

**Bills Committee on Bankruptcy (Amendment) Bill 2004**  
**Third meeting on 11 January 2005**

**Responses to List of Follow-up Actions**

**Introduction**

This paper sets out the responses to the list of the follow-up actions arising from the discussion at the Bills Committee meeting on 11 January 2005.

**A. *Feasibility of capping the fees and expenses incurred by the Official Receiver's Office (ORO) for each summary bankruptcy case, and contingency plan in the event that the total amount of the fees and expenses exceeds the debtor-deposit***

2. First, it should be born in mind that, in the great majority of self-petition bankruptcy cases, the bankrupts have very limited assets and income, or no assets and no income at all. Given the profile of the bankrupts, it is estimated that the fees and expenses to be incurred by the ORO would amount to \$2,000 to \$3,000<sup>1</sup>, and the chance of great fluctuation is very remote. A balance in the range of \$5,650 (\$8,650 - \$3,000) to \$6,650 (\$8,650 - \$2,000), plus any further net asset realized from the bankrupt and any net contribution made by him/her during the bankruptcy period, would therefore be available to cover the disbursements, relevant costs and the remuneration of the private sector insolvency practitioners (PIPs). It is extremely unlikely that the total amount of the fees and expenses incurred by ORO would exceed the deposit of \$8,650. Indeed, as far as we can trace so far, there are no such cases happening in the past 10 years.

3. In the very unlikely event that the balance of deposit, i.e. deposit paid by the petitioner deducted by the relevant fees and expenses incurred by the ORO, is less than the likely amount of disbursements plus the remuneration tendered by the PIPs, the ORO will **not** outsource the case. Instead, the ORO will handle the case in-house or try to convene a creditors' meeting for the appointment of a trustee.

4. In view of paragraphs 2 and 3 above, it is considered neither necessary nor appropriate to consider revising the existing arrangement

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<sup>1</sup> For details, see paragraphs 1 to 5 of [Appendix 1](#), which are extracted from Annex B to our "Responses to the List of follow-up actions by the Administration at the second meeting" issued on 7 January 2005.

under Rule 52 of the Bankruptcy Rules. The Rule provides that the fees and expenses incurred by the ORO shall be paid from the deposit made by the petitioner, and that the ORO is not at liberty to cap the fees and expenses.

5. Furthermore, it is worth noting that it would be at the discretion of PIPs as to whether they would participate in the tendering exercise or not, taking into account the proposed arrangements (including no capping) and their business considerations.

***B. Likely costs, charges and other expenses to be incurred by PIPs in handling summary bankruptcy cases, and how the costs, charges and expenses will be met in the event that the debtor's estate is insufficient to cover them***

6. The total amount of disbursements of a PIP depends on the circumstances of a specific case. On average, it is estimated to be between \$900 and \$1,500 (see paragraph 6 of [Appendix 1](#)). It is very unlikely that the disbursements of a PIP would not be met by the balance of a debtor's estate after deducting the fees and expenses incurred by the ORO. As mentioned in paragraph 2 above, the balance is estimated to be in the range of \$5,650 to \$6,650, plus any further net asset realized from the bankrupt and any net contribution made by him during the bankruptcy period. This is well above the estimated amount of disbursements of \$900 to \$1,500.

7. Appendix 1 sets out in detail the amount available in a typical summary bankruptcy case for payments for the costs of persons properly employed by the PIP and the PIP's remuneration, even without additional asset realized and without income contribution made by the bankrupt. The estimated amount is between \$4,150 and \$5,750. With this amount, together with the relatively straight-forward nature of the administration of summary bankruptcy cases, and that summary bankruptcy cases would be outsourced in batches so as to achieve economies of scale, we believe that there would be sufficient interest from PIPs in tendering. In any case, the proposed Bill aims to give the ORO an option (not an obligation) to outsource summary bankruptcy cases. PIPs are also free to decide whether or not to participate in the tendering exercise, taking into account the relevant arrangements and their own business considerations.

***C. (i) The range of costs, charges and other expenses incurred by PIPs, and the range of remuneration for the PIPs concerned, in handling the outsourced summary liquidation cases under the existing outsourcing scheme***

8. The ORO does not keep statistics on the costs, charges and other expenses incurred by PIPs, and the remuneration for the PIPs concerned in outsourced liquidation cases. To address Members' request, the ORO has conducted a survey with the use of a randomly selected sample and is in the course of compiling the data collected. We aim to report to the Members on the findings at the 5<sup>th</sup> Bills Committee meeting.

*(ii) In the best case scenario where ORO is able to minimize the amount of its fees and expenses, such as by consolidating the publication of several orders in one notice in the Gazette and consolidating the publication of several orders in one advertisement in a newspaper, the amount of remuneration for the PIP concerned in handling the outsourced summary liquidation cases under the existing outsourcing scheme*

9. There is a difference between the proposed outsourcing of summary bankruptcy cases and the existing outsourcing of summary liquidation cases by the ORO. For the former, only debtor petition cases are intended to be outsourced. The fees and expenses incurred by the ORO would be deducted from the petitioner (i.e. debtor)'s deposit pursuant to Rule 52 of the Bankruptcy Rules, and the balance of deposit would then be used for payments including the remuneration for the PIP appointed in accordance the priority set out in section 37 of the Bankruptcy Ordinance. Details are set out in Appendix 1.

10. On the other hand, summary liquidation cases outsourced by the ORO are generally creditor-petition cases. The deposit made by the creditor, after deduction of the fees and expenses incurred by the ORO, will be accounted to the petitioning creditor pursuant with Rule 22A of the Companies (Winding-up) Rules. The balance of the deposit will **not** be available for payments such as the remuneration of the PIP appointed as liquidator. Thus, there is generally no direct relationship between the amount of the fees and expenses incurred by the ORO and the amount available for payment of the remuneration of the PIP. The costs of persons employed by the PIP as well as the PIP's remuneration are paid out of the assets realized in the liquidation, or where there are insufficient assets, from the price of the ORO's tender.

*D. In respect of the existing scheme for outsourcing summary liquidation cases, number of PIPs/firms which have submitted bids and number of PIPs/firms awarded the contracts in each tender, with a breakdown by solicitors' firms, accountants' firms and company secretaries, etc. and a*

*breakdown by the scale of the firms concerned*

11. The required information in respect of the five tenders of the ORO for outsourcing summary liquidation cases is at Appendix 2.

*E. The suggestion of setting out in the legislation the qualification criteria for appointment as provisional trustees or trustees for summary bankruptcy cases*

12. We have given further consideration to the suggestion of setting out in the legislation the minimum qualification criteria for appointment as provisional trustees or trustees for summary bankruptcy cases. As we pointed out at the Bills Committee meeting held on 11 January 2005, we believe that the suggestion has wide ramification and would need to be examined carefully. Moreover, there is a need to consult the relevant stakeholders.

13. For this purpose, we have issued a consultation paper (copy at Appendix 3) to 24 stakeholders. They include professional bodies (e.g. the Hong Kong Institute of Certified Public Accountants, Hong Kong Bar Association, Law Society of Hong Kong and Hong Kong Institute of Company Secretaries), business chambers, associations of financial institutions as well as those bodies that have made submissions to the Bills Committee. A full list of these bodies is at Appendix 4.

14. So far, we have received five replies. A list of the respondents together with a copy of their replies is at Appendix 5. The Hong Kong Association of Banks has indicated that it needs more time to study the matter. The ORO is in parallel consulting some of its customers i.e. the major banks. We will revert on the outcome of the consultation after all the outstanding replies have been received.

**Payments from the Deposit/Estate of the Bankrupt  
In Outsourced Cases**

It is proposed that only debtor-petition cases where the assets held by the bankrupt are not likely to exceed \$200,000 (summary cases) may be outsourced by the Official Receiver's Office (ORO).

**Deposit made by the Petitioner**

***(A) Statutory Provisions***

2. Under rule 52(1) of the Bankruptcy Rules, upon the presentation of a bankruptcy petition, the petitioner (must be a debtor in outsourced cases) shall deposit with the ORO a sum of \$8,650<sup>1</sup>. Such sum will first cover the fees and expenses incurred by the OR, whether the OR is acting in his official capacity or as a trustee-in-bankruptcy.

***(B) Actual Operation***

3. The amount to be deducted by the ORO depends on the actual fees and expenses incurred in the particular case. As a rough estimate, it would be in the range of \$2,000–\$3,000 in a typical case, detailed as follows –

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<sup>1</sup> A sum further to \$8,650 shall be deposited as the debtor and ORO may agree or as the court may from time to time direct.

<u>Item</u>	<u>Amount (\$)</u>
<i>(i) Fees (i.e. statutory Fees Payable under the Bankruptcy (Fees and Percentages) Order)</i>	
(a) Insertion in the Gazette of a notice relating to bankruptcy	355
(b) For all official stationery, printing, postage, etc	670 <sup>2</sup>
<i>(ii) Expenses</i>	
(a) Land registration <sup>3</sup>	210
(b) Photocopying	90*
(c) Printing expense payable to Government Logistics Department for publication of the bankruptcy order in the Gazette <sup>4</sup>	350*
(d) Printing expense payable for publication of the bankruptcy order in newspapers <sup>5</sup>	350*
<b>Total:</b>	2,025 =====

\*: These are approximate figures. The actual expenses may be affected by factors such as the actual volume of photocopying required, the feasibility to arrange consolidated gazetting/ advertisements, as well as the prevailing rates applicable.

The total amount of fees and expenses incurred by the ORO would be in the range of \$2,000 to \$3,000. Assuming that it is equal to \$A, the balance of the deposit would then be \$8,650 - \$A, say = \$B.

### **Payment under Section 37**

#### ***(A) Statutory Provisions***

4. After the petition made by the debtor is accepted and a bankruptcy order is granted by the court, the ORO would then account the balance of the deposit to the debtor's estate, pursuant to rule 52(2) of the Bankruptcy Rules. The estate, which may be augmented by any further asset realized from the

<sup>2</sup> A fee of \$670 is charged for a bankruptcy case where the number of creditors and bankrupts does not exceed 10, and an additional fee of \$670 is charged thereafter for every 10 additional creditors and bankrupts or part thereof.

<sup>3</sup> Rule 53 of the Bankruptcy Rules provides that where a bankruptcy petition is filed, OR may register a memorial of the petition in the Land Registry registered in the name of the debtor.

<sup>4</sup> Rule 78 of the Bankruptcy Rules provides that where a bankruptcy order is made, the OR shall forthwith send notice thereof to the Gazette and to such local newspaper or newspapers as he may think fit.

<sup>5</sup> See footnote (4).

bankrupt and any contribution made by him during the bankruptcy period, would then be used to cover the costs and charges set out in section 37 of the BO. Under this section, expenses properly incurred in preserving, getting in or realizing any of the assets of the bankrupt would first be paid off. Thereafter, the remaining balance would be used to cover payments according to the order of priority in the same section (proposed to be amended by Clause 11 of the Amendment Bill), namely -

- (a) the remuneration of, fees, commissions, percentages and charges payable to, and costs, charges and expenses incurred or authorized by, the OR, whether acting as trustee or otherwise, including the costs of any person properly employed by him;
- (b) the taxed costs of the petition, including the taxed costs of any person appearing at the hearing of the petition whose costs are allowed by the court but excluding the interest on such costs;
- (c) the remuneration of, and fees, disbursements and expenses properly incurred by the special manager, if any;
- (d) the costs and expenses of any person who makes the bankrupt's statement of affairs;
- (e) the taxed charges of any shorthand writer appointed to take any examination, except expenses properly incurred in preserving, getting in or realizing the assets of the bankrupt;
- (f) the necessary disbursements of any trustee other than the OR<sup>6</sup>, except expenses properly incurred in preserving, getting in or realizing the assets of the bankrupt;
- (g) the costs of any person properly employed by any trustee other than the OR;
- (h) the remuneration of any trustee other than the OR; and
- (i) the actual out-of-pocket expenses necessarily incurred by the creditors' committee subject to the approval of the trustee.

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<sup>6</sup> "Trustee other than the OR" would include the PIP appointed to administer the outsourced bankruptcy case.

***(B) Actual Operation***

5. Assuming that -

- (a) the ORO would account the balance of the deposit, namely \$B, to the debtor's estate; and
- (b) the further assets realized from the bankrupt and the contribution made by him during the bankruptcy period total \$C; and
- (c) \$D was the expenses properly incurred in preserving, getting in or realizing any of the assets of the bankrupt;

then it would mean  $\$B + \$C - \$D = \$E$  would be available to cover the relevant costs and charges as set out in paragraphs 4(a) to (i) above. In a real-life situation regarding a debtor-petition summary case, we would however like to point out that some of the costs and charges would unlikely arise, as explained below -

<b>Para.</b>	<b>Cost/charge item</b>	<b>Reasons as to why the item would unlikely arise</b>
4(a)	The remuneration of, fees and expenses etc incurred or authorized by the OR, whether acting as trustee or otherwise	They are rarely applicable or should have been covered under Rule 52 of the Bankruptcy Rules.
4(b)	Taxed costs of the petition	The costs are expected to be paid by the bankrupt himself in a debtor-petition case.
4(c)	Remuneration of, and fees, disbursements and expenses properly incurred by the special manager	It is very unlikely that a special manager would be appointed in summary bankruptcy cases.
4(d)	Costs and expenses of any person who makes the bankrupt's statement of affairs	The statement of affairs is expected to be prepared by the bankrupt himself.
4(e)	Taxed charges of any shorthand writer appointed to take any examination	It is very unlikely that a shorthand writer would be appointed in summary bankruptcy case.
4(i)	Expenses necessarily incurred by the creditors' committee	There would be no creditors' committee for summary cases.



As such, in practice only the costs and charges under paragraphs 4(f), (g) and (h). They are: (i) the disbursements of the PIP (except expenses properly incurred in preserving, getting in or realizing the assets of the bankrupt); (ii) the costs of any persons employed by PIPs; and (iii) the remuneration of PIPs, are relevant.

**Paragraph 4(f): Disbursements of PIP (except expenses properly incurred in preserving, getting in or realizing the assets of the bankrupt)**

6. The amount of disbursements incurred by the PIP (except expenses properly incurred in preserving, getting in or realizing the assets of the bankrupt) will depend on the actual amount incurred in a particular case. Assuming a typical case with no more than 10 creditors and where no assets were recovered, the likely disbursements of the PIP are –

	(\$)
(a) Gazette costs for notice of appointment (assuming in batches of 50 cases per notice) <sup>7</sup>	250
(b) Various searches <sup>8</sup>	95
(c) Postage (for letters to all banks and report to creditors, OR, notice of objection/no objection to discharge and notice of release to creditors) <sup>9</sup>	250
(d) Bank charges/photocopying charges <sup>10</sup>	250
(e) Travelling expenses	50
	—————
	895
	(rounded up to 900)

7. Even if the PIP would need to apply for objection to discharge (and

<sup>7</sup> Notice of appointment of trustee shall be gazetted pursuant to Rule 162 of Bankruptcy Rules. The PIP should be able to arrange consolidated gazetting to minimize costs as the cases will be outsourced in batches.

<sup>8</sup> Land search for one address at \$30. Business Registration search for one business at \$45. Company search for one year for one company at \$20.

<sup>9</sup> PIP may send notice of objection/no objection to discharge to creditors by post under section 30A(5)(a) of Bankruptcy Ordinance.

<sup>10</sup> Bank charges and photocopying charges are payable to the bank for obtaining bank records of the bankrupt.

therefore have to pay an extra court fee of \$528 for filing the application)<sup>11</sup>, his disbursements would unlikely exceed \$1,450. We therefore consider that on average the total disbursement of the PIPs would be between, say, \$900 and \$1,500.

**Paragraphs 4(g) and (h): Costs of persons employed by PIPs and the Remuneration of PIPs**

8. As illustrated in the calculation set out in paragraphs 3 to 7 above, there would be *between \$4,150* (\$8,650 - \$3,000 - \$1,500) *and \$5,750* (\$8,650 - \$2,000 - \$900) *for payment of the costs of person properly employed by the PIP and the PIP's remuneration, even without additional asset realized and without income contribution made by the bankrupt.*

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<sup>11</sup> Pursuant to Item 6(a) Table A, Schedule, Bankruptcy (Fees and Percentages) Order. Based on the ORO's experience, application for objection to discharge may be needed in 5% to 6% of summary bankruptcy cases.

**Contracting out of Summary Liquidation Cases****Summary of the Five Tenders**

	<b>2000-01*</b>	<b>2001-02</b>	<b>2002-03</b>	<b>2003-04</b>	<b>2004-06 (2-year contract)</b>
Total no. of tenderers	22	37	28	53	57
Successful tenderers	5 (5A)	10 (6A+4S)	17 (13A+4S)	21 (15A+4S +2M)	14 (9A+3S +2M)
Staff available to perform insolvency work#					
1-20	1	8	8	17	12
21-40	3	1	7	2	2
41-60	1	1	2	2	0
Unsuccessful tenderers	17 (17A)	27 (24A+3S)	11 (9A+2S)	32 (27A+4S +1C)	43 (36A+6S +1M)
Staff available to perform insolvency work					
1-20	11	18	7	19	34
21-40	4	6	3	10	6
41-60	2	3	1	2	3
Above 60	0	0	0	1	0

A: Accountants

S: Solicitors

M: Mixed: solicitors plus accountants

C: Company Secretaries

**Notes**

\*: Tender restricted to accountants

#: Staff engaged in other types of work is not included.

**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. Currently, the BO and Companies Ordinance (CO) generally do not set out the

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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.

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*

12. As regards what should constitute the minimum qualifications, it may be

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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).

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

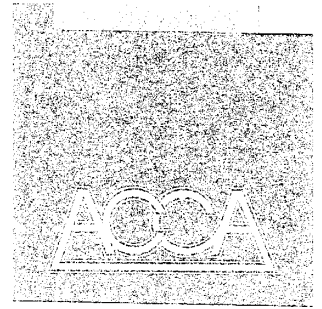
8. To facilitate relevant parties to understand their rights and duties, the ORO has put in place a number of measures. For example, the ORO has published a Guide on Bankruptcy setting out matters such as the rights of creditors and the duties of bankrupts. Moreover, enquiries or complaints (including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

**List of Consultees**

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

**List of Respondents**

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

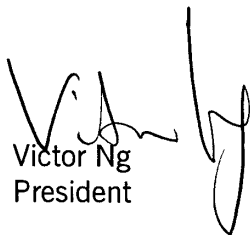
**The Association of Chartered Certified Accountants 特許公認會計師公會**



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

A handwritten signature in black ink, appearing to read 'Victor Ng', is written over the typed name and title. The signature is fluid and cursive, with a prominent vertical stroke on the right side.

Victor Ng  
President

**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) *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

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

存款公司公會 (香港有限制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,

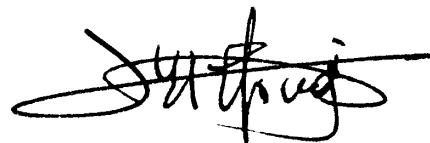
## Bankruptcy (Amendment) Bill 2004

Thanks for your letter of 1<sup>st</sup> 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.



## **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

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