

《2004年破產(修訂)條例草案》委員會  
二零零五年一月十一日第三次會議

就跟進事項一覽表的回應

引言

本文件載述因應法案委員會於二零零五年一月十一日會議的討論所需跟進事項一覽表的相關回應。

A. *為破產管理署每宗簡易程序破產個案所招致的各項費用及開支設定上限的可行性，以及萬一有關費用及開支總額超過債務人的繳存的按金時的應變計劃*

2. 首先，我們應考慮到，絕大多數自行呈請的破產案件中的破產人，資產和收入都很少，或甚至完全無資產和收入。鑑於破產人的這些狀況，我們估計破產管理署所招致的各項費用及開支一般會是 2,000 至 3,000 元<sup>1</sup>，通常都不會相差太大。因此，一筆介乎 5,650 元(8,650 元 - 3,000 元)與 6,650 元(8,650 元 - 2,000 元)之間的結餘，加上破產人的任何其他變現所得的淨資產，以及他／她在破產期內所作出的任何淨供款額，將可用作支付私營清盤從業員的支出、有關費用及酬金。破產管理署所招致的各項費用及開支總額應該不可能超過 8,650 元的按金金額。事實上，到目前為止，就我們所能翻查到的情況是，過去十年都沒有此等情況發生。

3. 萬一在不大可能的情況下，按金(即呈請人所繳存的款項)在扣除破產管理署所招致的各項相關費用及開支後，結餘少於私營清盤從業員可能須支出的款額及投標書上訂明的酬金，則破產管理署將**不會**外判有關的案件。該署會將案件交由內部處理，或嘗試召開債權人會議，以委任一名受託人。

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<sup>1</sup> 有關詳情請參閱附錄 1 的第 1 至第 5 段，該附錄摘錄自我們在二零零五年一月七日發出的「政府當局在第二次會議上就跟進事項一覽表作出的回應」的附件 B。

4. 鑑於上文第 2 及第 3 段所述情況，我們認為沒有需要，亦不適宜考慮修訂《破產規則》第 52 條之下的現有安排。現時該條規則規定，破產管理署所招致的各項費用及開支，須從呈請人繳存的按金中撥款支付，而破產管理署亦無權就有關費用及開支設定上限。

5. 此外，值得注意的是，參與投標與否，是由私營清盤從業員在顧及擬議安排(包括不設定上限)及其本身的商業考慮後自行決定。

***B. 私營清盤從業員在處理簡易程序破產案件時可能招致的費用、收費及其他開支，以及在債務人產業不足以支付有關款項時如何應付此等費用、收費及其他開支***

6. 私營清盤從業員的實際支出總額，是視乎個別案件的情況而定；平均來說，估計會介乎 900 元與 1,500 元之間(見附件 1 第 6 段)。我們相信，在扣除破產管理署所招致的費用和開支後，債務人產業的餘款不足以支付私營清盤從業員支出的情況應不大可能發生。正如上文第 2 段所述，餘款估計會介乎 5,650 元與 6,650 元之間，加上破產人額外變現淨資產，以及破產人在破產期內的淨供款，足以應付 900 元至 1,500 元的預計支出。

7. 附件 1 詳述在典型的簡易程序破產案件中，即使沒有額外資產變現，破產人也沒有作出供款，仍有多少款項可用以支付私營清盤從業員正式聘用人員的費用，以及私營清盤從業員的酬金。估計有關款項會介乎 4,150 元與 5,750 元之間。有了這筆款項，加上簡易破產案件的管理工作性質較簡單，而當局亦會分批把簡易案件外判，以獲得規模經濟效益，我們因此相信，私營清盤從業員會對投標感興趣。無論如何，制定擬議條例草案的目的，是為破產管理署提供一項選擇(而非強制規定)，可外判簡易程序破產案件；私營清盤從業員也可在顧及有關安排及其本身的商業考慮後，自行決定是否參與投標。

***C. (i) 根據現行的外判計劃，私營清盤從業員在處理外判的簡易程序清盤案件時所招致的費用、收費及其他開支的幅度，以及有關私營清盤從業員酬金的幅度***

8. 至於私營清盤從業員在處理外判的簡易程序清盤案件時所招致的費用、收費及其他開支，以及有關私營清盤從業員的酬金，破產管理署並無有關的統計數據。為回應委員的要求，破產管理署以隨機抽樣方式，進行統計調查，現正整理蒐集所得的數據。我們打算在法案委員會第五次會議上，向委員匯報有關結果。

*(ii) 在最佳的情況下，即破產管理署可盡量減低費用和開支(例如透過在憲報綜合刊登多項破產令的公告和在報章綜合刊登多項破產令的廣告等)時，有關私營清盤從業員在處理外判的簡易程序清盤案件所收取的酬金*

9. 擬議的外判簡易程序破產案件與破產管理署現時外判的簡易程序清盤案件有所不同，前者只打算外判債務人呈請個案。根據《破產規則》第 52 條的規定，破產管理署所招致的各項費用及開支會從呈請人(即債務人)繳存的按金中扣除，其後的餘款會按《破產條例》第 37 條所訂的優先次序，支付所委任私營清盤從業員的酬金等款項。有關詳情載於附錄 1。

10. 相反，破產管理署外判的簡易程序清盤案件一般是債權人呈請個案。債權人繳存的按金經扣除破產管理署所招致的費用及開支後，餘款須根據《公司清盤規則》第 22A 條的規定撥還給呈請的債權人，並不會用作支付獲委任為清盤人的私營清盤從業員的酬金等款項。因此，破產管理署所招致的費用及開支，大致上與支付私營清盤從業員的酬金的款項之間並無任何直接關係。由私營清盤從業員聘用人員的費用，以至私營清盤從業員的酬金，均會以清盤案中的變現資產支付，如資產不足，便會以破產管理署的標書內的價格處理。

*D. 在現時的簡易程序清盤案外判計劃下，每次招標程序中曾提交標書和獲批合約的私營清盤從業員／公司數目，並備各律師事務所、會計師事務所和公司秘書公司等的分項數字，以及細列有關公司的規模。*

11. 議員要求有關破產管理署外判簡易程序清盤案的五次招標的資料載於附錄 2。

**E. 在法例中列明有關委任簡易程序破產案件暫行受託人或受託人的資格準則的建議**

12. 我們已再考慮在法例中列明有關委任簡易程序破產案件暫行受託人或受託人的最低資格準則的建議。正如我們在法案委員會二零零五年一月十一日的會議中指出，我們相信這項建議會有廣泛影響，須予審慎考慮，並且有需要徵詢各有關方面的意見。

13. 為此，我們已向 24 個有關單位發出諮詢文件(載於附錄 3 (只提供英文文本))。這些單位包括專業團體(例如香港會計師公會、香港大律師公會、香港律師會和香港公司秘書公會)、商會、金融機構組織，以及曾向法案委員會提交意見書的團體。整份名單載於附錄 4(只提供英文文本)。

14. 迄今，我們已收到五份回覆，有關單位的名單及其意見書載於附錄 5(只提供英文文本)。香港銀行公會已表示需要更多時間研究此事。與此同時，破產管理署正徵詢一些它的顧客即主要銀行的意見。當收到所有其他回應，我們會匯報諮詢的結果。

財經事務及庫務局  
破產管理署  
二零零五年二月

## 在外判案件由破產人所繳存的按金／產業支付費用

根據建議，如在債務人呈請個案中破產人所持資產相當可能不超過 20 萬元(簡易案件)，破產管理署才可把這些案件外判。

### 呈請人所繳存的按金

#### (A) 法定條文

2. 根據《破產規則》第 52(1)條，呈請人提交破產呈請時，該呈請人(如屬外判案件，須為債務人)須向破產管理署繳存一筆 8,650 元<sup>1</sup>的按金，而按金會先用作支付破產管理署署長所招致的各項費用及開支，不論破產管理署署長是以公職身分抑或以破產案件的受託人身分行事。

#### (B) 實際運作

3. 扣除的款額須視乎在特定案件中實際招致的費用及開支而定，粗略估計，會介乎 2,000 至 3,000 元之間。詳情如下：

	<u>項目</u>	<u>金額(元)</u>
(i)	<u>費用(即根據《破產(費用及百分率)令》須繳付的法定費用)</u>	
	(a) 在憲報刊登關於破產的公告	355
	(b) 所有公事用的文具、印刷、郵費等	670 <sup>2</sup>
(ii)	<u>開支</u>	
	(a) 土地註冊 <sup>3</sup>	210
	(b) 影印	90*
	(c) 因在憲報 <sup>4</sup> 刊登破產令而須向政府物流服務署繳付的印刷費用	350*

<sup>1</sup> 除該筆 8,650 元款項外，也須按債務人與破產管理署同意或法院所不時發出的指示，繳存額外款項。

<sup>2</sup> 如破產案件的債權人和破產人數目不超過 10 人，收費為 670 元，而其後每多 10 名或不足 10 名債權人和破產人，會額外收費 670 元。

<sup>3</sup> 《破產規則》第 53 條訂明，當有破產呈請書提交時，破產管理署署長可將該份呈請書的提要在土地註冊處針對債務人名下的財產註冊。

<sup>4</sup> 《破產規則》第 78 條訂明，凡已作出破產令，破產管理署署長須隨即將有關該令的公告送交憲報及他認為合適的一份或多於一份本地報章。

(d) 因在報章 <sup>5</sup> 刊登破產令而須付的印刷費用	350*
總額：	2,025 ====

\*：這些金額只是約數。實際開支會受不同因素，例如實際影印的數量、是否可安排綜合刊登憲報及廣告，以及當時的收費水平。

破產管理署所招致的費用及開支總額會是介乎 2,000 元至 3,000 元之間。假設該總額為 A 元，按金結餘是 B 元，計算方法是 8,650 元 - A 元 = B 元。

### 根據第 37 條支付的款項

#### (A) 法定條文

4. 在債務人提出的呈請獲得接納，而法院發出破產令後，破產管理署會按《破產規則》第 52(2)條的規定，將按金餘額撥歸債務人的產業。該等產業或會因破產人的資產變現或他在破產期內作出的供款而增加，再用作支付條例第 37 條所訂的訟費及費用。根據該條，凡為保存或取得破產人的任何資產或將破產人的任何資產變現而正當地招致的開支，會獲優先支付，剩餘資產會按該條所訂的優先次序(擬由修訂條例草案第 11 條修訂)用作支付以下的項目：

- (a) 破產管理署署長的酬金、須支付予破產管理署署長的費用、手續費、百分率及收費，或破產管理署署長所招致或批准的訟費、收費及開支，包括他正式聘用任何人的費用，而不論破產管理署署長是以受託人身分或是以其他身分行事；
- (b) 呈請的經評定的訟費，包括在呈請的聆訊中出庭並獲法庭判給訟費的任何人的經評定訟費在內，但不包括該等訟費的利息；
- (c) 如有特別經理人，該人的酬金和由他正當地招致的費用、支出及開支；

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<sup>5</sup> 見附註 4。

- (d) 任何填寫破產人的資產負債狀況說明書的人的費用及開支；
- (e) 任何獲委任記錄任何訊問過程的速記員的經評定收費，但為保存或取得破產人的資產或將破產人的資產變現而正當地招致的開支除外；
- (f) 破產管理署署長以外的任何受託人<sup>6</sup>的必需支出，但為保存或取得破產人的資產或將破產人的資產變現而正當地招致的開支除外；
- (g) 由破產管理署署長以外的任何受託人正式聘用的任何人的費用；
- (h) 破產管理署署長以外的任何受託人的酬金；及
- (i) 債權人委員會在有需要的情況下招致的實際現金付款開支，但該等開支須獲受託人核准。

**(B) 實際運作**

5. 假設一

- (a) 破產管理署將按金結餘，即 B 元撥歸債務人的產業；
- (b) 因破產人再有資產被變現及在破產期內作出供款，總額為 C 元；以及
- (c) 為保存或取得破產人的任何資產或將破產人的任何資產變現而正當地招致的開支，即 D 元

則在 B 元+C 元-D 元=E 元後，E 元可用作支付上文第 4 段(a)至(i)項所列的各項訟費及費用。然而，在實際情況中，循簡易程序處理的債務人呈請個案中，有些訟費及費用相當可能無須支付，理由如下：

段數	訟費／費用項目	相當可能無須支付有關訟費／費用項目的理由
4(a)	破產管理署署長的酬金和破	這類項目在很少情況下會適

<sup>6</sup> “破產管理署署長以外的受託人”包括獲委任管理外判破產案件的私營清盤從業員。

	產管理署署長所招致或批准的費用及開支等，而不論破產管理署署長是以受託人身分或是以其他身分行事	用，或應已為《破產規則》第 52 條所涵蓋。
4(b)	呈請的經評定訟費	在債務人呈請個案中，這類訟費預期由破產人本人支付。
4(c)	特別經理人的酬金和由他正當地招致的費用、支出及開支	在簡易程序破產案件中，不大可能會委任特別經理人。
4(d)	任何填寫破產人的資產負債狀況說明書的人的費用及開支	這資產負債狀況說明書預期由破產人本人填寫。
4(e)	任何獲委任記錄任何訊問過程的速記員的經評定收費	在簡易程序破產案件中，不大可能會委任速記員。
4(i)	債權人委員會在有需要的情況下招致的開支	在簡易程序個案中，不會成立債權人委員會。

因此，實際上只有第 4(f)、(g)和(h)段所述的訟費和費用是相關的，即(i)私營清盤從業員的支出(為保存或取得破產人的資產或將破產人的資產變現而正當地招致的開支除外)，(ii)由私營清盤從業員聘用的任何人的費用；以及(iii)私營清盤從業員的酬金。

**第 4(f)段：私營清盤從業員的支出(為保存或取得破產人的資產或將破產人的資產變現而正當地招致的開支除外)**

6. 私營清盤從業員招致的支出款額(為保存或取得破產人的資產或將破產人的資產變現而正當地招致的開支除外)，將視乎在一宗案件中實際招致的款額而定。以一宗不多於十名債權人，以及沒有資產被收回的典型案件為例，私營清盤從業員的一般支出為

	(\$)
(a) 在憲報刊登委任公告的費用(假設每份公告刊登 50 宗案件) <sup>7</sup>	250
(b) 各項查冊費用 <sup>8</sup>	95

<sup>7</sup> 根據《破產規則》第 162 條，受託人的委任公告須在憲報刊登。由於這些案件將會分批外判，私營清盤從業員應可安排綜合刊登憲報，以盡量減低費用。

<sup>8</sup> 一個地址的土地查冊費為 30 元。查詢一項業務的商業登記資料為 45 元。一間公司一年的公司查冊費為 20 元。



(c) 郵費(用於發信給所有銀行、發給債權人和破產管理署署長的報告、向債權人發出反對／不反對解除破產的通知和免除債務的通知) <sup>9</sup>	250
(d) 銀行費用／影印費 <sup>10</sup>	250
(e) 交通費	50
	895
	(約為 900)

7. 即使私營清盤從業員須提出反對解除破產的申請(並因此須就提出申請而額外繳付 528 元法院費用)<sup>11</sup>，他的支出也不應超過 1,450 元。因此，我們認為私營清盤從業員的平均總支出將介乎 900 至 1,500 元之間。

#### 第 4(g)和(h)段：由私營清盤從業員聘用人員的費用和私營清盤從業員的酬金

8. 一如上文第 3 至 7 段所載述的計算顯示，*即使沒有額外的資產變現，而破產人也沒有收入作出供款*，仍有一筆介乎 **4,150 元** (8,650 元-3,000 元-1,500 元)至 **5,750 元** (8,650 元-2,000 元-900 元)之間的款額，用作支付私營清盤從業員正式聘用人員的費用和私營清盤從業員的酬金。

<sup>9</sup> 根據《破產條例》第 30A(5)a 條，私營清盤從業員可以把反對／不反對解除破產的通知以郵遞方式寄給債權人。

<sup>10</sup> 銀行費用和影印費是付予銀行以取得破產人的銀行記錄。

<sup>11</sup> 根據《破產(費用及百分率)令》附表 A 表 6(a)項。在破產管理署的經驗中，簡易程序破產案件中有 5%至 6%可能須提出反對解除破產的申請。



外判簡易程序清盤案  
五項投標摘要

	二零零零 /零一年*	二零零一 /零二年	二零零二 /零三年	二零零三 /零四年	二零零四 /零六年 (兩年合約)
投標者總數	22	37	28	53	57
中標者	5 (5A)	10 (6A+4S)	17 (13A+4S)	21 (15A+4S +2M)	14 (9A+3S +2M)
負責處理 無力償債 工作的 員工#					
1-20	1	8	8		12
21-40	3	1	7	17	2
41-60	1	1	2	2 2	0
未有中標的 投標者	17 (17A)	27 (24A+3S)	11 (9A+2S)	32 (27A+4S +1C)	43 (36A+6S +1M)
負責處理 無力償債 工作的 員工					
1-20	11				34
21-40	4	18	7	19	6
41-60	2	6	3	10	3
60 以上	0	3 0	1 0	2 1	0

A: 會計師

S: 律師

M: 混合：律師加會計師

C: 公司秘書

註

\*: 只限會計師投標

#: 不包括負責其他工作的員工

**Minimum Qualification Criteria for Appointment as  
Provisional Trustees or Trustees for  
Outsourced Bankruptcy Cases**

**Bankruptcy (Amendment) Bill 2004**

**Introduction**

We would like to seek relevant stakeholders' views on how the qualification criteria for appointment as provisional trustees or trustees should be set out for summary bankruptcy cases which are intended to be outsourced by the Official Receiver's Office (ORO).

**Background**

*The Bill*

2. The Bankruptcy (Amendment) Bill 2004 (the Bill) was re-introduced into the Legislative Council (LegCo) in October 2004 to provide the ORO with the authority of outsourcing summary bankruptcy cases to private-sector insolvency practitioners (PIPs). Clause 3 of the Bill amends existing section 12 of the Bankruptcy Ordinance (BO) to provide that the Official Receiver (OR) shall become the provisional trustee on the making of a bankruptcy order. Where OR considers that the bankrupt's property is unlikely to exceed \$200,000 in value, he may appoint another person as the provisional trustee in his place without having to convene a meeting of creditors which in normal circumstances he would have to do. Clause 42 amends existing section 112A of the BO so that, where the court has made an order for summary administration of a bankrupt's estate, the provisional trustee shall become the trustee. Further background of the Bill is set out in our Legislative Council Brief, which can be downloaded from [http://www.legco.gov.hk/yr04-05/english/bills/brief/b01\\_brf.pdf](http://www.legco.gov.hk/yr04-05/english/bills/brief/b01_brf.pdf). It should be noted that the ORO's intention is that only debtor-petition summary (i.e. bankrupt's property is unlikely to exceed \$200,000 in value) cases would be outsourced. Other types of bankruptcy cases will continue to be administered by the ORO either

in-house or by holding creditors meetings in order to allow the creditors to appoint their own trustee.

3. In the course of the scrutiny of the Bill by the Bills Committee set up by LegCo, a number of questions have been raised. Some of them relate to the selection and supervision of the PIPs appointed to administer the cases. The Administration replied that there are proper statutory, non-statutory and supporting measures to monitor the administration of outsourced bankruptcy cases (please see Annex). Furthermore, we consider that the administration of such cases is relatively more straight-forward, compared with, say, summary liquidation cases that are already outsourced by the ORO to PIPs.

### *Qualification Criteria for Appointment as PIPs*

4. At the meeting of the Bills Committee on 11 January 2005, Members generally did not object to the proposal that the qualification criteria for appointment as provisional trustees or trustees for outsourced bankruptcy cases should be similar to those adopted for the current scheme for the outsourcing of summary liquidation cases<sup>1</sup>, though questions had been raised at previous meetings as to whether company secretaries should be allowed to be appointed as provisional trustees or trustees. The current thinking is that for a PIP to be eligible for participation in the tendering, he/she would need to be a member of a relevant professional body – Hong Kong Institute of Certified Public Accountants, Law Society of Hong Kong or Hong Kong Institute of Company Secretaries. He/she would also be required to have a minimum number of years of post qualification experience and a minimum number of professional or chargeable hours in respect of insolvency work. The Administration's intention is that these detailed qualification criteria would be set out in the tender contract of the ORO.

5. Some Members of the Bills Committee however suggested that consideration should be given to setting out some form of minimum qualification criteria in the statute, so as to help ensure the quality of PIPs appointed by the ORO and enhance the transparency of the outsourcing scheme. In response, the Administration pointed out that the suggestion could have wider ramifications.

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<sup>1</sup> For summary liquidation (of company) cases, the current minimum requirements are: (i) the PIPs need to be a member of a relevant professional body – Hong Kong Institute of Certified Public Accountants, Law Society of Hong Kong or Hong Kong Institute of Company Secretaries; (ii) 3 years of post-qualification experience; (iii) 300 chargeable hours of relevant insolvency work over last 3 years, with at least 150 hours related to insolvent liquidation/receiverships, and remaining hours may be on solvent liquidation of which the hours would be reduced by 50%; and (iv) having performed a minimum of 4 winding-up cases.

Currently, the BO and Companies Ordinance (CO) generally do not set out the minimum qualification criteria for persons eligible for appointment as office holders in relation to the administration of most solvency/insolvency cases. Furthermore, the profile of summary bankruptcy cases does not suggest that the criteria should not be dealt with in the same way as that under the existing tendering scheme for summary liquidation cases (i.e. to set out the criteria in the tender contract). Nevertheless, we undertook to consider the suggestion further and consult relevant stakeholders before reverting to the Bills Committee.

## **The Issues for Consideration**

### *Detailed Qualification Criteria for the Contract*

6. Notwithstanding whether any form of minimum qualification criteria should be set out in the statute, it is important that the detailed qualification criteria must be set out in the tender contract of the ORO, i.e. contractual in nature. Such detailed qualification criteria will include professional qualification, post-qualification experience, insolvency work experience and managerial experience and support, etc. The tender will be an open tender, and the ORO will ensure transparency of the relevant arrangements by measures such as putting the tender documents on ORO's website and publishing tender notices in the Gazette. These arrangements are in line with the existing scheme for the outsourcing of summary liquidation cases, which has served well in the past.

7. In any case, while the appointment of a PIP as the provisional trustee of a summary bankruptcy case would be made by the OR, there are other checks provided under the BO to help ensure that only a fit person is so appointed. For instance, when a provisional trustee applies to the court for a summary procedure order under section 112A (proposed to be amended by clause 42 of the Bill), the court has inherent jurisdiction of objecting to the provisional trustee becoming the trustee. Moreover, a provisional trustee or trustee may be removed from his office by the court under the new section 96(2) in certain circumstances, such as he fails to perform his duties under the Ordinance.

8. However, some Bills Committee Members have expressed concerns about this approach (i.e. setting the detailed criteria in tender contract only) in terms of safeguarding the quality of the PIPs appointed for the administration of outsourced

bankruptcy cases.

### *Statutory Minimum Qualifications*

9. Some Members suggested that some form of minimum qualification criteria should be specified in the BO or its subsidiary legislation, and any revision of the criteria will therefore need to go through the legislative process. It is argued that this would have the advantage of enhancing transparency and safeguarding quality of the PIPs.

10. On the one hand, it can be argued that this suggestion may give rise to wider ramifications. As explained in paragraph 5 above, no statutory qualifications are currently set for appointment of most types of office holders in relation to the administration of insolvency/solvency cases, except for the appointment of provisional liquidator under section 228A of the CO<sup>2</sup>. If this suggestion is adopted, it may raise the question as to whether minimum statutory criteria should also be introduced for the appointment of trustees for non-summary bankruptcy cases, creditors' appointed liquidators, etc. These are important matters. It is reasonable and, as a principle of legal policy<sup>3</sup>, appropriate for the Administration to look into them comprehensively. They are also probably outside the scope of the current Bill, which aims to enable the ORO to outsource summary bankruptcy cases only. On the other hand, it may be argued that outsourced bankruptcy cases may be treated as a special procedure and special treatment for such cases is warranted.

11. In any case, **assuming** that some form of minimum qualifications would be set out in the statute, we consider that they should be set out in the form of subsidiary legislation under the BO, which may be amended by the OR and subject to the negative vetting by the LegCo. This approach would avoid the need to enact an amendment ordinance to effect changes to the minimum qualifications. The latter is relatively a much more complex and time-consuming process, compared with subsidiary amendment legislation.

### *What should Constitute Minimum Qualifications*

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<sup>2</sup> Section 228A provides for a special procedure for winding up a company voluntarily where the directors or majority of the directors of the company have formed the opinion that the company cannot by reason of its liabilities continue its business. Under this special procedure, the directors appoint a person who is either a solicitor or accountant to be the provisional liquidator in the winding up.

<sup>3</sup> It is a principle of legal policy that law should be coherent and self-consistent (see Bennion, *Statutory Interpretation*, 4<sup>th</sup> Edition, page 690).

12. As regards what should constitute the minimum qualifications, it may be stated in the subsidiary legislation that PIPs appointed to be the provisional trustee or trustee of summary bankruptcy cases must be -

- (a) A certified public accountant who is a member of the Hong Kong Institute of Certified Public Accountants; or
- (b) A solicitor who is a member of the Law Society of Hong Kong; or
- (c) A company secretary who is a member of the Hong Kong Institute of Company Secretaries; or
- (d) A person who in the opinion of the OR is fit and proper for the appointment.

13. The proposed professional qualifications referred to in paragraphs (a), (b) and (c) above are in line with professional qualifications currently required under the outsourcing scheme of summary liquidation cases. In addition, it is considered that the OR should be given the reserve discretion to appoint other fit persons, because we cannot, and should not, rule out that only a member of the three professions can act as the provisional trustee or trustee for summary cases. In this regard, creditors are now allowed under the BO to appoint any fit person to be the trustee for a non-summary bankruptcy case. If the BO provides that only members of the three professions may be appointed as provisional trustee for summary cases, it may lead to an odd, albeit remote, scenario of a fit person having considerable experience in the administration of non-summary (and usually less straight-forward) bankruptcy cases but is denied of the opportunity of being appointed to administer summary cases. A possible example is an ex-Insolvency Officer with considerable experience who had left the ORO.

14. We do not consider it appropriate to set out in the BO the detailed criteria, such as specific post-qualification experience, insolvency work experience and managerial experience and support, which are more “case specific” in nature and may change over time. As a matter of principle and noting the exclusivity of statutory requirements, we consider that the BO should only set out the basic fundamental criteria. Instead, it would be more appropriate to set out the detailed criteria in the tender contracts. This approach would enable the ORO to be more responsive to changes in the regulatory environment and the market conditions in determining the detailed criteria.



## **Way Forward**

15. We would like to invite you to comment on the above matters by *12 February 2005*, in particular whether some form of minimum qualifications for PIPs appointed to administer summary bankruptcy cases should be set out in the statute, and if so, what should such minimum qualifications be.

**Financial Services and the Treasury Bureau /  
The Official Receiver's Office  
January 2005**

## **Supervision of PIPs Appointed as Provisional Trustee or Trustee of Outsourced Bankruptcy Cases**

In general, the private sector insolvency practitioners (PIPs) as fiduciaries and officers of the court should deal with all matters relating to administration of the estate of the bankrupt and undertake any duties and obligations in accordance with the provisions of the Bankruptcy Ordinance (BO) and the contract with the Official Receiver's Office (ORO). There are many "checks and balances" to ensure that PIPs will exercise their powers in a reasonable and consistent manner. They can be classified into the following categories:

### (i) Statutory measures

2. The PIPs will be subject to the statutory control in the BO. Under section 82(2) of the BO, one-fourth in value of the creditors may request the trustee to call a meeting of creditors. Section 83 provides that a bankrupt, creditor or any other aggrieved person may appeal to court against the act or decision of the trustee. Section 84 provides for the control of the court over the trustee in the event of complaint made by any creditor, the Official Receiver (OR), the bankrupt or any other persons.

3. Under section 89 of the BO, the PIPs are required to provide annual statement of proceedings to the OR through which the OR will be able to monitor the progress of the proceedings.

4. Under the proposed section 93(1A) of the BO, the OR may at any time require the PIPs to provide the accounts of the bankrupt's estate. Under the existing section 93(3A), the OR may cause the accounts to be audited.

### (ii) Non-Statutory measures

5. As in the outsourcing of liquidation cases, the work specifications of the PIPs will be specified in the contract of appointment<sup>1</sup>. The PIPs will be briefed at the time of the appointment as to their duties and obligations as the provisional trustee and trustee of the bankrupt's estate.

6. The ORO will also monitor the performance of the PIPs through the terms of contract under which the ORO will have with PIPs.

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<sup>1</sup> For example, the appointed PIPs are required to comply in all respect with the relevant professional standards and ethical guidelines of the relevant professions, and may be required to submit a report to the ORO if they do not complete certain work within the specified timeframe.

7. The PIPs are professionals. They may be subject to disciplinary action for breaching professional rules or codes of conduct of the professional bodies they are members of, including the committal of professional misconduct in the course of acting as trustee-in-bankruptcy.

(iii) Other Supporting Measures

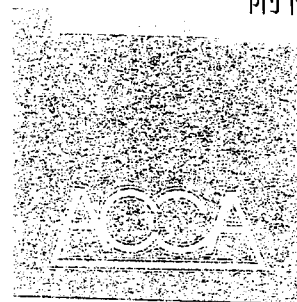
8. To facilitate relevant parties to understand their rights and duties, the ORO has put in place a number of measures. For example, the ORO has published a Guide on Bankruptcy setting out matters such as the rights of creditors and the duties of bankrupts. Moreover, enquiries or complaints (including any against the PIPs) can be directed to the ORO through a hot line or other means such as the internet.

諮詢單位一覽表

1. Association of Insolvency Officers
2. Baker Tilly
3. Clifford Chance
4. Consumer Council
5. Grant Thornton
6. Hong Kong Bar Association
7. Hong Kong Institute of Certified Public Accountants
8. Hong Kong Monetary Authority
9. Joseph S.C. Chan & Co
10. Kenny Tam & Co
11. Standard Chartered Bank
12. The Association of Chartered Certified Accountants
13. The British Chamber of Commerce of Hong Kong
14. The Chinese General Chamber of Commerce
15. The Chinese Manufacturer's Association of Hong Kong
16. The DTC Association
17. The Hong Kong Association of banks
18. The Hong Kong Institute of Company Secretaries
19. The Hong Kong Institute of Directors
20. The Hong Kong S.A.R. Licensed Money Lenders Association Ltd
21. The Law Society of Hong Kong
22. The Society of Chinese Accountants and Auditors
23. The Standing Committee on Company Law Reform
24. Yip, Tse & Tang Solicitors

回應團體一覽表

1. The Association of Chartered Certified Accountants (附件 A)
2. Hong Kong Monetary Authority (附件 B)
3. The DTC Association (附件 C)
4. The Law Society of Hong Kong (附件 D)
5. The Standing Committee on Company Law Reform (附件 E)



Mr Alan Lo  
Financial Services Branch  
Financial Services and The Treasury Bureau  
Government of the HK SAR  
18<sup>th</sup> Floor  
Admiralty Centre Tower 1  
18 Harcourt Road  
Hong Kong

7 February 2005

Dear Mr Lo

**Bankruptcy (Amendment) Bill 2004 ("the Bill")**

We refer to your letter dated 1 February 2005 inviting us for comments on the captioned matter. On behalf of ACCA (The Association of Chartered Certified Accountants) Hong Kong, we are writing to submit our comments for your consideration.

*Qualification of private-sector insolvency practitioners (PIPs)*

We raised our comments regarding the qualification of the provisional trustee in our letter dated 2 November 2004. We consider that criteria for a provisional trustee and / or trustee should be considered. However, we appreciate the fact that flexibility should be ensured where changes to the requirements are needed. As such, we do not object to the proposal of setting out the minimum qualifications in the form of subsidiary legislation under the Bankruptcy Ordinance.

We also agree that only the basic fundamental criteria should be set out. They may include domicile and independence of the individual, whether the individual has conflict of interest with the bankrupt, and whether the individual has expertise in handling a bankrupt's assets. We have no objection that the detailed criteria are set out in the tender contracts as in the case of the outsourcing scheme of summary liquidation cases.

**ACCA Hong Kong 香港分會**

Room 1901 19/F World Wide House 19 Des Voeux Road Central

中環 德輔道 19 號 環球大廈 19 樓 1901 室

tel 電話: +852 2524 4988 fax 傳真: +852 2868 4909 <http://hongkong.accaglobal.com>

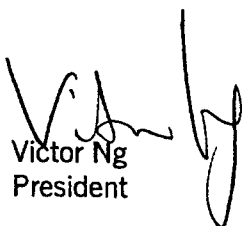
**The Association of Chartered Certified Accountants 特許公認會計師公會**



However, we note that the proposed professional qualification is limited to certified public accountants who are members of the Hong Kong Institute of Certified Public Accountants. We propose that the accounting qualification should extend to include all professional accountants who possess professional accounting qualifications with any member body of the International Federation of Accountants. For instance, ACCA, being one of the licensing professional accountancy bodies in the United Kingdom, also regulates its members engaged in insolvency practices, and will have no doubt in providing adequate support to its members in Hong Kong to act as provisional trustees. We are of the view that all professional accountants who have the appropriate technical knowledge with considerable relevant experience should not be denied of the opportunity of being appointed to administer summary cases.

Should you like to clarify any of the above issues, please do not hesitate to contact myself or Ms Sonia Khao at 2524 4988.

Yours faithfully

  
Victor Ng  
President

Hong Kong Monetary Authority 香港金融管理局

附件 B



Your Ref.: C3/17(04)  
Our Ref.: B9/69C

14 February 2005

**By Fax (2865 6778) and By Post**

Secretary for Financial Services and  
the Treasury  
Financial Services and the Treasury Bureau  
18/F, Admiralty Centre, Tower 1  
Harcourt Road  
Hong Kong

(Attn: Mr Alan Lo) 8 14.2

Dear Sir,

**Bankruptcy (Amendment) Bill 2004**

Thank you for your letter of 1 February 2005.

The paper attached to your letter has clearly set out the advantages and disadvantages of laying down the minimum qualification criteria for appointment as PIPs in the legislation. One additional drawback which you may wish to consider is whether the specification of such criteria would inhibit competition in the insolvency services market.

We are not in a position to comment on what should constitute the minimum appointment criteria for PIPs because we are unfamiliar with bankruptcy laws and practices.

Yours faithfully,

(Raymond Chan)  
Division Head  
Banking Development Department



# The DTC Association

附件 C

(The Hong Kong Association of Restricted Licence Banks and Deposit-taking Companies)

存款公司公會 (香港有限牌照銀行及接受存款公司公會)

Unit 2404, 24/F., Bonham Trade Centre,  
No. 50 Bonham Strand East, Sheung Wan, Hong Kong.  
Tel: 2526 4079 Fax: 2523 0180  
E-mail: dtca@dtca.org.hk HomePage: <http://www.dtca.org.hk>

香港上環文咸東街 50 號  
寶恒商業中心 24 樓 2404 室  
電話: 2526 4079 傳真: 2523 0180  
電子郵件: dtca@dtca.org.hk 網頁: <http://www.dtca.org.hk>

Our Ref.: 20/02/20

Your Ref.: C3/17(04)

8<sup>th</sup> February, 2005 (Tue)

Financial Services Branch,  
*Financial Services and Treasury Bureau,*  
18<sup>th</sup> floor, Admiralty Centre Tower 1,  
18 Harcourt Road, HONG KONG.  
Attn.: Mr Alan Lo,  
[Fax: 2865 6778; Pages Faxed: 1]

Dear Mr Lo,

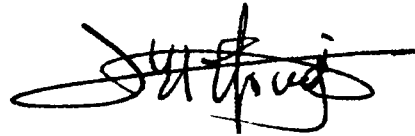
## Bankruptcy (Amendment) Bill 2004

Thanks for your letter of 7 February, 2005 (Tue), captioned "Bankruptcy (Amendment) Bill 2004" relating to us the latest development at the last Legislative Council (LegCo) deliberations on the issue and your Branch's second consultation arising therefrom.

We would like to let you know that our Association members have made no comments on the consultation paper.

Thank you for consulting us,

Yours sincerely



Pui-Chong LUND  
Association Secretary

cc: Miss Jane CHUNG, (☎ 2867 2534)  
Official Receiver's Office, (ORO)  
10<sup>th</sup>-12<sup>th</sup> floors, Queensway Government Offices,  
66 Queensway, HONG KONG.  
Fax: 2869 0423  
ORO Reference: GA/12/10 III: letter of 9<sup>th</sup> July, 2002.

Chairman : Cliff Forster 霍肇滔 ☎ : 2847 3980

Vice-Chairman : Yoke Kong Tan 陳玉光 ☎ : 2525 9351

Association Secretary : P.C. Lund 龍沛蒼 ☎ : 2526 4079

Incorporated Under the Companies Ordinance of Hong Kong and Limited by Guarantee

根據香港公司條例成立之有限保證法團



## **Bankruptcy (Amendment) Bill 2004**

### **Minimum Qualification Criteria for Appointment as Provisional Trustees or Trustees for Outsourced Bankruptcy Cases**

The Law Society's Insolvency Law Committee has reviewed the paper prepared by the Financial Services and Treasury Bureau/Official Receiver dated January 2005 on the qualification criteria for appointment as provisional trustee or trustee for outsourced bankruptcy cases.

The paper indicates there is a general level of acceptance amongst the members of the Bills Committee that the qualification criteria for appointment of trustees when outsourcing bankruptcy cases should be similar to those for the current scheme for outsourcing summary liquidation cases. However, some members felt that minimum qualification criteria should be recorded in the Bankruptcy legislation rather than in the Official Receiver's Office ("ORO") tender contracts, as is the case with summary liquidation cases. The Committee assumes the main concern is a desire to maintain transparency of appointments.

The scheme for summary company liquidations appears to operate satisfactorily and under that scheme the minimum qualification requirements are spelled out in the ORO tender documents. The Committee cannot see any justification to change either the qualification criteria or the way that they are recorded and applied in the case of summary personal bankruptcies.

In relation to the idea of setting these out in the ordinance:

1. The requirements under the standard ORO tender contracts are already publicly accessible and transparent. There seems to be no point in recording them separately in a statutory provision.
2. If statutory provisions are introduced, it is likely these would inhibit future flexibility at the very early stages of a new privatised bankruptcy administration system. The scheme may yet need to evolve to meet new market demands as it settles down. It would be unfortunate if changes to the criteria could only be achieved by undertaking a full legislative amendment.
3. It might be appropriate to set minimum qualifications and requirements in a statutory form if Hong Kong is moving towards establishing a new system of regulating insolvency practice, such as the UK system of registered insolvency practitioners. If this is to occur it would be logical to spell out qualifications and criteria in a comprehensive statutory form which deals with both company and personal insolvencies. In

that context, the identification of criteria for membership of the professional group would occur only after a full public examination and debate about what was appropriate and necessary in the public interest to ensure that insolvency were adequately administered. However to be doing this within the relatively narrow context of summary bankruptcies, which is only a small segment of the broader area of professional insolvency practice, seems an anomaly and inappropriate. It appears the proposal is largely for a collateral purpose, namely, to achieve transparency in the making of appointments.

**The Committee re-iterates its comments that it cannot see any justification to change either the qualification criteria or the way that they are recorded and applied in the case of summary personal bankruptcies.**

**The Law Society of Hong Kong**  
**8 February 2005**  
84075



公司註冊處  
COMPANIES REGISTRY

香港金鐘道六十六號  
金鐘道政府合署十五樓

附件 E

QUEENSWAY GOVERNMENT OFFICES  
15TH FLOOR, 66 QUEENSWAY,  
HONG KONG.

<http://www.info.gov.hk/cr/>

覆函請註明本處檔號：

In reply please quote this Ref (6) in CR/HQ/20/6 (II)

來函檔號 YOUR REF.: C 3/17 (04)

電話 TEL.: 2867 2820

圖文傳真 FAX: 2869 1007

電郵 E-MAIL: edwardlau@cr.gov.hk

8 February 2005

Financial Services and the Treasury Bureau  
Financial Services Branch  
18th Floor, Admiralty Centre, Tower 1  
18 Harcourt Road  
Hong Kong  
(Attn: Mr Alan Lo)

**BY FAX : 2865 6778**

Dear Mr Lo,

**Re : Bankruptcy (Amendment) Bill 2004**

Thank you for your letter of 1 February 2005 and the Paper on "Minimum Qualification Criteria for Appointment as Provisional Trustees or Trustees for Outsourced Bankruptcy Cases" thereto enclosed.

The Paper has been circulated to members of the SCCLR for comment and I have to date, only received the following feedback from one of them :-

- (i) to single out summary bankruptcy cases for express enactment of minimum qualifications in the statute is incongruous having regard to the fact that there are no such provisions on summary liquidations. There seems to be no point in setting out such requirements if the minimum qualifications include a residual category such as "fit and proper person";
- (ii) if the minimum qualifications are to be set out they can be done in subsidiary legislation rather than in the statute; and
- (iii) a relatively broad category e.g. "fit and proper" for the appointment should be included.

Other members have expressed no views on the issue in question.

Yours sincerely,

  
(Edward Lau)  
Secretary

Standing Committee on Company Law Reform