

立法會
Legislative Council

LC Paper No. CB(1)2130/04-05
(These minutes have been seen
by the Administration)

Ref : CB1/BC/2/04

Bills Committee on Bankruptcy (Amendment) Bill 2004

**Minutes of the tenth meeting held on
Thursday, 26 May 2005, at 8:30 am
in Conference Room A of the Legislative Council Building**

- Members present** : Hon TAM Heung-man (Chairman)
Hon Albert HO Chun-yan
Hon Miriam LAU Kin-yee, GBS, JP
Hon Audrey EU Yuet-mee, SC, JP
Hon LI Kwok-ying, MH
Hon Ronny TONG Ka-wah, SC
Hon KWONG Chi-kin
- Members absent** : Dr Hon LUI Ming-wah, JP
Hon CHAN Kam-lam, JP
- Public officers attending** : Miss Emma LAU
Deputy Secretary for Financial Services and the Treasury
(Financial Services)
- Mr Alan LO
Principal Assistant Secretary for Financial Services and
the Treasury (Financial Services)
- Mr Arthur AU
Assistant Secretary for Financial Services and the Treasury
(Financial Services)

Mr E T O'Connell
Official Receiver

Ms May LEE
Assistant Official Receiver

Ms Vicki LEE
Senior Government Counsel
Department of Justice

Clerk in attendance : Miss Salumi CHAN
Chief Council Secretary (1)5

Staff in attendance : Mr KAU Kin-wah
Assistant Legal Adviser 6

Ms Connie SZETO
Senior Council Secretary (1)4

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- I. Confirmation of minutes of meeting**
(LC Paper No. CB(1)1623/04-05 — Minutes of eighth meeting held on 10 May 2005)

The minutes of the meeting held on 10 May 2005 were confirmed.

- II. Meeting with the Administration**
(LC Paper No. CB(1)1564/04-05(01) — “Follow-up to the eighth meeting on 10 May 2005” prepared by the Legislative Council Secretariat
- LC Paper No. CB(1)1624/04-05(01) — “Follow-up to the ninth meeting on 20 May 2005” prepared by the Legislative Council Secretariat
- LC Paper No. CB(1)1624/04-05(02) — Paper provided by the Administration on “Responses to list of follow-up actions for the eighth and ninth meetings on 10 and 20 May 2005”

- LC Paper No. CB(1)1060/04-05(02) — Paper provided by the Administration on “Responses to list of follow-up actions for the fourth meeting on 21 February 2005”
- LC Paper No. CB(3)42/04-05 — The Bill
- LC Paper No. CB(1)137/04-05(01) — Marked-up copy of the Bankruptcy (Amendment) Bill 2004
- LC Paper No. CB(1)1165/04-05(04) — “Summary of issues of concern on individual clauses of the Bill (Position as at 29 March 2005)” prepared by the Legislative Council Secretariat
- LC Paper No. CB(1)1281/04-05(03) — Administration’s response to the submission dated 1 April 2005 from the Hong Kong Institute of Certified Public Accountants
- Annex to LC Paper No. — Paper provided by the Administration on “Responses to list of follow-up actions for the eighth and ninth meetings on 10 and 20 May 2005”
CB(1)1624/04-05(02)

2. The Bills Committee deliberated (Index of proceedings attached at **Appendix**).

Follow-up actions to be taken by the Administration

3. At the request of the Bills Committee, the Administration agreed to take the following actions:

- (a) Basic qualification criteria for appointment as provisional trustees for summary bankruptcy cases
Members noted the Administration’s policy intent that the “reasonable conditions” which the Official Receiver (OR) might impose on a person for appointment as a provisional trustee were those conditions to be set out in the tender document for outsourcing summary bankruptcy cases, including the conditions that the person should have a certain number of years of post-qualification experience and a minimum number of

professional or chargeable hours in respect of insolvency work. To address members' concern that the drafting of section (b) of the proposed new Schedule 3 to the Bankruptcy Ordinance (BO) did not reflect this policy intent, the Administration undertook to consider the suggestion for the Secretary for Financial Services and the Treasury to state such policy intent in his speech when the Second Reading debate on the Bill was resumed;

(b) Long title and clause 11 – proposed section 37(1) of the Bankruptcy Ordinance

The Administration was requested to take the following actions and report its response to the Bills Committee at the next meeting on 3 June 2005 -

- (i) Given that bankruptcy cases and company winding-up cases were different in nature, the Administration was requested to review its original proposal of bringing the order of priority of payment of costs and charges out of a bankrupt's estate as set out in section 37 of BO in line with rule 179(1) of the Companies (Winding-up) Rules (Cap. 32, sub. leg. H);
- (ii) In connection with item (i) above, the Administration was requested to consider members' suggestion of elevating the priority of payment of the necessary disbursements, costs and remuneration of the private-sector insolvency practitioners (PIPs) for summary bankruptcy cases. A suggested option was to incorporate the proposed subsections (1)(f), (g) and (h) of section 37 in subsection (1)(a); and
- (iii) In connection with items (i) and (ii) above, given that the long title provided that one of the objects of the Bill was "to bring section 37 in line with rule 179(1) of the Companies (Winding-up) Rules", the Administration was requested to consider the need for amending the long title as a result of the proposed amendments to section 37 of BO to ensure that the proposed amendments were consistent with the long title.

(c) Monitoring of PIPs' work

The Administration was requested to note a member's view that in carrying out audit checks on PIPs' work in outsourced summary bankruptcy cases, the OR should strike a proper balance between the need to ensure the quality of PIPs' work and avoid creating undue burden on PIPs.

(d) Updated draft proposed Committee Stage amendments (CSAs) to the Bill

The Administration undertook to provide the Bills Committee with the bilingual version of a full set of the updated draft proposed CSAs to the

Bill.

(Post-meeting note: The Administration's written response was circulated to members via LC Paper Nos. CB(1)1689/04-05(02) and (03) on 1 and 2 June 2005 respectively.)

Work progress

4. The Bills Committee completed clause-by-clause examination of the English text of the Bill. The Chairman invited the Administration to provide as early as possible a full set of the updated draft proposed CSAs to the Bill. The Chairman also invited Assistant Legal Adviser 6 to examine the Chinese text of the Bill and the draft CSAs to ensure consistency with the English text.

Date of next meeting

5. The Chairman reminded members that the next meeting would be held on Friday, 3 June 2005, at 3:30 pm.

(Post-meeting note: The meeting on 3 June 2005 was subsequently cancelled in anticipation of the absence of a quorum. The meeting was re-scheduled for 9 June 2005 at 8:30 am.)

III. Any other business

6. There being no other business, the meeting ended at 10:35 am.

Council Business Division 1
Legislative Council Secretariat
25 July 2005

**Proceedings of the tenth meeting of the
Bills Committee on Bankruptcy (Amendment) Bill 2004
on Thursday, 26 May 2005, at 8:30 am
in Conference Room A of the Legislative Council Building**

| Time marker | Speaker | Subject(s) | Action Required |
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| 000000-000317 | Chairman | Confirmation of minutes of meeting on 10 May 2005 (LC Paper No. CB(1)1623/04-05) | |
| 000318-002441 | Administration Chairman Ms Miriam LAU Ms Audrey EU Assistant Legal Adviser 6 (ALA6) | <p><u>Detailed proposals for setting out in subsidiary legislation the basic criteria for appointment as provisional trustees for summary bankruptcy cases</u> (Paragraph 1 of and Annex to LC Paper No. CB(1)1624/04-05(02))</p> <p>(a) Briefing by the Administration on:</p> <p style="padding-left: 40px;">(i) its proposal to add the new Schedule 3 to the Bankruptcy Ordinance (BO) to set out the basic qualification criteria for appointment as provisional trustees; and</p> <p style="padding-left: 40px;">(ii) the draft proposed Committee Stage amendments (CSAs) to subsections (1A) and (1C) of section 12 of BO</p> <p>(b) Administration's advice that:</p> <p style="padding-left: 40px;">(i) the policy intent was that</p> | |

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| | | <p>the “reasonable conditions” which the Official Receiver (OR) might impose on a person for appointment as a provisional trustee referred to in section (b) of the proposed new Schedule 3 were those conditions to be set out in the tender document for outsourcing summary bankruptcy cases; and</p> <p>(ii) the “reasonable conditions” were accessible to the public</p> <p>(c) Concern that the drafting of section (b) of the proposed new Schedule 3 did not reflect the policy intent in item (b)(i) above and the OR might impose other conditions</p> <p>(d) Suggestion for the Administration to spell out the policy intent in item (b)(i) above in the proposed new Schedule 3</p> <p>(e) Administration’s advice that it was inappropriate to spell out the policy intent in the legislation</p> <p>(f) Administration’s undertaking to consider the suggestion for the Secretary for Financial Services and the Treasury (SFST) to state the policy</p> | <p>Administration to take action under paragraph 3(a) of the minutes</p> |

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| | | intent in his speech when the Second Reading debate on the Bill was resumed | |
| 002442-002618 | Chairman Administration | <p><u>Reasonable conditions which the OR might impose on a provisional trustee</u></p> <p>Administration's advice that:</p> <p>(a) the reasonable conditions which the OR might impose on a provisional trustee would be modelled on those adopted in the existing tendering scheme for outsourcing summary liquidation cases; and</p> <p>(b) such conditions included that the person should have a certain number of years of post-qualification experience and a minimum number of professional or chargeable hours in respect of insolvency work, and adequate resources for handling outsourced cases</p> | |
| 002619-002732 | ALA6 Administration Chairman | <p><u>Means by which the public could access to the conditions that the OR might impose on a provisional trustee</u></p> <p>Administration's advice that the conditions would be put on the Official Receiver's Office (ORO)'s website, and hard copies would be disseminated to the relevant professional bodies and available in ORO</p> | |

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| 002733-003239 | Chairman Administration | <p><u>Basic criteria for appointment as provisional trustees for summary bankruptcy cases</u></p> <p>(a) Basic criteria suggested by the Association of Chartered Certified Accountants (ACCA), such as expertise in handling a bankrupt's assets and free from conflict of interest with the bankrupt (LC Paper No. CB(1)1060/04-05(02))</p> <p>(b) Administration's advice that:</p> <p>(i) professional qualification and minimum experience in insolvency work would be conditions which the OR might impose on a provisional trustee; and</p> <p>(ii) private-sector insolvency practitioners (PIPs) were officer of the court and were required to comply with relevant provisions of BO and the code of conduct of their profession in undertaking their duties, including those relating to avoidance of conflict of interest</p> <p>(c) Basic criterion of "fit and proper", which was modelled on the relevant provisions of the UK Insolvency Act 1986,</p> | |

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| | | <p>suggested by the Hong Kong Association of Banks</p> <p>(d) Administration’s advice that given that the basic criterion of “fit and proper” was related to the licensing system for PIPs in the UK and Australia and there was no plan to implement such a system in Hong Kong, it was not appropriate to stipulate the criterion in the legislation</p> | |
| 003240-012949 | <p>Chairman Administration Ms Miriam LAU Mr Ronny TONG Mr KWONG Chi-kin Clerk Mr Albert HO</p> | <p><u>Clause 11 – proposed section 37(1) of BO</u> (Paragraphs 2 to 12 of LC Paper No. CB(1)1624/04-05(02))</p> <p>(a) Briefing by the Administration on its responses to address concerns about the proposed arrangement to accord the remuneration and disbursements of PIPs almost the lowest priority for payment (proposed subsections (1)(f), (g) and (h) of section 37), as follows:</p> <p>(i) The order of priority in the proposed section 37(1) was in line with rule 179(1) of the Companies (Winding-up) Rules for payments in liquidation cases;</p> <p>(ii) The proposed order of priority was made with recognition of ORO’s</p> | |

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| | | <p>multiple roles and duties under BO;</p> <p>(iii) As some of the costs and charges referred to in the proposed section 37(1)(a) to (e) would unlikely arise in a typical outsourced case, the disbursements and remuneration of the PIP appointed to handle the case would likely rank next in line to ORO's fees and charges;</p> <p>(iv) It was up to PIPs to decide whether to participate in the tendering scheme for outsourcing summary bankruptcy cases, and they would take into account the proposed section 37(1) in determining their tender price; and</p> <p>(v) The order of priority in the proposed section 37(1) was subject to any order of the court, and if PIPs considered that the expenses incurred by ORO in an outsourced case unreasonable, he might seek an order of the court</p> <p>(b) Concern that the proposed arrangement to accord the remuneration and disbursements of PIPs almost</p> | |

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| | | <p>the lowest priority for payment would adversely affect the quality of service of PIPs</p> <p>(c) Suggestion of elevating the priority of payment of PIPs' necessary disbursements, costs and remuneration in handling summary bankruptcy cases</p> <p>(d) Administration's advice that:</p> <p>(i) there were statutory and non-statutory measures to monitor the performance of PIPs and ensure their quality of service in outsourced bankruptcy cases; and</p> <p>(ii) ORO would strengthen its efforts in conducting audit checks on outsourced cases and improving the monitoring regime of PIPs' work</p> <p>(e) Members' view that as bankruptcy cases and company winding-up cases were different in nature, it was inappropriate to bring the order of priority in the proposed section 37(1) of BO in line with that in rule 179 of the Companies (Winding-up) Rules</p> <p>(f) Request for the Administration to review its original proposal in item (e) above</p> | <p>Administration to take action under paragraph 3(b)(i) of</p> |

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| | | <p>(g) Concern that PIPs could not recover their necessary disbursements and costs from the balance of the debtor-deposit</p> <p>(h) A member's view that in carrying out audit checks on PIPs' work in outsourced summary bankruptcy cases, the OR should strike a proper balance between the need to ensure the quality of PIPs' work and avoid creating undue burden on PIPs</p> <p>(i) Request for the Administration to take the following actions and report its response to the Bills Committee at the next meeting on 3 June 2005:</p> <p>(i) To review its original proposal of bringing the order of priority of payment of costs and charges out of a bankrupt's estate as set out in section 37 of the BO in line with rule 179(1) of the Companies (Winding-up) Rules;</p> <p>(ii) To consider elevating the priority of payment of PIPs' necessary disbursements, costs and remuneration in handling summary bankruptcy cases; and</p> | <p>the minutes</p> <p>Administration to note the view under paragraph 3(c) of the minutes</p> <p>Administration to take action under paragraph 3(b)(i) and (ii) of the minutes</p> |

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| | | <p>(iii) To incorporate the proposed subsection (1)(f), (g) and (h) of section 37 in subsection (1)(a)</p> | |
| 012950-013809 | Chairman Administration Clerk | <p><u>Briefing by the Administration on its responses to the following issues raised at the meetings on 10 and 20 May 2005</u></p> <p>(a) Suggestion to regard PIPs as persons employed by ORO so that PIPs' remuneration and expenses would be included as costs incurred by ORO under the proposed section 37(1)(a) of BO (Paragraphs 13 to 14 of LC Paper No. CB(1)1624/04-05(02))</p> <p>(b) Suggestion of setting it out clearly that "remuneration of, fees, commissions, percentages and charges payable to" the OR referred to in proposed section 37(1)(a) meant those fees, charges and percentages set out in the Bankruptcy (Fees and Percentages) Order (Paragraph 15 and Annex to LC Paper No. CB(1)1624/04-05(02))</p> <p>(Note: Members agreed to examine the draft proposed CSA to section 37(1)(a) at the next meeting on 3 June 2005</p> | |

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| | | <p>together with other possible amendments to the section)</p> <p>(c) The English and Chinese texts of the proposed section 37(1)(a) (Paragraph 16 of LC Paper No. CB(1)1624/04-05(02))</p> <p>(d) Cost incurred for the employment by the OR of an external party to look into suspected malpractices of a PIP in handling outsourced cases (Paragraphs 17 and 18 of LC Paper No. CB(1)1624/04-05(02))</p> <p>(e) Whether the Chinese expression “行為操守” accurately reflected the meaning of the word “conduct” in the proposed new section 86A of BO (Paragraphs 19 and 20 of LC Paper No. CB(1)1624/04-05(02))</p> | |
| 013810-013924 | Chairman Administration | <p><u>Proposed CSAs to the new subsections (1) and (1A) of section 80 of BO (clause 24), and the new section 86A(2)(b) of BO (clause 28)</u> (Paragraph 22 (c) and (d) of and Annex to LC Paper No. CB(1)1624/04-05(02))</p> <p>(a) Briefing by the Administration on the draft proposed CSAs</p> | |

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| | | (b) Members' agreement with the draft proposed CSAs | |
| 013925-015609 | Chairman Ms Miriam LAU Administration | <p><u>Clause-by-clause examination of the Bill</u> (LC Paper Nos. CB(3)42/04-05, CB(1)137/04-05(01), CB(1)1165/04-05(04), Annex to CB(1)1624/04-05(02))</p> <p><u>Clauses 35 to 48</u></p> <p>(a) Briefing by the Administration on clauses 35 to 48</p> <p>(b) Members' agreement with the draft proposed CSAs to clause 36 (section 98(2) of BO) and clause 47 (consequential amendments)</p> <p>(c) Briefing by the Administration on its response to comments made by ACCA on clause 42 (LC Paper No. CB(1)1165/04-05(04))</p> | |
| 015610-015859 | Chairman Administration Ms Miriam LAU ALA6 | <p><u>Long title of the Bill</u></p> <p>(a) Briefing by the Administration on the long title</p> <p>(b) Given that the long title provided that one of the objects of the Bill was "to bring section 37 in line with rule 179(1) of the Companies (Winding-up) Rules", the Administration was requested to consider the need for amending the long title as a result of the proposed</p> | Administration to take action under paragraph 3(b)(iii) of the minutes |

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| | | amendments to section 37 of BO to ensure consistency between the proposed amendments and the long title | |
| 015900-015951 | Ms Miriam LAU Administration Chairman | <u>Commencement date of the Bill</u> (a) Administration's advice that: (i) if the Bill was passed by LegCo within the current session, it was envisaged that the amended Ordinance would be effective by the end of 2005; (ii) the amended Ordinance would come into operation on a day to be appointed by SFST; and (iii) the Commencement Notice of the amended Ordinance would be a subsidiary legislation subject to negative vetting by LegCo | |
| 015952-020112 | Chairman Administration Ms Miriam LAU Clerk | <u>Chinese text of the Bill and the draft proposed CSAs</u> Request for the Administration to provide the Bills Committee with the bilingual version of a full set of the updated draft proposed CSAs to the Bill <u>Date of next meeting</u> | Administration to take action under paragraph 3(d) of the minutes |

Legislative Council Secretariat
25 July 2005