditors"; subsequently, a liquidator will be appointed to wind-up the company. Alternatively, in the former circumstance, after the provisional liquidator assesses and confirms the OR's initial assessment that the company has only assets

³⁸ For details about the HKICPA's standard rate, please refer to Section III of this article where it provides, "The current Standard Scale of Fees approved by the OR in consultation with HKICPA". Such scale of fees provides basis for the calculation of PIPs' remuneration in the Panel A Scheme.

worth less than HK\$200,000, then s 227F of the CO shall apply whereby the court will issue a supplementary procedure order to effect the company's winding-up in a summary manner; subsequently, the PIP who had been appointed and acted as the provisional liquidator (under the Panel T Scheme) may continue to work as the liquidator. The liquidator will be paid based on the Panel T Scheme rate and each appointee firm will be paid differently, at different rates that are applicable to different grades of staff engaged.

III. Remuneration

With respect to liquidators' remuneration, they are either fixed on a percentage basis or a time-cost basis. The former refers to the liquidator's remuneration being paid out of the insolvent company's assets, at a percentage payable on realisations and distributions as stipulated in the Companies (Winding-up) Rules (Sub Leg H, Cap 32). The latter denotes that the liquidator's remuneration being paid at the scale of standard hourly fees of the scheme as agreed between the OR and the HKICPA (for Panel A Scheme cases), or on terms as agreed between the OR and PIPs (for Panel T Scheme cases). Often referred to as appointee firms in the Panel T Scheme, these PIPs are appointed in place of the OR; whether they should be remunerated on a percentage basis or a time-cost basis was not short of debate. The 2006 landmark case, *Re Goldlory Restaurant Ltd & Others*,³⁹ brought before the court in a taxation hearing by the OR and the private sector, grappled with this uncertainty. At issue was the basis of remuneration of liquidators appointed under the summary procedure provisions of s 227F of the CO pursuant to s 196(2) of the CO and r 146(2) of the Companies (Winding-up) Rules. The counsels suggested that there was no uniform practice in Hong Kong and the OR submitted that time-cost basis for liquidators' remuneration in summary cases should therefore be adopted. The court held that, as a matter of construction of s 196(2) of the CO and r 146(2) of the Companies (Winding-up) Rules, the courts had an unfettered discretion to determine the appropriate basis of remuneration of a liquidator in summary cases (Panel T Scheme cases). Also held by the court, the percentage basis applicable to the OR as liquidator would not be applied as the "default" basis of remuneration, on the reasoning that, unlike the English position, there was no requirement to show special circumstances in a summary case to adopt the time-cost basis.

One thing is certain in Hong Kong now — the time-cost basis is adopted as the basis of remuneration in Panel T Scheme summary cases.⁴⁰ Precedents of such, according to the court in *Re Goldlory Restaurant Ltd & Others*, can be

³⁹ *Re Goldlory Restaurant Ltd & Others* (n 3 above).

⁴⁰ *Ibid.*

seen in some enlightening cases such as *Re Carton Ltd* (1923),⁴¹ *Re Exchange Securities & Commodities Ltd & Others* (1986),⁴² and *Re Bondfield International Ltd & Another* (2005).⁴³ At the time of writing in January 2009, the latest available Panel T Scheme tender document (issued by the OR for 8 January 2008 tender) also indicates the same. In Part III, paragraph 6, it provides for the OR's right to scrutinise bills and to require court taxation if necessary, and that when the PIP is acting as provisional liquidator in a summary winding-up, their fees and remuneration shall be assessed on a time-cost basis. Beyond this contractual term that renders the OR the "right" to scrutinise the bill, the OR is actually under statutory duty (pursuant to ss 196(1A), 196(2A) and 204 of the CO) to review and scrutinise the remuneration of any provisional liquidators and liquidators. The provisional liquidator under s 194(1A) of the CO shall be entitled to charge their fees and remuneration on a time-cost basis for the work they have performed. In such circumstance where charges are sought to be covered on a time-cost basis, the provisional liquidator must explain exactly what they did and why they did it and for that they must keep proper records.

What remains uncertain is the basis of remuneration for Panel A Scheme non-summary cases. In other words, whether the Panel A Scheme liquidator's fees should be assessed (and paid) on a percentage basis or time-cost basis is still without uniform agreement among interested parties such as the OR, the HKICPA and PIPs. Section 196(2) of the CO provides essentially the percentage basis for fees and remuneration for an appointed liquidator (other than the OR) unless otherwise determined by the court. It is therefore suggested that the Panel A Scheme liquidator's fees are assessed on a percentage basis. Moreover, s 196(2) of the CO appears to suggest that percentage basis is the norm and other methods of assessment (including the time-cost basis) are exceptions. In practice, however, only the OR (when acting as the liquidator) charges on a percentage basis while PIPs (including Panel A Scheme liquidators) charge on a time-cost basis.⁴⁴

Section 196(2) of the CO, wherein the percentage basis is prescribed, applies to both Panel A and Panel T Schemes appointments made by the OR (for PIPs acting as liquidators and / or provisional liquidators).⁴⁵ As the

⁴¹ *Re Carton Ltd* (1923) 39 TLR 194.

⁴² *Re Exchange Securities & Commodities Ltd & Others* (No 2) (1986) 2 BCC 98, 932.

⁴³ *Re Bondfield International Ltd & Another* (No 1) unrep., HCCW Nos 99 and 711 of 2002, [2005] HKEC 1706.

⁴⁴ The author would like to acknowledge and thank Mr Mat Ng (a private insolvency practitioner in Hong Kong) for contributing to this particular aspect of discussion.

⁴⁵ According to Mr Mat Ng, the practice of using the time-cost basis in considering the Panel T Scheme liquidator's fees, was questioned by a High Court Taxing Master (Master Kwang). The court selected 21 test cases to invite comments from the OR and the HKICPA (as well as the Law Society), and they all favoured the time-cost basis.

time-cost basis is accepted for Panel T Scheme summary cases, there seems no likely reason why the court would depart from such practice in Panel A Scheme non-summary cases.

In *Re Goldlory Restaurant Ltd & Others*,⁴⁶ Kwan J sought the assistance of, *inter alia*, the OR on this very issue. The OR assisted the court by expressing its preference for a uniform practice, favouring specifically the adoption of the time-cost basis for liquidators' remuneration in Panel T Scheme summary cases, rather than being left with an uncertain situation to be resolved on an ad hoc application to the court by the liquidator concerned. Kwan J noted the OR's comment and ultimately determined that, as a matter of practice, the time-cost basis should be adopted as the basis of remuneration in summary cases (Panel T Scheme cases):

"There are good practical reasons in support of the Official Receiver's stance that the discretion of the court should be exercised in favour of the time cost basis for the remuneration of liquidators in summary cases and that there should be a practice of providing for this basis of remuneration when a summary procedure order is made to avoid the need for a subsequent ad hoc application. This is consistent with the spirit of section 227F in minimising costs and simplifying procedure in summary cases. I would determine the Issue in this manner..."

The time-cost basis approach is appropriate, otherwise a liquidator's remuneration under the percentage basis approach would be far too great, since the assets involved in Panel A Scheme non-summary cases are worth typically a lot more than those in Panel T Scheme summary cases. In practice, one can recall hardly any Panel A Scheme non-summary cases which were charged on a percentage basis.⁴⁷

In spite of s 196(2) of the CO applying to both Panel A and Panel T Scheme appointments, it should be noted that if a Committee of Inspection ("COI") is appointed, the COI will determine the liquidation fee instead, and thereby render s 196(2) of the CO to be non-applicable in those cases.

As far as the liquidation fee is concerned, it covers both liquidation fees under the Panel A and Panel T Schemes. The liquidation fee will be determined either by court taxation or COI approval. Alternatively, such fees and remuneration may also be determined by agreement between the liquidator and the COI (where there is a COI) or by the court (where there is no COI or the liquidator and the COI fail to agree). In the situation whereby two or more persons are appointed liquidators, their remuneration

⁴⁶ *Re Goldlory Restaurant Ltd & Others* (n 3 above), paras 37 and 38.

⁴⁷ This aspect of discussion was also contributed by Mr Mat Ng.

shall be distributed among them in such proportions as may be determined by the COI.

Unlike in creditors' voluntary liquidation, the remuneration of a liquidator is determined by the COI, or if there is no such COI, the creditors. In compulsory liquidation, upon which this article focuses, the remuneration of a liquidator is subject to the court taxation system, unless the liquidator has obtained a resolution passed by the COI relating to approval of his remuneration. In other words, where there is no COI or the COI disallows part or all of the remuneration of a liquidator in a compulsory winding-up, the remuneration of the liquidator will be subject to court taxation. For that purpose, the liquidators are required to submit to the court details of items disallowed by the COI and the reasons given, if any.⁴⁸

Once we accept that it is possible for liquidators under the Panel A Scheme and provisional liquidators under the Panel T Scheme (who may become subsequently the liquidator for small windings-up liquidation of the same company) to be remunerated on the time-cost basis, then we consider the hourly rates to apply. It is important to note that the rates under the Panel A and Panel T Schemes are distinctive. A brief summary is provided in the following section.

1. The Panel A Scheme

The Panel A Scheme rate is applicable only when the OR itself acts as the provisional liquidator for non-summary cases and, during its time in that role, it receives no nominations from the "Meeting of Contributors & Creditors" for a PIP to act as a (private) liquidator. In such circumstance, the OR will nominate a PIP from the list of the Panel A Scheme, and apply the standard Panel A Scheme rate.

Liquidators under the Panel A Scheme will be paid through the realisation of the insolvent company's assets, and their fees will be assessed based on the Panel A Scheme rate. Those rates are the same for any appointed liquidator, based on the HKICPA's standard rate. In an effort to control costs, the OR has approved a standard hourly rate in consultation with the HKICPA for PIPs appointed by the OR. Although the Panel A Scheme rates were agreed upon by the OR and the HKICPA, the court nonetheless has an unfettered discretion to determine the appropriate basis of remuneration; hence the court can apply any rate that it deems appropriate depending on the circumstances of the case.

⁴⁸ The INSOL (International Association of Restructuring, Insolvency and Bankruptcy Professionals) Report, available at: http://209.85.175.132/search?q=cache:sFhEGcGPbEUI:www.insol.org/pdf/directory_pdf/hongkong.pdf+%22Panel+T+Scheme%22&hl=en&ct=clnk&cd=1&gl=hk (visited 20 Feb 2009).

As recent as 26 February 2009, the OR, responding to the author's enquiry,⁴⁹ confirmed the following standard hourly rates as "the current Standard Scale of Fees approved by the OR in consultation with HKICPA":

Staff Grade	Hourly Rate
Partner / Principal	HK\$4,480
Senior Manager 3	\$3,390
Manager 2	\$2,740
Manager 1	\$2,130
Senior Staff 2	\$1,490
Senior Staff 1	\$1,090
Trainee 2	\$840
Trainee 1	\$590
Clerical	\$370

The OR stated that the above rates "apply (only) to the Panel A Scheme" and "under certain circumstances, appointment takers may apply to the COI or to the court to be remunerated at a different rate from the standard scale of fees". The above rates have been in effect since 1 July 1998 and the OR noted that "the Panel A Scheme is currently under review" and "the results of (the) review are expected to be available by end of 2009".⁵⁰

It is important to note that under the Panel A Scheme, no government subsidy is available and therefore the Panel A Scheme liquidators will not be paid if their fees exceeds the insolvent company's assets.

It should be noted that the above-mentioned standard Panel A Scheme rates are not always adopted by the liquidators, indicating flexibility is desirable. For example, if a PIP is nominated by the insolvent company's creditors and appointed by the court as liquidator, then he may use any rate he wishes, subject to taxation. By the same token, some Panel A Scheme firms may have a standard firm rate that is higher than the Panel A Scheme rate. Conversely, firms may use a lower rate than the Panel A Scheme rate, in particular when they need to compete against each other for the appointment and to win votes (for its appointment) from the creditors.⁵¹ To that end, the court has an unfettered discretion to determine the appropriate basis of fees and remuneration so that it can use any rate that it deems appropriate, depending on the circumstances of the situation.

⁴⁹ Email dated 26 Feb 2009 from Mr William Wong of the Official Receiver's Office.

⁵⁰ *Ibid.*

⁵¹ The author would like to acknowledge and thank Mr Mat Ng for bringing this issue to the author's attention.

2. The Panel B Scheme

The PIP, acting as the OR's agent, would receive a "maximum settlement fee of HK\$60,000 (when the OR first started contracting-out summary cases in 1998, but the fee was reduced to HK\$40,000 in 1999), or his time-costs, whichever was the lower, in the event that he was unable to realise any assets".⁵² It should be noted again that the Panel B Scheme has ceased to operate.

3. The Panel T Scheme

As mentioned above, if the initial assessment of the insolvent company's assets is less than HK\$200,000 there will be a tender for appointment as the provisional liquidator. The remuneration of the provisional liquidator would be subject to the OR's approval, and this was still the case until a few months ago.

The OR's approval of the provisional liquidator's remuneration was considered by Barma J in *Re Bondfield International Ltd*,⁵³ in which the court held that the OR did not have the legal authority to determine such fees and that according to the CO, the remuneration is to be determined by the ordinance or ordered by the court. For this very reason, the OR's authority to approve remuneration of the provisional liquidator is now being withheld, until the court gives clarification on whether the OR has the actual legal authority to do so. A change is to be made presumably soon, following the judgement of a so-called "test case"⁵⁴ concerning whether the OR has the authority to approve the remuneration of the provisional liquidator. A decision, if any, has not been made available to the public yet.

According to Barma J in *Re Bondfield International Ltd*,⁵⁵ the provisional liquidators (and the liquidators thereafter) under the Panel T Scheme can essentially be remunerated from the realisation of the insolvent company's assets and where their assets fall short, by government subsidy, subject to the OR's administration and court taxation.

"As appointments would be made in relation to cases in which there were not expected to be substantial assets, successful appointees' remuneration would be paid out of the assets of the company in liquidation where possible, but to the extent that such assets were insufficient, would be met out of a subsidy to be provided by the Hong Kong Government, which was to be administered by the Official Receiver's Office. Firms tendering for appointment were required to indi-

⁵² Smart *et al* (see n 6 above), p 61.

⁵³ *Re Bondfield International Ltd & Another* (n 21 above).

⁵⁴ The author would like to acknowledge and thank Mr Mat Ng for bringing this issue to the author's attention. According to Mr Mat Ng, the test case was heard on 25 Feb 2009 but a decision by the court, if any, has not yet been made available to the public.

⁵⁵ *Re Bondfield International Ltd & Another* (n 21 above).

cate, among other things, the charging rates (in respect of the different grades⁵⁶ of staff to be used by the tenderer) which would be applied on a time-cost basis for work done on each liquidation, the amount of the required subsidy (which would form the limit of the payment to be made by the Government where the assets of the company concerned were insufficient to meet the fees of the provisional liquidator or liquidator), and the number and grades of staff available to carry out work if the tender was successful.”

It is likely that the provisional liquidator (“Appointee Firms”) under the Panel T Scheme will eventually receive less remuneration than what it expected when it bid for the role.

For illumination purposes, taking the OR’s latest available tender,⁵⁷ for example, there were 11 firms who were successful bidders in netting the Qualified Cases through the OR’s tender. They are: (1) Baker Tilly Hong Kong Business Recovery Limited; (2) Sammy Lau CPA Limited; (3) Wealth Funding Services Limited; (4) Neil Collins Corporate Advisory Services Limited; (5) Kennic L. H. Lui & Co.; (6) John Lees & Associates Limited; (7) Victor Chiu Tsang Partners; (8) Tso & Associates, Solicitors; (9) T. K. Choi and Company; (10) Maninvest Asia Limited; and (11) Eric Ng C.P.A. Limited. Of these 11 appointee firms, each firm will take up 93 cases (estimated). With the relatively large number of cases undertaken and the enormity of work, each appointee firm is likely to engage more than one qualified staff (who may not be from the same grade) to deal with the estimated 93 cases. When executing the bill, the actual hourly rate per grade of staff shall be listed and incorporated into a single bill.

As one can expect reasonably, there are a few reasons that will contribute to reduction of the bill. First, the bill presented by the Appointee Firm is subject to court taxation. Second, the OR in its tender document reserves the right to scrutinise the bill and adjust accordingly the fees and remuneration. Third, the Panel T Scheme Appointee Firm’s “appointment takers”, when acting as joint and several provisional liquidators in a Qualified Case, are entitled to charge their fees and remuneration⁵⁸ for

⁵⁶ The Official Receiver’s tender would normally specify a range of grades of staff said to be available, ranging from Partner / Director down to Office Clerk, and provide that the successful tenderer keep under its employment sufficient staff resources to ensure that all cases allocated to it are handled in a professional and expeditious manner.

⁵⁷ See Notice of Award of Contract (Tender Reference OR / T / 2008). It was published for general information by the Official Receiver’s Office for contracts awarded during the month of Mar 2008.

⁵⁸ On the other hand, the Appointee Firm’s appointment undertaker, when acting as “liquidators” under s 227F of the Companies Ordinance following from their appointment as joint and several provisional liquidators in a Qualified Case shall be entitled to charge such fees and remuneration in accordance with the provisions of the Companies Ordinance or as may be approved by the court, out of the assets of the wound-up company. See Part III, para 6(b) of the Official Receiver’s tender document (used for 8 Jan 2008 tender).

the work they performed on a time-cost basis. However, the actual hourly rate per grade of staff shall in no circumstance be in excess of the rates set out by the Appointee Firm in the Quotation Sheet.⁵⁹ Furthermore, where government subsidy is available, the subsidy and required subsidy are to be calculated and payable strictly on a case-by-case basis. Under no circumstances will such subsidy or required subsidy or any balance thereof be transferred between cases. It is fair to say that the deduction (caused by the court's taxation or the OR's exercise of scrutiny) is a 'real cut' from the Appointee Firm's bill.

IV. *Shortfall (in the Panel T Scheme) and Government Subsidy*

1. Shortfall Can Be Met By The Government Subsidy

Unlike the Panel A Scheme, where the liquidators receive no government subsidy, the provisional liquidators and liquidators in the Panel T Scheme can be subsidised by government funds up to the limits submitted in their tender. The payment of government subsidy will be provided where the insolvent company's assets are insufficient to meet the fees of the provisional liquidator or liquidator ("shortfall"). The shortfall will be met from the government subsidy but only to the extent of a required subsidy having been agreed prior to the tender stage; and only at or below the time-cost rates agreed prior to the tender stage. For instance, in the OR's latest available tender offer, it states if the insolvent company's assets are insufficient to meet the Appointee Firm's appointment takers' fees and remuneration as joint and several provisional liquidators or liquidators, the shortfall will be met by the government subsidy but "only to the extent of the Required Subsidy and only at or below the hourly rates set out by the Firm in the Quotation Sheet",⁶⁰ which is normally annexed to the tender.

It is important to note that first, the government subsidy will be made available only on a case-by-case basis; no carry-over is allowed. Second, the government subsidy is payable only where a summary procedure order under s 227F of the CO has been made; otherwise the fees and remuneration will be paid out of the insolvent company's assets in accordance with the CO. Most important, if the liquidators failed to apply for summary procedure order, they will not be paid by government subsidy at all. Paragraphs 6(d) and (e) of the OR's tender document prescribes that:

"(d) The Subsidy and the Required Subsidy shall be calculated and payable

⁵⁹ *Ibid*, Part III, para 6(a) of the Official Receiver's tender document.

⁶⁰ *Ibid*, Part III, para 6(c) of the Official Receiver's tender document.

strictly on a case by case basis. Under no circumstances will such Subsidy or Required Subsidy or any balance thereof be transferred between cases.”⁶¹

“(e) No subsidy will be payable in respect of any Qualified Case allocated to the Firm unless a summary procedure order under Section 227F of the Companies Ordinance is made in respect of the Qualified Case. The Firm’s Appointment Takers’ fees and remuneration as joint and several provisional liquidators or liquidators in a case where no summary procedure order is made under Section 227F shall be paid out of the assets of the company in accordance with the provisions of the Companies Ordinance.”⁶²

When will the government subsidy be payable?

“In practice, where the subsidy is payable, 60% is paid when the summary procedure order is made and the balance of 40% when a release of the liquidator is obtained. Also, in practice, the subsidy payment is made only after the Official Receiver has scrutinized the bill of the practitioner in accordance with the court’s taxation guidelines for provisional liquidators or, after taxation of the bill of the liquidator by the court.”⁶³

The Registrar of the High Court of Hong Kong, in April 2004, provided the “Procedural Guide for Taxation / Determination of Bills of Provisional Liquidators or Liquidators by Masters (for liquidators’ bills)”.⁶⁴ This guide applies to the taxation / determination of the remuneration of the provisional liquidators or liquidators. According to Part I – Introduction, this guide “is expected to be followed by all Provisional Liquidators or Liquidators. In cases of non-compliance, the Court may issue appropriate directions to the person lodging the bill requiring him to remedy the default before proceeding with the taxation / determination”.⁶⁵ It is important to note that unless the court otherwise directs, this Guide does not apply to summary liquidation cases under s 227F of the CO.⁶⁶

⁶¹ *Ibid*, Part III, para 6(d) of the Official Receiver’s tender document.

⁶² *Ibid*, Part III, para 6(e) of the Official Receiver’s tender document.

⁶³ *Re Goldlory Restaurant Ltd & Others* (n 3 above).

⁶⁴ Tang (see n 27 above), Appendix 18, pp 927–931.

⁶⁵ *Ibid*, p 927.

⁶⁶ *Ibid*.

2. The Interaction Between Provisional Liquidator Fee, Liquidator Fee, Shortfall and Government Subsidy

For demonstration purposes, the interaction between the provisional liquidator's fee, liquidator's fee, shortfall and government subsidy, can be understood by reference to using the example below:

Suppose:

- (1) Provisional Liquidator's fee = a,
- (2) Liquidator's fee = b,
- (3) Company's assets = c

The problem of shortfall comes into place where $[c - (a+b)] < 0$. In other words, if an insolvent company's total assets (c) are less than the total aggregated amount of the provisional liquidator's fee (a) and the liquidator's fee (b), then there is a shortfall.

The shortfall can be offset by the government subsidy. But, there is a catch. That is because the estimates under the Panel T Scheme account only for the maximum amount payable to the liquidator (or its appointee firm). In actual fact, the estimated number is still yet to be divided by the total number of cases undertaken by the liquidator, and no carry-over is allowed. Assuming that an appointee firm is awarded HK\$280,000 for 100 cases that have been netted from a successful tender; on average, any given case in this pool will be paid off at HK\$2,800 per case, but this is only an estimate. Let us further assume that, in the first case, if the liquidator's fee is determined by the court at only HK\$1,000, then the remainder of the estimated fee (HK\$1,800) must be written off. No carry-over is allowed, meaning the balance of HK\$1,800 cannot be applied against any of the other 99 cases that are also undertaken by the same liquidator.

Ironically, although the OR's present system has the benefit of government subsidy, the government subsidy usually falls far short in paying for the liquidator's performance of its statutory duty.

"[E]ven in summary cases, the liquidators must undertake a minimum level of work which would give rise to no or negligible realisations. Examples of such work ... include complying with the statutory obligations of a liquidator, liaising with directors, investigation work, work relating to assets, and work relating to creditors. Work undertaken in these respects is not materially different as that undertaken in a non-summary case."⁶⁷

⁶⁷ *Re Goldlory Restaurant Ltd & Others* (n 3 above).

The ramifications of such shortfall (which may not be sufficiently ameliorated by government subsidy) reflect the mixed feelings of the liquidator in taking up summary cases. How much work would the liquidator be willing to engage in maintaining commercial viability? It is a commercial decision. It might be in the liquidator's best interest to do more; for example, discovering and realising more company assets so as to increase the liquidator's chance of getting a satisfactory reward. Or, the liquidator may just as well settle for not getting paid at all. The reason is because when an insolvent company's assets are insufficient to pay for both the provisional liquidator's fee and the liquidator's fee, the provisional liquidator's fee will be paid off first through the company's assets, and the remainder will be used to pay the liquidator's fee. Therefore, if there is nothing left from the company's assets after having paid the provisional liquidator, the liquidator may not even get paid.

V. *Questions and Concerns*

1. *Is the Government Subsidy Unfair?*

The current system remunerates on different bases the liquidator under the Panel A Scheme and the provisional liquidator under the Panel T Scheme (who may become subsequently the liquidator for small windings-up liquidation of the same company). As regards the government subsidy, it is made available only for PIPs in the Panel T Scheme but not for liquidators selected from the Panel A Scheme. This difference may be thought of as unfair, given that the Panel A Scheme liquidators will not be paid if their fees exceed the insolvent company's assets.

It is normally thought that, in considering what necessitates government subsidy in the first place, it is not so much an issue of fairness or equality between the payment in Panel A and Panel T Schemes cases than the fact that there are normally sufficient assets to pay the liquidator in Panel A Scheme non-summary cases but insufficient assets in Panel T Scheme summary cases. But what are abnormal situations? What is the recourse for liquidators under the Panel A Scheme, who are not provided with government subsidy, when there are insufficient assets to pay their fees and remuneration?

Therefore, it has been suggested that, for PIPs to be willing to participate in liquidations of Panel T Scheme summary cases in the absence of government subsidy, there would need to be a reasonable mix of Panel A Scheme non-summary work and Panel T Scheme summary

work available.⁶⁸ However, in Hong Kong, “over 80% of compulsory liquidations...are summary cases, and the majority of those have less than HK\$50,000 in assets”.⁶⁹ One main reason for the preference of government subsidy is because the cost of running an insolvency practice is high and PIPs need to ensure that there are sufficient financial incentives for them to participate in the schemes.

Is it necessary to make changes to the current system by doing away with the government subsidy? In an attempt to resolve this situation, the OR’s 2002 Consultation Paper⁷⁰ suggested the introduction of a “cab rank” system. This will be explored in the next section.

2. Would a “Cab Rank” System be Better?

The “cab rank” system, also known as the “cab rank” rule, would first require PIPs to indicate to the OR or the court their willingness to act as liquidators; then, when the OR or court allocates a case to them, they are obligated to act as the liquidators. They are not permitted to decline accepting the case on the basis that there are no or minimal insolvent company’s assets. Moreover, they are required to act in the absence of government subsidy. Under the “cab rank” system, the PIPs perform the role of “liquidator of last resort” in contrast to the current system where the OR, a government body, in Hong Kong fulfils that role. The “cab rank” system is a proposal that is suggested and born out of the belief of access to unbiased professional advice from liquidation experts and a right to such expert representation.

Under the “cab rank” system, the OR’s function would change, from its current mandate of executing casework to regulating and / or overseeing the liquidation process. In other words, under this system, the OR would transfer its current duties to PIPs.

However, for PIPs to be interested in such system, there would need to be a reasonable mix of Panel A Scheme non-summary work and Panel T Scheme summary work available, as noted previously, so the PIPs are motivated financially to participate in the system.

The system was considered so Panel A Scheme non-summary cases may cross-subsidise the administration of Panel T Scheme summary cases, and remove the need for government subsidy. As the system was not adopted, government subsidy remains available only for PIPs in the Panel T Scheme submarket and there is little or no indication of disadvantaging liquidators

⁶⁸ The Financial Services Bureau of the Official Receiver’s Office, “Review of the Role of the Official Receiver’s Office”, Consultation Paper (hereinafter “the OR’s 2002 Consultation Paper”), p 13. Available at <http://www.info.gov.hk/archive/consult/2002/oro-e.pdf> (visited 24 Feb 2009).

⁶⁹ *Ibid*, p 14.

⁷⁰ *Ibid*, pp 11, 13–15, 32, 43, 46.

selected from the Panel A Scheme. Statistically speaking, “large liquidations in which assets and fees available materially exceed the HK\$200,000 threshold are not common. The vast majority of corporate insolvencies in Hong Kong are of companies with less than HK\$50,000 in assets”.⁷¹ On the other hand, in reality, it is very rare to come across Panel A Scheme cases that exceed the HK\$200,000 threshold by only small margins. Insolvent companies that become the subject of Panel A cases are more willing to hire highly-qualified and experienced PIPs in order to protect its interests; meanwhile, they have minimal problem meeting the costs for the liquidators’ administration by realising its assets.

3. Who Should be the Liquidator of Last Resort?

The OR, a government body, is the “liquidator of last resort” in Hong Kong. In the United States, United Kingdom and Australia, the role of “liquidator of last resort” is carried out by PIPs on the court roll. The role performed by Hong Kong’s OR, compared to those in the benchmark jurisdictions of the United Kingdom, United States and Australia, necessitates the OR being charged with the basic level of insolvency service.

Given that the private sector would not normally provide a service where the costs of its administration may not be met by insolvent companies with insufficient assets or no assets at all (summary cases), the Panel T Scheme is operated as a “last resort service”.⁷² This practice was established based on the recognition of the importance of an orderly resolution of all insolvencies and the guarantee of a basic level of insolvency service in every case, regardless of assets coverage.⁷³ Indeed, most insolvency practices of jurisdictions of developed countries arrange for an insolvency practitioner of last resort, whose provision of service can be viewed as a delegation of the OR’s mandate. Referring to the OR’s 2002 Consultation Paper, “without such a service, Hong Kong’s practice would be significantly out of line with comparable jurisdictions, and the credibility of its insolvency and credit system would suffer accordingly”.⁷⁴

VI. Conclusion

In Hong Kong, there is no regulated insolvency profession. Nor does Hong Kong have a well developed statutory framework in relation to the proper approach to be taken to the approval of fees and remuneration for both

⁷¹ *Ibid.*

⁷² *Ibid.*, pp 5–6.

⁷³ *Ibid.*, p 5.

⁷⁴ *Ibid.*

the provisional liquidators and liquidators.⁷⁵ Also, Hong Kong does not yet have a corporate insolvency law; statutory provisions relating to corporate insolvency are embedded in the CO and its subsidiary legislation⁷⁶ such as the Companies (Winding-up) Rules. The former sets out different circumstances that call for different appointments (provisional liquidators or liquidators). The latter refers to procedural rules for an insolvent company's winding-up. The flow chart in Part II illustrates the procedures applicable to the OR and his contracting-out schemes, commonly known as the Panel A Scheme and the Panel T Scheme. It further indicates the bases for the liquidator's fee under the Panel A Scheme and for the provisional liquidator's (and liquidator's) fee under the Panel T Scheme.

For liquidators under the Panel T and / or Panel T Scheme(s), whether they shall be paid on a fixed percentage or time-cost basis was not without questions. The landmark case *Re Goldlory Restaurant Ltd & Others*⁷⁷ made it clear that the time-cost basis will be adopted for "the so-called winding-up by the court by way of summary procedures or small windings-up",⁷⁸ that is, the Panel T Scheme cases. On the other hand, s 196(2) of the CO provides essentially the percentage basis for fees and remuneration for an appointed liquidator (other than the OR). Accordingly, some observers view that the Panel A Scheme liquidator's fees should be assessed on a percentage basis; others disagree, saying the time-cost basis prevails in practice. In any case, providing that the time-cost basis applies to both Panel A and the Panel T Schemes, the Panel A and Panel T Schemes rates are distinctive.

It should be noted that liquidators under the Panel A Scheme may not receive government subsidy, unlike provisional liquidators and liquidators under the Panel T Scheme. The provisional liquidator fees and liquidator fees for summary cases are likely to be in a shortfall if the insolvent company's assets are insufficient to cover their fees. This would act as a disincentive for PIPs to take up appointments under the Panel T Scheme. In order to ensure a reasonable return that permits PIPs to take up the work as

⁷⁵ Mark R Hyde, "Remuneration of Insolvency Officeholders and Their Legal Advisers in Hong Kong—The Peregrine Experience", a conference paper published by the Inter-Pacific Bar Association (Vancouver Conference 2000, Apr 28 to May 2, 2000).

⁷⁶ The Companies Ordinance's subsidiary legislations are the Companies (Winding-up) Rules; the Companies (Fees and Percentages) Order; and the Companies (Reports on Conduct of Directors) Proceedings Rules. Also, as provided in the Companies Ordinance, certain provisions in the Bankruptcy Ordinance (Cap 6) and its subsidiary legislation, namely the Meeting of Creditors Rules and the Proof of Debts Rules, are applicable in the liquidation of insolvent companies. Other legislations relevant to the Companies Ordinance include the Employment Ordinance (Cap 57) and the Limitation Ordinance (Cap 347). Tang (see n 27 above), p 436.

⁷⁷ *Re Goldlory Restaurant Ltd & Others* (n 3 above).

⁷⁸ Paragraph [227E.02] of *Hong Kong Company Law Handbook: Companies Ordinance (Cap 32)* (n 4 above).

economically viable, the OR's present system has the benefit of government subsidy, on the condition that the liquidator had applied for a summary procedure order under s 227F of the CO. Nevertheless, government subsidy is usually far short for paying the liquidator's statutory duty; the ramification of such is that the liquidator would usually make a commercial decision towards his rewards.

The flow chart provided in Part II above suggests at the outset, the OR shall decide whether a given case falls into the Panel A Scheme or the Panel T Scheme, once a winding-up order is received. The OR, who acts as the provisional liquidator by virtue of his office, must, according to his initial assessment determine whether it is a summary case or non-summary case. Summary cases account for the vast majority of court winding-up cases in Hong Kong. In the OR's 2002 Consultation Paper,⁷⁹ it was suggested that about 80% of compulsory liquidations in Hong Kong are summary cases. However, a staggering figure of 95% was estimated according to the OR's latest available statistics. In light of this, the Panel T Scheme is becoming quite significant for its scope of application. As the OR continues to delegate his workload to the private sector, the landmark case *Re Goldlory Restaurant Ltd & Others* is a step in the right direction, at least politically, for providing enough incentives for PIPs to participate in small windings-up under the Panel T Scheme.

Over the years, the Panel A and Panel T Schemes have proved to be well-established and accepted by creditors, PIPs and the public.⁸⁰ One main reason for the parties' favourable views toward the schemes is its cost effectiveness; according to the OR's 2002 Consultation Paper, "outsourcing is not a cost saving device in itself, although it can be argued that it is a more flexible and ultimately less expensive option than expanding the [OR's] in-house resources to deal with the case volume".⁸¹ This is a key advantage of the schemes. Moreover, with the contracting-out of its workload, the OR can focus on regulating the insolvency system and monitoring PIPs. However, in Hong Kong, there is not much literature devoted to the remuneration of insolvency services. Unlike in the UK, "the scale of PIPs' fees is an issue that has attracted considerable public attention in recent years ... where

⁷⁹ See n 68 above, p 14. "Unlike both Australia and the US, Hong Kong has not historically had a significant volume of large cases under other forms of insolvency proceeding, such as administration or receivership that require and reward the skills and experience of highly qualified PIPs [i.e. Private Insolvency Practitioners]. Moreover, large liquidations in which assets and fees available materially exceed the HK\$200,000 threshold are not common. Over 80% of compulsory liquidations in Hong Kong are summary cases, and the majority of those have less than HK\$50,000 in assets...".

⁸⁰ *Ibid*, p 11.

⁸¹ *Ibid*, p 10.

a series of high profile incidents resulted in a working party being led by Mr. Justice Ferris into insolvency practitioner remuneration ...⁸² As the court can tax the bill submitted by PIPs, and the OR further reserves the right to scrutinise the bill and adjust accordingly the fees and remuneration, it is debatable to what extent the OR enjoys such responsibility and authority. This question is open-ended and interesting given that the court is looking for additional support in its role of final arbiter of fees⁸³ and that regulating and supervising PIPs should be a wider mandate for the OR in its role and function. It should be noted, however, that the OR is in charge only of the compulsory winding-up process; hence its right and authority to scrutinise PIPs' bills, adjust PIPs' fees and remuneration, and monitor PIPs' practices are restricted to those which are of the PIPs participating in the OR's contracting-out schemes. Even narrower in scope, the OR's focus is only on the remuneration of liquidators (including provisional liquidators) in compulsory liquidations alone, compared to the wider scope of PIP's remuneration in general that the working group of Ferris J was assessing in the United Kingdom. In Hong Kong, a test case concerning whether the OR has the authority to approve the remuneration of the provisional liquidator generated, and continues to generate, a lot of attention by PIPs and the public alike. At the time of printing, a decision, if any, has not been made available to the public.

⁸² *Ibid*, p 28.

⁸³ *Ibid*.