

**38. Priority of debts**

(1) In the distribution of the property of a bankrupt there shall be paid in priority to all other debts—

(a) *(Repealed 47 of 1984 s. 5)*

(b) any—

(i) payment from the Protection of Wages on Insolvency Fund under section 18 of the Protection of Wages on Insolvency Ordinance (Cap. 380) to any clerk or servant in respect of wages or salary or both in respect of services rendered to the bankrupt if such payment was made during a period of 4 months before the date of the filing of the petition; and *(Amended 48 of 1987 s. 8)*

(ii) wages and salary (including commission provided that the amount thereof is fixed or ascertainable at the relevant date) of any clerk or servant in respect of services rendered to the bankrupt during a period—

(A) beginning 4 months next before the date of the filing of the petition and ending on the making of the bankruptcy order; or *(Amended 76 of 1996 s. 73)*

(B) beginning 4 months next before the last day of service within the meaning of section 16(4) of the Protection of Wages on Insolvency Ordinance (Cap. 380) of any clerk or servant who has made an application for an ex gratia payment under section 15(1) of that Ordinance, and ending on that last day of service, *(Replaced 68 of 1996 s. 4)*

whichever is the earlier, not exceeding, together with any payment under subparagraph (i), \$300; *(Replaced 12 of 1985 s. 29(4). Amended 48 of 1987 s. 8; E.R. 1 of 2019)*

(c) any—

(i) payment from the Protection of Wages on Insolvency Fund under section 18 of the Protection of Wages on Insolvency Ordinance (Cap. 380) to any labourer or workman in respect of wages, whether payable for time or for piece work, in respect of services rendered to the bankrupt if such payment was made during a period of 4 months before the date of the filing of the petition; and

(ii) wages of any labourer or workman, whether payable for time or for piece work, in respect of services rendered to the bankrupt during the period—

(A) beginning 4 months next before the date of the filing of the petition and ending on the making of a bankruptcy order; or (*Amended 76 of 1996 s. 73*)

(B) beginning 4 months next before the last day of service within the meaning of section 16(4) of the Protection of Wages on Insolvency Ordinance (Cap. 380) of any labourer or workman who has made an application for an ex gratia payment under section 15(1) of that Ordinance, and ending on that last day of service, (*Replaced 68 of 1996 s. 4*)

whichever is the earlier, not exceeding, together with any payment under subparagraph (i), \$100; (*Replaced 12 of 1985 s. 29(4). Amended 48 of 1987 s. 8; E.R. 1 of 2019*)

(ca) any severance payment payable to an employee under the Employment Ordinance (Cap. 57), not exceeding in respect of each employee \$6,000; (*Added 54 of 1974 s. 2*)

(caa) any long service payment payable to an employee under the Employment Ordinance (Cap. 57), not exceeding in respect of each employee \$8,000; (*Added 78 of 1985 s. 2*)

(cb) any amount due in respect of compensation or liability for compensation under the Employees' Compensation Ordinance (Cap. 282) accrued before the date of the bankruptcy order and, where the compensation is a periodical payment, the amount due in respect thereof shall be taken to be the amount of the lump sum for which the periodical payment could, if redeemable, be redeemed on an application being made for that purpose under the Employees' Compensation Ordinance (Cap. 282), but this paragraph shall not apply to any amount due in respect of compensation or liability for compensation where the bankrupt has entered into a contract with a person carrying on accident insurance business in Hong Kong in respect of his liability under the Employees' Compensation Ordinance (Cap. 282) for personal injury by accident to the employee to whom the compensation or liability for compensation is due; (*Added 5 of 1977 s. 2. Amended 47 of 1984 s. 16; 76 of 1996 s. 73*)

(cc) any wages in lieu of notice payable to an employee under the Employment Ordinance (Cap. 57), not exceeding in respect of each employee one month's wages or \$2,000 whichever is the lesser; (*Added 5 of 1977 s. 2*)

(cd) all accrued holiday remuneration becoming payable to any clerk, servant, workman or labourer (or in the case of his death to any other person in his right) on the termination of his employment before or as a consequence of the bankruptcy order; (*Added 47 of 1984 s. 5. Amended 76 of 1996 s. 73*)

(ce) any payment from the Employees Compensation Assistance Fund under Part IV of the Employees Compensation Assistance Ordinance (Cap. 365) representing an amount due by the bankrupt in respect of compensation or liability for compensation under the Employees' Compensation Ordinance (Cap. 282) accrued before the date of the bankruptcy order; (*Added 54 of 1991 s. 47. Amended 76 of 1996 s. 73*)

- (cf) any amount of unpaid contribution or any amount deemed to be unpaid contribution calculated in accordance with rules made under section 73(1)(n) of the Occupational Retirement Schemes Ordinance (Cap. 426) which should have been paid by the bankrupt in accordance with the terms of an occupational retirement scheme within the meaning of that Ordinance before the commencement of the bankruptcy:

Provided that where such amount exceeds \$50,000 in respect of an employee, 50% of such part of the amount that exceeds \$50,000 shall not be paid in priority to all other debts under this subsection; (*Added 88 of 1992 s. 83*)

- (cg) (without prejudice to any right or liability under a trust) any amount of salaries deducted by the bankrupt from his employees' salaries for the purpose of making contributions in respect of such employees to the funds of an occupational retirement scheme within the meaning of the Occupational Retirement Schemes Ordinance (Cap. 426) which have not been paid into such funds; (*Added 88 of 1992 s. 83*)

- (ch) any amount of unpaid contribution under, or any amount of unpaid contribution calculated in accordance with, the Mandatory Provident Fund Schemes Ordinance (Cap. 485) which should have been paid by the bankrupt in accordance with the provisions of that Ordinance before the commencement of the bankruptcy:

Provided that where such amount exceeds \$50,000 in respect of an employee, 50% of such part of the amount that exceeds \$50,000 shall not be paid in priority to all other debts under this subsection; (*Added 80 of 1995 s. 49*)

- (ci) any amount deducted by the bankrupt from the relevant income of his relevant employees for the purpose of making contributions in respect of such relevant employees to the approved trustee of a registered scheme within the meaning of the Mandatory Provident Fund Schemes Ordinance (Cap. 485) which have not been paid to that approved trustee; (*Added 80 of 1995 s. 49*)
  - (cj) any sum and interest thereon payable to the Mandatory Provident Fund Schemes Authority under section 17(7) of the Mandatory Provident Fund Schemes Ordinance (Cap. 485); (*Added 80 of 1995 s. 49*)
  - (d) all statutory debts due from the bankrupt to the Crown at the date of the bankruptcy order and which became due and payable within 12 months next before that date. (*Replaced 47 of 1984 s. 5. Amended 76 of 1996 s. 73*)
- (2)-(2A) (*Repealed 76 of 1996 s. 28*)
- (2B) Where—
- (a) the date of the receiving order is on or after 1 April 1977; or
  - (b) a bankruptcy order is made on or after the day the Bankruptcy (Amendment) Ordinance 1996 (76 of 1996) comes into operation,
- the sum of \$8,000 shall be deemed to be substituted in each case for the sums of \$300 and \$100 referred to in paragraphs (b) and (c) respectively, and for the sum of \$6,000 referred to in paragraph (ca), of subsection (1). (*Added 5 of 1977 s. 2. Amended 76 of 1996 s. 28*)
- (3) The debts specified in subsection (1)(b), (c), (ca), (caa), (cb), (cc), (cd), (ce), (cf), (cg), (ch), (ci) and (cj)— (*Amended 47 of 1984 s. 5; 78 of 1985 s. 2; 54 of 1991 s. 47; 88 of 1992 s. 83; 80 of 1995 s. 49*)

- (a) shall have priority over the debts specified in subsection (1)(d);
  - (b) shall rank equally among themselves; and
  - (c) shall be paid in full unless the property of the bankrupt is insufficient to meet them, in which case they shall abate in equal proportions among themselves. *(Replaced 42 of 1970 s. 2. Amended 54 of 1974 s. 2; 5 of 1977 s. 2)*
- (3A) *(Repealed 47 of 1984 s. 5)*
- (4) Subject to the provisions contained in section 37 and to the retention of such sums as may be necessary for the costs of administration or otherwise, the foregoing debts shall be discharged forthwith so far as the property of the debtor is sufficient to meet them.
  - (5) In the event of a landlord or other person distraining or having distrained on any goods or effects of a bankrupt within 3 months next before the date of the bankruptcy order the debts to which priority is given by this section shall be a first charge on the goods or effects so distrained on or the proceeds of the sale thereof. *(Amended 42 of 1970 s. 2; 76 of 1996 s. 73)*
- (5A) Any money paid under a charge under subsection (5) shall be a debt due from the estate of the bankrupt to the landlord or other person distraining or having distrained, and such debt shall be discharged so far as the property of the bankrupt is sufficient to meet it after payment of the debts specified in subsection (1) but before payment of the other debts proved in the bankruptcy. *(Added 42 of 1970 s. 2)*
- (5B) Where any assets have been recovered under an indemnity for costs of litigation given by certain creditors, or have been protected or preserved by the payment of moneys or the giving of indemnity by creditors, or where expenses in relation to which a creditor has indemnified a trustee have been recovered, the court may, on the application of the Official Receiver or the trustee or any such creditor, make such order as it deems just with respect to the distribution of those assets and the amount of those expenses so recovered with a view to giving those creditors an advantage over others in consideration of the risk run by them in so doing. *(Added 47 of 1984 s. 5)*
- (5C) Any remuneration in respect of a period of holiday or of absence from work through sickness or other good cause shall be deemed to be wages in respect of services rendered to the bankrupt during that period. *(Added 47 of 1984 s. 5)*
- (6) This section shall apply in the case of a deceased person who dies insolvent as if he were a bankrupt and as if the date of his death were substituted for the date of the bankruptcy order. *(Amended 76 of 1996 s. 73)*
  - (7) In the case of partners the joint estate shall be applicable in the first instance in payment of their joint debts and the separate estate of each partner shall be applicable in the first instance in payment of his separate debts. If there is a surplus of the separate estates, it shall be dealt with as part of the joint estate. If there is a surplus of the joint estate, it shall be dealt with as part of the respective separate estates in proportion to the right and interest of each partner in the joint estate. *(See Rule 195)*
  - (8) Subject to the provisions of this Ordinance, all debts proved in the bankruptcy shall be paid *pari passu*.
  - (9) If there is any surplus after payment of the foregoing debts, it shall be applied in payment of interest from the date of the bankruptcy order at the rate specified in section 71(3) on all debts proved in the bankruptcy. *(Amended 76 of 1996 ss. 28 & 73)*
  - (10) In this section—

**accrued holiday remuneration** (累算的假日薪酬) includes, in relation to any person, all sums which, by virtue either of his contract of employment or of any enactment (including any order made or direction given under any Ordinance), are payable on account of the remuneration which would, in the ordinary course, have become payable to him in respect of a period of holiday had his employment with the bankrupt continued until he became entitled to be allowed the holiday, and, without limitation, includes any pay for untaken statutory holidays and pay for untaken annual leave; (*Amended 7 of 2012 s. 9*)

**Employees Compensation Assistance Fund** (僱員補償援助基金) means the fund established by section 7 of the Employees Compensation Assistance Ordinance (Cap. 365); (*Added 54 of 1991 s. 47*)

**pay for untaken annual leave** (未放年假薪酬), in relation to any person, means any sum which, by virtue either of the person's contract of employment or of any enactment (including any order made or direction given under any Ordinance), is payable—

- (a) in respect of annual leave to which the person has become entitled to be allowed but which the person has not taken; or
- (b) on account of the remuneration in respect of annual leave that would have become payable to the person if the person's employment had continued until the person became entitled to be allowed the annual leave,

and, without limitation, includes any sum payable under section 41D of the Employment Ordinance (Cap. 57); (*Added 7 of 2012 s. 9*)

**pay for untaken statutory holidays** (未放法定假日薪酬) means any sum payable under the Employment Ordinance (Cap. 57) or a contract of employment in respect of a statutory holiday (within the meaning of that Ordinance) that has not been taken as a holiday (within the meaning of that Ordinance); (*Added 7 of 2012 s. 9*)

**Protection of Wages on Insolvency Fund** (破產欠薪保障基金) means the fund deemed to be established and continued in existence under section 6 of the Protection of Wages on Insolvency Ordinance (Cap. 380); (*Added 12 of 1985 s. 29(4)*)

**statutory debt** (法定債項) means a debt the liability for which and the amount of which are determined by or under any provision in any Ordinance; (*Amended 18 of 2005 s. 12*)

**wages** (工資) includes, in relation to any person, any sum which, by virtue of his contract of employment, is payable to him as a Lunar New Year bonus, but does not include any accrued holiday remuneration. (*Replaced 47 of 1984 s. 5*)

- (11) The Bankruptcy (Amendment) Ordinance 1984 (47 of 1984) shall not apply in the case of a bankruptcy where the date of the receiving order occurred before the commencement\* of that Ordinance, and, in such a case, the provisions relating to priority of debts which would have applied if that Ordinance had not been enacted shall be deemed to remain in full force. (*Added 47 of 1984 s. 5*)
- (12) The Fifth Schedule to the Protection of Wages on Insolvency Ordinance (Cap. 380) shall not apply in the case of a bankruptcy where the date of the filing of a petition occurred before the commencement\*\* of that Ordinance, and, in such case, the provisions relating to priority of debts which would have applied if that Ordinance has not been enacted shall be deemed to remain in full force. (*Added 12 of 1985 s. 29(4)*)
- (13) Section 4(a) and (b) of the Protection of Wages on Insolvency (Amendment) Ordinance 1996 (68 of 1996) (*the amending Ordinance*) shall not apply in the case of a bankruptcy to which an application under section 15(1) of the Protection of Wages on Insolvency Ordinance (Cap. 380) relates where such application is made before the commencement<sup>§</sup> of the amending Ordinance, and, in such case, the provisions relating to priority of debts which would have applied if the amending Ordinance had not been enacted shall be deemed to remain in full force. (*Added 68 of 1996 s. 4*)

*[cf. 1914 c. 59 s. 33 U.K.]*

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Editorial Note:

- \* Commencement date: 31 August 1984.
- \*\* Commencement date: 19 April 1985.
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