

**《 2004 年破產(修訂)條例草案 》委員會
二零零五年二月二十一日第四次會議
就跟進行動一覽表作出的回應**

引言

本文載述政府當局對法案委員會二零零五年二月二十一日會議所討論事項的跟進行動一覽表作出的回應。

A. 作出委員會審議階段修正案(修正案)以反映條例草案的政策目的在於容許把債務人呈請簡易程序破產案件而非債權人呈請案件外判

2. 我們將於法案委員會審議條例草案的有關條文時，提交有關的修正案。

B. 私營清盤從業員處理外判清盤案件時所招致的費用、收費和其他開支，以及酬金

3. 破產管理署並無統計獲委任處理外判清盤案件的私營清盤從業員所招致的費用、收費和其他開支，以及其酬金。破產管理署為此進行了一項調查，以隨機選定的一百宗清盤人被免除職務案件¹為樣本。

4. 該項調查的結果如下：

以每宗案件計

(a) 私營清盤從業員獲支付的酬金平均為	17,091 元
(b) 獲支付的費用、收費和其他開支平均為	1,161 元

¹ 指有關清盤人已獲法院免除職務的案件，因為進行清盤的公司的所有可變現財產已經變現，而最後債款(如有的話)亦已經支付給債權人。

不過，我們必須指出，這一百宗被免除職務的案件大多數是在二零零一／零二年度和二零零二／零三年度外判，因而值得注意的是在該兩個年度內，破產管理署所外判簡易程序清盤案件中標者的平均競投價格分別為 16,606 元和 13,384 元。

5. 由於大部分在二零零三／零四年度及以後外判的案件，其清盤人仍未被免除職務，故有關調查未能包括該等案件，但該等案件可顯示私營清盤從業員所招致的費用、收費和其他開支，以及他們的酬金的較近期／最新情況。值得注意的是在二零零三／零四年度和二零零四／零六年度(兩年期合約)，簡易程序清盤案件中標者的平均競投價格分別為 9,255 元和 5,482 元。

C. 提議在法例內訂明獲委任為簡易程序破產案件的暫行受託人或受託人的資格準則

6. 正如在法案委員會二零零五年二月二十一日的會議上所指出，我們已就在法例內訂明獲委任為簡易程序破產案件的暫行受託人或受託人的最低資格準則的構思，諮詢有關方面(包括專業團體)的意見。迄今，我們共收到十份回覆，現把這些回覆連同摘要載於附件 A。

7. 總括而言，回應者普遍同意詳細資格準則應在破產管理署的招標文件或實務守則而非法例內訂明。

8. 至於是否有需要在法例內訂明專業資格等基本準則，則各方意見分歧。香港大律師公會、香港律師會和香港會計師公會並不認為有需要或應該在法例(不論是《破產條例》或其附屬法例)內訂明有關準則，所提出的理據包括：

- (a) 現行的《破產條例》及《公司條例》大致上並沒有就合資格獲委任處理有償債能力／無償債能力案件的人士，訂明最低資格準則。因此，並無理由把簡易程序破產案件歸入為特別類別；
- (b) 私營清盤從業員已受《破產條例》的法定管制；

(c) 破產管理署標準招標合約的要求已屬公開資料和具透明度，因此，似乎沒有必要以法定條文另行載述；以及

(d) 法定條文一經訂立，可能會在新破產管理私營化制度的很早階段窒礙其在日後的靈活運作和發展。

9. 另一方面，香港銀行公會、特許公認會計師公會和香港公司秘書公會均支持在法例內訂明「合適和適當」人選等基本準則，因為此舉有助提高透明度和維持私營清盤從業員的質素。

10. 考慮諮詢的結果後，我們發現專業團體尤其大力支持簡易程序破產案件暫行受託人或受託人獲委任的資格準則，應以簡易程序清盤案件現行招標計劃所採用的相同方式處理，即在招標合約上訂明。鑑於目前已有牽制措施可以保障私營清盤從業員的服務質素，加上在法例內訂明準則會帶來非常廣泛的影響，我們謹請委員積極考慮政府當局的原先建議，即無須在法例條文內訂明私營清盤從業員的準則。這做法已得到香港大律師公會、香港律師會和香港會計師公會的支持。

D. 香港律師會提交的意見書

11. 對於一位委員關注到香港律師會兩份意見書所提出的意見是否前後不一，我們已向該會查詢，其回覆載於附件 B（只有英文文本）。

**財經事務及庫務局
破產管理署
二零零五年三月**

對於在法例內訂明
獲委任為外判破產案件暫行受託人或受託人
的資格準則的提議各方面所提出的意見¹

《 2004 年破產(修訂)條例草案 》

(直至二零零五年三月二日為止)

團體	意見
1. 香港大律師公會	<p>基於下列理由，香港大律師公會認為沒有需要在《破產條例》或附屬法例內訂明私營清盤從業員的最低資格準則：</p> <ol style="list-style-type: none">1. 私營清盤從業員已受《破產條例》的法定管制。請參閱《破產條例》第 82(2)、83 和 84 條。2. 現行的《破產條例》及《公司條例》大致上並沒有就委任處理有償債能力／無償債能力的案件的人士，訂明最低資格準則，因此，並無理由把簡易程序破產案件列入為特別類別。 <p>雖然《公司條例》第 228A 條明文訂定臨時清盤人獲委任的最低資格準則，但大律師公會認為破產管理署根據《破產條例》新訂第 12(1A)條委任臨時清盤人時無須遵循這做法。</p>
2. 香港金融管理局 (金管局)	<p>政府當局的諮詢文件已清楚載述在法例內訂明獲委任的私營清盤從業員的最低資格準則的利弊。另外尚有一項弊端，就是不知訂明有關準則</p>

¹ 這表摘要載述各團體就在法例內列明資格準則的提議所提出的意見。詳情請參閱附錄所載的意見書原文。

團體	意見
	<p>會否抑制清盤服務市場的競爭。</p> <p>至於私營清盤從業員獲委任的最低準則，金管局不擬置評。</p>
<p>3. 公司法改革常務委員會(常委會)</p>	<p>一名常委會委員認為：</p> <ol style="list-style-type: none"> 1. 如只是針對簡易程序破產案件，在法規中明文訂定最低資格，而簡易程序清盤案件卻並無同類條文，則兩者的做法並不一致； 2. 如要訂明最低資格準則，可在附屬法例內訂明；及 3. 委任人選應包括較概括的類別，如「合適和適當」人選。
<p>4. 特許公認會計師公會</p>	<p>特許公認會計師公會對於以《破產條例》附屬法例形式訂明最低資格，沒有異議，並贊成只訂明基本準則，例如是否具備處理破產人資產的專業知識等。</p> <p>不反對仿效簡易程序清盤案外判計劃的做法，在招標合約上訂明詳細準則。</p>
<p>5. 存款公司公會</p>	<p>存款公司公會的會員並沒有就諮詢文件提出意見。</p>
<p>6. 香港銀行公會(銀行公會)</p>	<p>為保持透明度並顧及各有關方面的利益，銀行公會仍相信應以英國的有關條文為藍本，在法例中載明任何獲委任的私營清盤從業員必須為合適和適當人選的規定。</p> <p>銀行公會相信的法例內加入「合適和適當人選」的最低準則應該沒有困難。</p>

團體	意見
	<p>至於委任及終止委任私營清盤從業員的詳細規定，則可在附屬法例或業務守則內訂定。由於銀行公會基於後者較具靈活性及易於作出修訂以配合日後的發展，故認為較為可取。</p>
<p>7. 香港公司秘書公會(公司秘書公會)</p>	<p>公司秘書公會認為不宜在《破產條例》內訂明詳細準則(如取得資格後的工作經驗、處理無力償債案件的工作經驗，以及管理經驗及支援等)。公司秘書公會認為，該等準則應在招標過程中由破產管理署制訂及載於合約文件內，而《破產條例》則應訂明基本準則，即那些專業的成員會獲認可為合資格的私營清盤從業員。</p>
<p>8. 香港律師會</p>	<p>香港律師會的破產法委員會認為，簡易程序公司清盤案件的計劃看來運作良好。在該計劃下，最低資格準則訂明於破產管理署的招標文件上。因此，該會認為沒有理據須就簡易程序個人破產案件更改有關的資格準則或其記錄和應用方式。</p> <p>關於在《破產條例》內訂明最低資格準則的構思：</p> <ol style="list-style-type: none"> 1. 破產管理署標準招標合約的要求，已屬公開資料和具透明度，因此，似乎沒有必要以法定條文另行載述。 2. 法定條文一經訂立，可能會在新的破產管理私營化制度的很早階段窒礙其日後的靈活運作和發展。 3. 香港如有意建立一套新制度以規管無力償債事宜，或許宜以法定形式訂明最低資格和要求。
<p>9. 香港會計師公會(會計師公會)</p>	<p>會計師公會認為，必須明文訂定私營清盤從業員的最低資格，以提高透明度和確保只會委任具合適專業知識的專業人士出任(暫行)受託人。關於</p>

團體	意見
	<p>這方面，會計師公會建議以外判簡易程序清盤案和外判破產案初步訊問程序招標文件所已經採用的最低資格準則為藍本，為私營清盤從業員擬訂若干最低資格準則。</p> <p>一如破產管理署外判簡易程序清盤案件和其他的外判工作的安排，會計師公會亦相信，在招標條款內(即以合約性質而非法例規定形式)訂明最低資格要求應已足夠。一般來說，招標條款會在政府憲報和破產管理署網站所刊登的招標文件上訂明。這做法不但具透明度，並同時較在法例內訂明準則更具彈性。會計師公會亦同意政府當局在文件內所載述的意見，認為在法例納入(暫行)受託人的委任準則會有廣泛影響，故在採取這做法前須予周詳考慮。</p>
10. 均富會計師行 (均富)	<p>均富相信可在法規內加入某些形式的基本專業資格(例如參閱《公司條例》第 228A 條)，而這做法應適用於所有破產案件。不過，均富不支持在法規或附屬法例內訂明詳細資格。法規一旦訂明基本專業資格，其後便應由有關的專業團體透過某些形式的發牌制度或其他方法，又或與破產管理署作出集體及／或個別的合約安排來釐訂所需的詳細資格。</p>

附錄

LC Paper No. CB(1)948/04-05(01)**HONG KONG BAR ASSOCIATION'S****Comments on the Bankruptcy (Amendment) Bill 2004 and the Minimum Qualification
Criteria for Appointment of Provisional Trustees or Trustees for Outsourced
Bankruptcy cases**

1. The Bar is asked to comment on the Bankruptcy (Amendment) Bill 2004 (the "Bill") and the Minimum Qualification Criteria for Appointment of Provisional Trustees or Trustees for Outsourced Bankruptcy cases.

Background

2. The Bankruptcy Ordinance (the "BO") (Cap.6) provides that Official Receiver ("OR") shall become the receiver of the bankrupt's property on the making of a bankruptcy order by the court: section 12. For bankruptcy cases where the value of the bankrupt's property exceeds \$200,000 (i.e. non-summary cases), OR shall summon a meeting of creditors for the purpose of appointing a private-sector insolvency practitioner ("PIP") as the trustee of the bankrupt's property. For cases where the value of the bankrupt's property does not exceed \$200,000 (i.e. summary cases), no meeting of creditors is called and, upon an order made by the court that the case be administered in a summary manner, OR shall automatically be the trustee: section 112A. According to the Legislative Council Brief on the Bill, summary cases of bankruptcy account for over 90% of the total number of cases in 2003 and the Official Receiver's Office ("ORO") had taken up the trusteeship for over 23,000 cases in 2003.

Objectives of the Bill

3. The Bill seeks to amend BO for the following main purposes:
- (a) To empower OR to outsource bankruptcy cases to PIPs in specified circumstances;
 - (b) To provide for the respective powers and duties of OR, a provisional trustee and a trustee;
 - (c) To revise the priority of payment of costs and charges out of a bankrupt's estate as set out in section 37 of BO;
 - (d) To adapt certain provisions of BO to bring them into conformity with the Basic Law and with the status of Hong Kong as a Special Administrative Region of the People's Republic of China.

The outsourcing of summary bankruptcy cases

4. The main proposed statutory provisions are as follows:
- (a) Section 2 introduces a new definition of "provisional trustee" (暫行受託人) (clause 2). Section 12 will be amended to provide that OR shall become the provisional trustee (instead of being called "receiver") on the making of a bankruptcy order. Where he considers that the bankrupt's property is unlikely to exceed \$200,000 in value, OR as the provisional trustee may appoint another person as the provisional trustee in his place under the

new section 12(1A) (clause 3). Section 112A will be amended (clause 42) so that, where the court has made an order for summary administration of a bankrupt's estate, the provisional trustee shall become the trustee thereafter.

- (b) Section 58 will be amended to provide that the bankrupt's property shall, on the making of the bankruptcy order, vest in the provisional trustee who shall, subject to qualifications, be regarded as the trustee for the purposes of the BO (clause 15).

5. For the following reasons, the Bar welcomes the proposal to empower OR to outsource bankruptcy cases to PIPs as set out in clause 12(1A) of the Bill:

- (a) The Bill was obviously introduced at the time when there was a drastic increase in bankruptcy cases. Whilst the number has recently reduced due to the improved economic condition, it is sensible to make provisions to allow ORO to outsource summary bankruptcy cases, particularly given its limited resources;
- (b) The proposed amendments are in line with the provisions of the Companies Ordinance (Cap.32) ("CO") concerning summary cases for liquidation of companies. Under section 194(1A) of the CO, where OR as the provisional liquidator is of the opinion that the property of the company is not likely to exceed in value \$200,000, he may appoint one or more persons as provisional liquidator in his place. In such a case, the court may, under section 227F of the CO, further order that the company be wound up in a summary manner and the provisional liquidator shall be the liquidator and there should be no meetings of creditors or contributories hence forth for the purpose of appointing a liquidator.

The Qualifications of the PIPs

6. The Bill does not set out the minimum qualification criteria of the PIPs to whom the summary bankruptcy cases will be outsourced. According to LC Paper No.CB(1) 054/04-05(02), only PIPs meeting a number of pre-qualification criteria are able to qualify as a tenderer. The PIPs would need to be a member of the specified professional body i.e. Hong Kong Institute of Certified Public Accountants, Law Society of Hong Kong or Hong Kong Institute of Company Secretaries, and should also have a certain number of years of post qualification experience and a minimum number of professional or chargeable hours in respect of insolvency work.
7. For the following reasons, the Bar does not think that the minimum qualifications criteria of the PIP need to be set out in the BO or subsidiary legislation:
 - (a) The PIPs are subject to the statutory control in the BO. See sections 82(2), 83 and 84 of the BO.
 - (b) Currently, the BO and the 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. There is no reason why summary bankruptcy cases should fall into a special category.
8. It is true that there is an exception to the general practice set out above, namely, the appointment of provisional liquidators under section 228A of the CO. 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 as a provisional liquidator who is either a solicitor, or a professional accountant under the Professional Accountants Ordinance (Cap.50). However, as pointed out by Yuen J. (as Yuen JA then was) in *Bank of China (Hong Kong) Ltd. v. Guangdong Water Conservancy & Hydro Power Engineering Development Co., Ltd.*, HCMP 407/2002, unrep., 27/3/2002:

“Section 228A is a special procedure for liquidation when directors of a company have formed the opinion that the company cannot by reason of its liabilities continue its business, and they consider it necessary that the company be wound up and it was not reasonably practicable for the winding-up to be commenced under another section of the Companies Ordinance. It is a unique type of voluntary winding-up, which is not to be confused with members voluntary winding-up or creditors’ voluntary winding-up (see s.233(4) CO)” (emphasis provided).

Further, under section 228A, the provisional liquidator is appointed by the directors whereas under the proposed new section 12(1A), the PIPs are to be appointed by OR.

9. In the circumstances, the Bar does not think the minimum qualification criteria for persons eligible for appointment as a provisional liquidator as expressly set out in section 228A of the CO should be followed in the case of appointment of provisional liquidator by OR under the new section 12(1A) of the BO.

The remuneration of the PIPs

10. The remuneration of the PIPs is governed by new section 85A (clause 17 of the Bill), which provides, inter alia, that the remuneration of a provisional trustee other than OR shall be fixed by OR in accordance with a scale of fees or on such other basis as OR may from time to time approve in writing. Revised section 37

(clause 11 of the Bill) sets out a revised order of priority of costs and charges before the distribution of dividends but after realization of the bankrupt's property. The Bar welcomes the proposed order of priority, which would bring the BO in line with Rule 179 of the Companies (Winding-up) Rules (Chapter 32H), which in turn sets out the order in this regard under liquidation cases.

18th February 2005

[LN:Comments]

Hong Kong Monetary Authority 香港金融管理局



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)

85 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



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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 :-

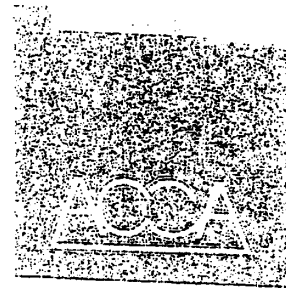
- (i) to single out summary bankruptcy cases for express enactment of minimum qualifications in the statute is incongruous having regard to the fact that there are no such provisions on summary liquidations. There seems to be no point in setting out such requirements if the minimum qualifications include 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



Mr Alan Lo
Financial Services Branch
Financial Services and The Treasury Bureau
Government of the HK SAR
18th 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>

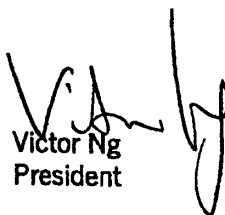
The Association of Chartered Certified Accountants 特許公認會計師公會



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

The DTC Association

(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)

8th February, 2005 (Tue)

Financial Services Branch,
Financial Services and Treasury Bureau,
18th floor, Admiralty Centre Tower 1,
18 Harcourt Road, HONG KONG.

Attn.: Mr Alan Lo,

[Fax: 2865 6778; Pages Faxed: 1]

Dear Mr Lo,

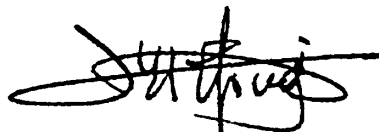
Bankruptcy (Amendment) Bill 2004

Thanks for your letter of 1st 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)
10th-12th floors, Queensway Government Offices,
66 Queensway, HONG KONG.
Fax: 2869 0423
ORO Reference: GA/12/10 III: letter of 9th July, 2002.

Chairman : Cliff Forster 霍榮滔 ☎ : 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



Room 525, 5/F., Prince's Building, Central, Hong Kong
Telephone: 2521 1160, 2521 1169 Facsimile: 2868 5035
Email: info@hkab.org.hk Web: www.hkab.org.hk

香港中環太子大廈5樓525室
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電郵：info@hkab.org.hk 網址：www.hkab.org.hk

16 February 2005

Mr. Alan Lo
Financial Services and the Treasury Bureau
18th Floor, Admiralty Centre, Tower 1
18 Harcourt Road
Hong Kong

Dear Mr Lo

Bankruptcy (Amendment) Bill 2004

We refer to your letter dated 1 February 2005 and your kind permission for us to revert with our comments by 16 February 2005.

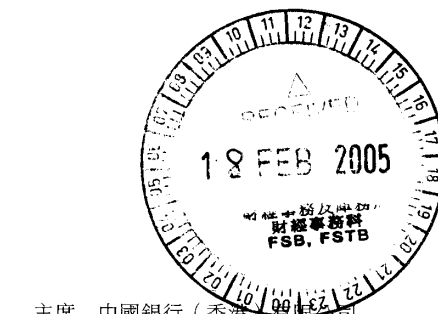
For the sake of transparency and in the interests of all stakeholders, we continue to believe that the legislation should contain a requirement that any private sector insolvency practitioner (PIP) appointed by the Official Receiver is fit and proper, modelling on the approach adopted in the U.K. Insolvency Act 1986 (specifically sections 394-398).

Since Hong Kong does not have a professional organisation for insolvency practitioners, it may be difficult to set out detailed criteria on practical training and experience for PIPs. We believe, however, that it should not be difficult to include in the legislation the minimum fit and proper criteria, ranging from his personal integrity, financial strength and history of a law-abiding citizen to the adequacy of the systems of control and record-keeping in his business practice. The detailed requirements relating to appointment and termination of PIPs can be laid down in the subsidiary legislation or a code of practice. A code of practice is preferred in terms of flexibility and ease of revision to take into account future developments. This code could also set out the minimum service standards to be observed by PIPs. We would be grateful for the opportunity to comment on the draft subsidiary legislation or the code of practice as may be set out in the proposed amendment to the Ordinance.

Yours sincerely


Eva Wong
Secretary

Chairman Bank of China (Hong Kong) Ltd
Vice Chairmen Standard Chartered Bank (Hong Kong) Ltd
The Hongkong and Shanghai Banking Corporation Ltd
Secretary Eva Wong Mei Seong



主席 中國銀行（香港）有限公司
副主席 渣打銀行（香港）有限公司
香港上海匯豐銀行有限公司
秘書 黃美嫦



THE HONG KONG INSTITUTE OF COMPANY SECRETARIES
香港公司秘書公會

Financial Services Branch
 Financial Services and the Treasury Bureau
 The Government of the HKSAR
 18th Floor
 Admiralty Centre Tower 1
 18 Harcourt Road
 Hong Kong
 (Your Ref: C3/17(04))

Attention: Mr Alan Lo

23 February 2005

Dear Sir,

Bankruptcy (Amendment) Bill 2004

Thank you for your letter dated 1st February 2005 inviting the Institute to make further comments in relation to the matters discussed in the meeting of the Bills Committee on 11th January 2005.

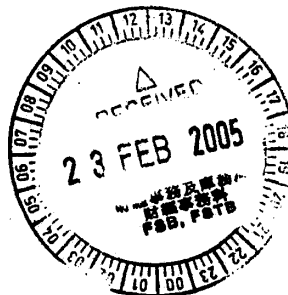
First, the Institute would like to confirm that our members are trained a broad range of legal and accountancy management subjects and are also required to address insolvency issues in the Institute's business law (covering bankruptcy cases), corporate law and company secretarial practice examinations (covering winding-up cases). In addition, a number of our members in particular are working in insolvency field in senior positions with accountant firms or legal firms. Hence, for those members who have sufficient working experience in the insolvency area, they are well qualified to take up bankruptcy cases.

As in winding up cases, practical working experience is crucial to ensure that any outsourcing summary bankruptcy cases to private-sector insolvency practitioners (PIPs) are conducted professionally. That said, we do not consider it appropriate to set out in the Ordinance the detailed criteria, such as post-qualification experience, insolvency work experience and managerial experience and support etc. Such criteria we believe are best left to be formulated and set out by the Official Receiver's Office in the contractual documents during the tender process, whereas the Ordinance should set out the fundamental criteria i.e. which professions would be recognized as qualified PIPs. This approach would preserve quality control of PIPs whilst maintain the flexibility to adapt or modify more conveniently in regard to possible changes in future.

Yours faithfully,

Neil McNamara
 President

c.c. Mr E T O'Connell, The Official Receiver



The Hong Kong Institute of Company Secretaries
 (Incorporated with limited liability)

The Institute of Chartered Secretaries and Administrators

3/F, Hong Kong Diamond Exchange Building, 8 Duddell Street, Central, Hong Kong
 香港中環德輔道中8號香港鑽石大廈3樓

Website: <http://www.hkics.org.hk>

香港公司秘書公會

(以有限責任形式成立)

特許秘書及行政人員公會

Te: 電話: 2881 6177 Fax 圖文傳真: 2881 5050

E-Mail: ask@hkics.org.hk





THE
LAW SOCIETY
OF HONG KONG
香港律師會

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

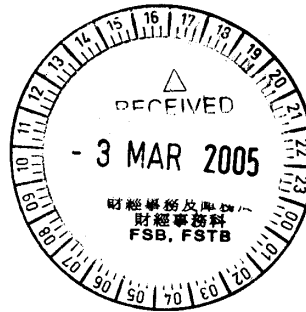
that context, the identification of criteria for membership of the professional group would occur only after a full public examination and debate about what was appropriate and necessary in the public interest to ensure that insolvency were adequately administered. However to be doing this within the 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



Hong Kong Institute of
Certified Public Accountants
香港會計師公會



BY FAX AND BY POST
(2865 6778)

Your Ref.: C3/17(04)
Our Ref.: C/IPC, M33457

3 March 2005

Mr. Alan Lo,
Financial Services Branch,
The Financial Services and the Treasury Bureau,
18th Floor, Admiralty Centre, Tower 1,
18 Harcourt Road, Hong Kong.

Dear Mr. Lo,

Bankruptcy (Amendment) Bill 2004

I am replying to your letter dated 1 February 2005 requesting comments on whether some form of minimum qualifications should be set out for private sector insolvency practitioners ("PIPs") to be appointed as (provisional) trustees in summary bankruptcy cases, and if so, what such minimum qualifications should be, and whether they should be set out in the statute. The comments of the Hong Kong Institute of Certified Public Accountants ("HKICPA"/"Institute") are set out below.

The Institute's submission on the Bankruptcy (Amendment) Bill 2004, dated 10 December 2004, stated that, amongst other things, the proposed framework under which the Official Receiver ("OR") is to outsource summary bankruptcy cases to PIPs should ensure that only those who are adequately qualified and experienced to act as (provisional) trustees would be appointed as such.

The Institute believes that express minimum qualifications for PIPs are required to enhance transparency and to ensure that only professionals with appropriate expertise are appointed to act as (provisional) trustees. In this regard, we suggest certain minimum qualification requirements be drawn up based on those already adopted in the tenders for outsourcing summary liquidation cases and outsourcing the preliminary examination in bankruptcy. Some suggested criteria for an applicant firm, modelled on the existing requirements, would be:

- (i) A firm must have at least two partners or directors who are "Recognised Professionals", one of whom must be a Professional Person", i.e.,
- a certified public accountant who is a member of the Hong Kong Institute of Certified Public Accountants; or
 - a solicitor who is a member of the Law Society of Hong Kong; or
 - a company secretary who is a member of the Hong Kong Institute of Company Secretaries; and having
 - at least 3 years of post-qualification experience; and

- 1 -



Hong Kong Institute of
Certified Public Accountants
香港會計師公會

- a minimum of 300 qualifying chargeable hours relating to "relevant insolvency work" over the past 3 years.

"Relevant insolvency work" would include bankruptcies, individual voluntary arrangements, insolvent liquidations and receiverships.

- The "relevant insolvency work" must have been performed in the course of a minimum of four separate administrations.

- (ii) A firm should have a minimum of two appointment-takers, who should be partners or directors, at least one of whom should be a Professional Person.

We also consider that, in considering the experience and qualifications of Professional Persons, some recognition should continue be given to relevant insolvency training courses, such as the HKICPA's Diploma in Insolvency, which covers all aspects of insolvency work, including bankruptcy and individual voluntary arrangements.

The Institute is of the view that the inclusion of item (d) in paragraph 12 of the Administration's paper, that is, "a person who in the opinion of the OR is fit and proper for the appointment" would provide a reasonable means for the OR to retain a discretion to allow the appointment of other suitable persons, on a case by case basis. It would not be practicable to specify an exhaustive list of such persons, who might be experienced specialists, adequately regulated overseas-qualified professionals, etc.

The Institute believes that, in line with the outsourcing arrangements for summary liquidation cases and other outsourcing conducted by the ORO, it would be sufficient for the time being for the minimum qualification requirements to be contained in the tender terms, i.e., to be contractual in nature, rather than statutory requirements. These terms of the tender are ordinarily stated in the invitation to tender, which appears in the Government Gazette and on the ORO website. In this way they are transparent and, at the same time, potentially, more flexible than criteria codified in legislation. We would also agree with the view expressed in the Administration's paper that incorporating the criteria for appointment as (provisional) trustee in legislation would have broader implications that ought to be examined fully before any such step is considered in this particular case.

I hope that you find our comments to be constructive. If you have any questions in respect of our comments, please feel free to contact Mr. Peter Tisman, Director, Faculties & Advocacy, at the Institute, on 2287 7084.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Winnie', with a stylized flourish at the end.

WINNIE C.W. CHEUNG
CHIEF EXECUTIVE & REGISTRAR

WCC/PMT/ay

Your ref: C3/17(04)
Our ref: ACWT/mm/ofc

2 March 2005

Private & Confidential

Financial Services Branch
Financial Services and The Treasury Bureau
Government of The Hong Kong
Special Administrative Region
18/F, Admiralty Centre Tower 1
18 Harcourt Road
Hong Kong

Attn: Mr Alan Lo

Dear Sirs

Re: Bankruptcy (Amendment) Bill 2004

Thank you for your letter of 1 February 2005.

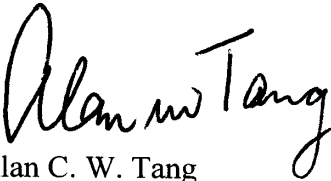
We are in support of the proposal to ensure that only suitably qualified PIPs are appointed provisional trustees or trustees. However, the same requirements should apply to all bankruptcy cases. Whilst it may be true that the vast majority of the "summary" cases tend to be relatively straightforward, it is the ability to discern the odd cases amongst the hundreds which require substantial investigation but which otherwise might have "slipped by" if not for the experience and expertise of the PIP in question. We gave a live example in this regard in our previous submission. It is imperative to note the background of the bankrupt in even "debtor-petition" summary cases, as there is nothing to prevent the major shareholder and former CEO of a failed listed company to file for his or her own bankruptcy.

As regards the qualification required of a PIP, we believe that some form of basic professional qualifications may be included in statute (e.g. see S228A of the Companies Ordinance) - and we reiterate this should apply to all bankruptcy cases. We are not in support of having detailed qualifications set out in statute, or even in subsidiary legislation. As long as the basic professional qualifications are stated in statute, it will then be up to the professional bodies concerned, through some form of licensing or otherwise and / or collective and / or individual contractual arrangements with the Official Receiver's Office ("ORO") to determine the detailed qualifications required.

- 2 -

We welcome the proposed inclusion of professional accountants and solicitors to be considered as suitable candidates to act as provisional trustees or trustees. We also welcome the flexibility given to the ORO to nominate a person "fit for the job" on a case by case basis.

Yours faithfully


Alan C. W. Tang

c.c. ORO - Mr. Eamonn O'Connell

香港律師會的回覆
〔 只有英文文本 〕

Dear Mr Lo,

I refer to the queries in your email dated 25 February 2005.

The Law Society's submission dated 5 January 2005 dealt with the issue of whether solicitors would be likely to undertake the office of trustee if summary bankruptcy cases were contracted out to the private sector. The final paragraph of this submission suggested that a panel system should be established to administer this function, similar to that in operation in the case of summary liquidations.

We understand a member of the Bills Committee has suggested that this point may be inconsistent with comments in paragraph 3 of the Law Society's submission dated 8 February 2005 which refers to minimum qualification criteria for any bankruptcy panel system being recorded in the ORO tender documents rather than the substantive bankruptcy legislation.

There are two distinct issues. The first is whether such a panel system should be established for bankruptcy cases. If it is, it will be necessary to decide whether the qualification criteria should be recorded in the ORO tender documents (as with the panel system for company liquidations) or become part of the Bankruptcy Ordinance. For the reasons recorded in our latest submission, we favour the former rather than the latter approach.

We do not consider that the comments in the two submissions are inconsistent.

I confirm that the Law Society does not have any objection to these comments being released to members of the Bills Committee.

Regards
Joyce Wong
Director of Practitioners Affairs
The Law Society of Hong Kong