

**Bills Committee on Bankruptcy (Amendment) Bill 2004**  
**Fourth meeting on 21 February 2005**

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

**Introduction**

This paper sets out the responses of the Administration to the list of the follow-up actions arising from the discussion at the Bills Committee meeting held on 21 February 2005.

**A. *Committee Stage Amendment (CSA) to reflect the policy intent that the Bill will enable the outsourcing of debtor-petition summary bankruptcy cases but not creditor-petition cases***

2. We will present the relevant CSA when the Bills Committee scrutinizes the relevant provisions of the Bill.

**B. *Costs, charges and other expenses incurred by Private-sector Insolvency Practitioners (PIPs), and remuneration for PIPs, in handling outsourced liquidation cases***

3. The ORO does not keep statistics on the costs, charges and other expenses incurred by PIPs, nor the remuneration for PIPs appointed to administer outsourced liquidation cases. The ORO has thus conducted a survey with the use of a randomly selected sample of 100 released cases<sup>1</sup>.

4. The findings of the survey are -

|  | <u>Per case</u> |
|--|-----------------|
| (a) Average amount of remuneration of PIPs paid              | \$17,091        |
| (b) Average amount of costs, charges and other expenses paid | \$1,161         |

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<sup>1</sup> A released liquidation case refers to a case where the court has released the relevant liquidator from the case because all the realizable property of the company in liquidation has been realized and the final dividend, if any, has been paid to creditors.

It should however be pointed out that of these 100 released cases, a majority were outsourced in 2001/02 and 2002/03. It is therefore relevant to note that for the years 2001/02 and 2002/03, the average bidding prices of successful tenderers for summary liquidation cases outsourced by the ORO were \$16,606 and \$13,384 respectively.

5. As the majority of cases outsourced in 2003/04 and thereafter have not yet been released, it would not be possible for the survey to include such cases which may give an indication of the more recent/updated position regarding the remuneration paid to and costs, charges and expenses incurred by PIPs. It is however relevant to note that for the years 2003/04 and 2004/06 (2-year contract), the average bidding prices of successful tenderers for summary liquidation cases were \$9,255 and \$5,482 respectively.

***C. Suggestion of setting out in the legislation the qualification criteria for appointment as provisional trustees or trustees for summary bankruptcy cases***

6. As mentioned at the Bills Committee meeting held on 21 February 2005, we had consulted the relevant stakeholders including the professional bodies on the idea of setting out in the legislation the minimum qualification criteria for appointment as provisional trustees or trustees for summary bankruptcy cases. So far, we have received a total of ten replies. The relevant replies, together with a summary thereof, are at Annex A.

7. In sum, there is general agreement among the respondents that the detailed qualification criteria should be set out in ORO's tender documents or a code of practice, and not in the legislation.

8. As to the need to set out in the legislation the basic criteria such as the professional qualifications, different views have been expressed. On the one hand, the Hong Kong Bar Association, Law Society of Hong Kong and Hong Kong Institute of Certified Public Accountants (HKICPA) do not think that the criteria need to be or should be set out in legislation, whether the Bankruptcy Ordinance (BO) or its subsidiary legislation. Reasons put forward in support of their views include -

- (a) Currently, the BO and Companies Ordinance (CO) generally do not set out the minimum qualification criteria for persons

eligible for appointment as office holders in relation to the administration of solvency/insolvency cases. There is no reason why summary bankruptcy cases should fall into a special category;

- (b) PIPs are already subject to the statutory control in the BO;
- (c) 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 statutory provisions; and
- (d) If statutory provisions were introduced, they would likely inhibit future flexibility at the very early stages of a new privatized bankruptcy administration system.

9. On the other hand, bodies like the Hong Kong Association of Banks, the Association of Chartered Certified Accountants and the Hong Kong Institute of Company Secretaries support including certain *basic* criteria such as “fit and proper” in the legislation, on the ground that such inclusion can enhance transparency and preserve the quality of PIPs.

10. Taking into account the outcome of the consultation, there is a strong support in particular among the professional bodies, for treating the qualification criteria for appointment as provisional trustees or trustees for summary bankruptcy cases 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. Having regard to the fact that there are already checks to help safeguard the quality of services of PIPs and the much wider ramifications of setting out the criteria in the legislation, we would like to invite Members to give favourable consideration to the Administration’s original proposal that there is no need to prescribe the criteria for PIPs in the statutory provisions. This position has the support of the Hong Kong Bar Association, the Law Society and the HKICPA.

***D. Submissions from the Law Society of Hong Kong***

11. We have consulted the Law Society on a Member's concern about whether there is any inconsistency in the views expressed in their two submissions. The Law Society's reply is at Annex B.

**Financial Services and the Treasury Bureau  
Official Receiver's Office  
March 2005**

**Comments<sup>1</sup> on the Suggestion of Setting Out  
in the Legislation the Qualification Criteria  
for Appointment as Provisional Trustees or Trustees  
for Outsourced Bankruptcy Cases**

**Bankruptcy (Amendment) Bill 2004**

(as at 2 March 2005)

| <b>Organization</b>                    | <b>Comments</b>  |
|--|--|
| 1. Hong Kong Bar Association           | <p>For the following reasons, the Hong Kong Bar Association does not think that the minimum qualification criteria of the PIP need to be set out in the BO or subsidiary legislation:</p> <ol style="list-style-type: none"><li>1. The PIPs are subject to the statutory control in the BO. See sections 82(2), 83 and 84 of the BO.</li><li>2. 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.</li></ol> <p>It does not think that 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.</p> |
| 2. Hong Kong Monetary Authority (HKMA) | <p>The Administration's consultation paper has clearly set out the advantages and disadvantages of laying down the minimum qualification criteria for appointment as PIPs in the legislation. One</p>  |

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<sup>1</sup> This table aims to summarise the comments made on the suggestion of setting out the qualification criteria in the legislation. For details, please refer to the submissions at Appendix.

| <b>Organization</b>  | <b>Comments</b>   |
|--|---|
|  | <p>additional drawback is whether the specification of such criteria would inhibit competition in the insolvency services market.</p> <p>The HKMA is however not in a position to comment on what should constitute the minimum appointment criteria for PIPs.</p>  |
| 3. Standing Committee on Company Law (SCCLR)                 | <p>A SCCLR member has commented that-</p> <ol style="list-style-type: none"> <li>1. 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;</li> <li>2. If the minimum qualifications are to be set out, they can be done in subsidiary legislation; and</li> <li>3. A relatively broad category e.g. “fit and proper” for the appointment should be included.</li> </ol> |
| 4. The Association of Chartered Certified Accountants (ACCA) | <p>The ACCA does not object to the proposal of setting out the minimum qualifications in the form of subsidiary legislation under the BO, and also agrees that only the basic fundamental criteria such as whether the individual has expertise in handling a bankrupt’s assets should be set out.</p> <p>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.</p>  |
| 5. The DTC Association (DTCA)                                | <p>The DTCA members have made no comments on the matter.</p>  |
| 6. The Hong Kong Association of Banks (HKAB)                 | <p>For the sake of transparency and in the interests of all stakeholders, the HKAB continues to believe that the legislation should contain a requirement that any PIP appointed is fit and proper, modelling on the relevant</p>   |

| Organization  | Comments   |
|---|--|
|   | <p>UK provisions.</p> <p>The HKAB believes that it should not be difficult to include in the legislation the minimum fit and proper criterion.</p> <p>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.</p>   |
| 7. The Hong Kong Institute of Company Secretaries (HKICS) | <p>The HKICS does not consider it appropriate to set out in the BO the detailed criteria such as post-qualification experience, insolvency work experience and managerial experience and support etc. Such criteria are best left to be set out by the ORO in the contractual documents during the tender process, whereas the BO should set out the fundamental criteria i.e. which professions would be recognized as qualified PIPs.</p>  |
| 8. The Law Society of Hong Kong                           | <p>The Insolvency Law Committee of the Law Society of Hong Kong considers that 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. 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.</p> <p>In relation to the idea of setting these out in the BO:</p> <ol style="list-style-type: none"> <li>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.</li> <li>2. If statutory provisions are introduced, it is likely these would inhibit future flexibility at the very</li> </ol> |

| Organization   | Comments  |
|--|---|
|  | <p>early stages of a new privatized bankruptcy administration system.</p> <p>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.</p>  |
| <p>9. The Hong Kong Institute of Certified Public Accountants (HKICPA)</p> | <p>The HKICPA 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, it suggests that 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.</p> <p>It also 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. It 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.</p> |
| <p>10. Grant Thornton (GT)</p>   | <p>The GT believes that some form of basic professional qualifications may be included in statute (e.g. see section 228A of the CO) – and that this should apply</p>  |

| <b>Organization</b> | <b>Comments</b>   |
|---------------------|---|
|                     | to all bankruptcy cases. It is not in support of having detailed qualifications set out in statute or 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 ORO to determine the detailed qualifications required. |

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

[LN:Comments]

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.

18<sup>th</sup> 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



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 :-

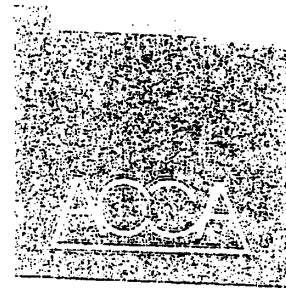
- (i) to single out summary bankruptcy cases for express enactment of minimum qualifications in the statute is incongruous having regard to the fact that there are no such provisions on summary liquidations. There seems to be no point in setting out such requirements if the minimum qualifications include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



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

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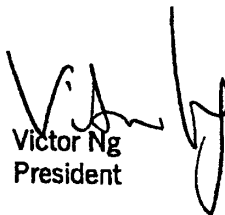
**The Association of Chartered Certified Accountants 特許公認會計師公會**



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)

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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,

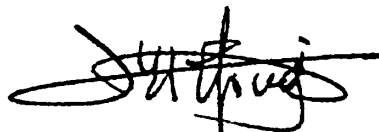
## Bankruptcy (Amendment) Bill 2004

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.

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



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16 February 2005

Mr. Alan Lo  
Financial Services and the Treasury Bureau  
18<sup>th</sup> 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.

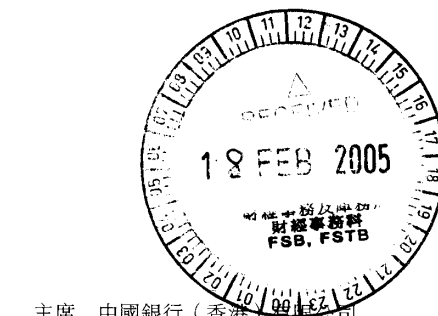
For the sake of transparency and in the interests of all stakeholders, we continue to believe that the legislation should contain a requirement that any private sector insolvency practitioner (PIP) appointed by the Official Receiver is fit and proper, modelling on the approach adopted in the U.K. Insolvency 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  
18<sup>th</sup> 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 1<sup>st</sup> February 2005 inviting the Institute to make further comments in relation to the matters discussed in the meeting of the Bills Committee on 11<sup>th</sup> January 2005.

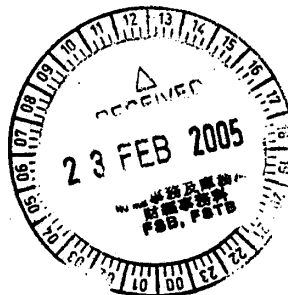
First, the Institute would like to confirm that our members are trained a broad range of legal and accountancy management subjects and are also required to address insolvency issues in the Institute's business law (covering bankruptcy cases), corporate law and company secretarial practice examinations (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

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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

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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.**

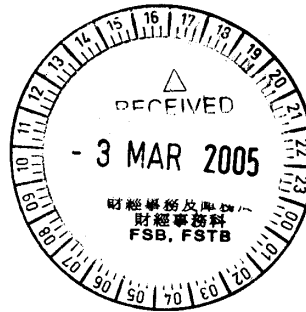
**The Law Society of Hong Kong  
8 February 2005**

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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,  
18<sup>th</sup> 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

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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.

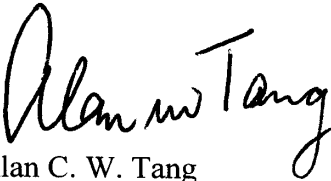
We are in support of the proposal to ensure that only suitably qualified PIPs are appointed provisional trustees or trustees. However, the same requirements should apply to all bankruptcy cases. Whilst it may be true that the vast majority of the "summary" cases tend to be relatively straightforward, 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.

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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

**Reply from the  
Law Society of Hong Kong**

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