

**Bills Committee on Bankruptcy (Amendment) Bill 2004
Tenth meeting on 26 May 2005**

List of follow-up actions

Basic qualification criteria for appointment as provisional trustees for outsourced bankruptcy cases

As discussed at the Bills Committee meeting on 26 May 2005, the intention of the Official Receiver's Office (ORO) is to follow the existing practice in respect of the outsourcing of summary winding-up cases, namely to set out in the tender document the detailed qualification criteria for a person to be eligible for appointment as the provisional trustee of an outsourced bankruptcy cases. The Administration will state such intention in its speech to resume the Second Reading of the Bill.

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

(a) The proposal to bring the order of priority of payment of costs and charges out of a bankrupt's estate as set out in section 37 of the BO in line with rule 179(1) of the Companies (Winding-up) Rules

2. As mentioned in the paper discussed at the meeting held on 26 May 2005 (LC Paper No. CB(1)1624/04-05(02)), the proposed section 37(1) provides for the priority of the payments of the assets of the bankrupt. The order of priority as stated in proposed section 37(1)(a) to (i) is in line with the existing rule 179 of the Companies (Winding Up) Rules for payments in winding-up cases (whether outsourced or not), and thus its adoption would ensure a consistent approach in the whole insolvency regime.

3. The relevant arrangements for companies winding-up vis-à-vis personal bankruptcy are not exactly the same. In this regard, while the deposit in a typical winding-up petition is \$12,150 and thus greater than that of a self-petition bankruptcy case (\$8,650), since the great majority of companies winding-up are creditor-petition, the deposit would be claimed by the creditors first.

4. More importantly, we would like to emphasize that there are specific

justifications for each of the items ranking above the disbursement and remuneration of PIPs under the proposed section 37(1), as we explained in detail at the meeting on 26 May 2005 (please see paragraphs 3 to 7 of LC Paper No. CB(1)1624/04-05(02)).

(b) Suggestion of elevating the priority of payment of the necessary disbursements, costs and remuneration of PIPs for summary bankruptcy cases

5. We have examined further the suggestion of elevating the priority of payment of PIPs' disbursements, costs and remuneration (items under proposed section 37(1)(f) to (h)) in outsourced bankruptcy cases, including the option of incorporating the disbursements in section 37(1)(a).

6. We remain of the view that the proposed outsourcing arrangements would already be able to attract qualified PIPs to participate in tendering. Having said this, we also note that some Members are still concerned about the "risk" of PIPs having to bear their disbursements out of their own pockets in really exceptional cases. We have considered this point further. With a view to addressing the concern, we propose to amend the proposed section 85A(3) (see Annex 1). In short, in an outsourced bankruptcy case, where the PIP concerned acts without remuneration, he or the ORO may make an application to the court and the court may approve the necessary disbursements incurred by the PIP in the course of the administration of the estate to be paid out of the bankrupt's estate. In this case, the order of priority set out in section 37(1) would be subject to any court order in this regard. Where the ORO acts as the applicant, it is unlikely that PIPs would need to incur any additional cost. In this regard, the ORO would take into account the relevant circumstances of a case in determining whether or not to act as the applicant.

7. We believe that the proposal set out in paragraph 6 above would help address the concern about the "risk" of PIPs having to bear their disbursements out of their own pockets and thus overtake the earlier suggestion of amending section 37(1). In any case, for the following reasons, we remain of the view that the order of priority in the proposed section 37(1) should be maintained –

- (a) As mentioned in paragraphs 3 to 7 of LC Paper No. CB(1)1624/04-05(02), there are specific justifications for the priority of each item under section 37(1), and so far we have not heard any arguments against these justifications. Furthermore, as a matter of principle, the priority should not be

revised simply because of the aforesaid “risk”, not to mention whether such “risk” should be extremely remote; and

- (b) Any elevation of the priority of the disbursements etc. of PIPs to section 37(1)(a) may cause wide ramification to, say, the collection of statutory fees prescribed under the Bankruptcy (Fees and Percentages) Order. Moreover, if the disbursements of a PIP were to be deemed as the expenses incurred or authorized by the ORO under section 37(1)(a), the questions as to whether the ORO should impose necessary control over such disbursements would arise, and if so, the means to impose the control. If the ORO has to vet the disbursement in advance, it may be argued that the system would become too cumbersome¹. The option may also have financial implications to the Government (taxpayers) and affect other stakeholders². All these are complicated matters.

(c) The long title of the Bill

8. We do not consider that the proposed amendment to section 85A(3) (see paragraph 6 above) would necessitate an amendment to the long title of the Bill.

Monitoring of PIPs’ work

9. Noting Members’ view, the ORO would aim to strike a proper balance between the need to ensure the quality of PIPs’ work and to avoid creating undue burden on the PIPs.

Proposed Committee Stage Amendments (CSAs)

10. The proposed CSAs are enclosed at Annex 2.

**Financial Services and Treasury Bureau
Official Receiver’s Office
June 2005**

¹ While the ORO would require PIPs to submit relevant accounts/document for monitoring and audit purposes, this differs considerably from a requirement that PIPs would need to seek the ORO’s prior agreement before they may incur any disbursements.

² Particularly if the change is not confined to outsourced cases.

Proposed Amendments to Section 85A

27. Sections added

The following is added –

**“85A. Remuneration of provisional trustee
and the first trustee constituted
under section 112A**

(1) The remuneration of the following persons shall be fixed by the Official Receiver in accordance with a scale of fees or on such other basis as the Official Receiver may from time to time approve in writing -

- (a) a provisional trustee other than the Official Receiver;
- (b) in a case where section 112A applies and the first trustee constituted under subsection (1)(i) of that section is not the Official Receiver, that first trustee.

(2) If one-fourth in number or value of the creditors apply to the Official Receiver or the Official Receiver is of the opinion that the remuneration of the provisional trustee or first trustee referred to in subsection (1) should be reviewed, the Official Receiver may apply to the court and thereupon the court may confirm, increase or reduce such remuneration.

(3) Where the provisional trustee or first trustee referred to in subsection (1) acts without remuneration, ~~he shall be allowed out of the bankrupt's estate such expenses properly incurred by him in or about the proceedings of the bankruptcy as the court may approve~~ the court may, on application, order the payment out of the bankrupt's estate to him such amount as the court considers sufficient to reimburse him for any necessary disbursements incurred by him in the course of the administration of the estate. Such application may be made by the trustee or the Official Receiver.

(4) The provisional trustee or first trustee referred to in subsection (1) shall not under any circumstances whatever make any arrangement for, or accept from the bankrupt, or any solicitor, auctioneer or any other person who may be employed in relation to the bankruptcy, any gift, remuneration or pecuniary or other consideration or benefit whatever to be made or payable to him beyond his said remuneration payable out of the estate, and he shall not make any arrangement for giving up, or give up, any part of his remuneration, whether as receiver, manager or trustee, to the bankrupt or any solicitor, auctioneer or any other person who may be employed in relation to the bankruptcy.”.

BANKRUPTCY (AMENDMENT) BILL 2004

COMMITTEE STAGE

Amendments to be moved by the Secretary for
Financial Services and the Treasury

<u>Clause</u>	<u>Amendment Proposed</u>
2	<p>By adding before paragraph (a) -</p> <p>“(aa) in the definition of “trustee”, by adding “, subject to section 58(1B),” after “means”;</p>
3(b)	<p>(a) By deleting the proposed section 12(1A) and substituting -</p> <p>“(1A) In the case of a debtor’s petition, the Official Receiver as the provisional trustee may at any time appoint any person to act as the provisional trustee of the property of the bankrupt in his place if he considers that -</p> <p>(a) the value of the property of the bankrupt is unlikely to exceed \$200,000; and</p> <p>(b) the person meets the requirement prescribed in</p>

Schedule 3."

(b) By adding -

"(1C) The Secretary for Financial Services and the Treasury may, by notice published in the Gazette, amend Schedule 3."

5(b) In the proposed section 15(4) -

(a) in paragraph (a), by deleting "person other than the Official Receiver is appointed as provisional trustee" and substituting "provisional trustee is appointed under section 12(1A)";

(b) in paragraph (b), by deleting "there is a trustee in relation to the bankrupt's estate" and substituting "a trustee is appointed or constituted under section 17, 100D(1), 112(4) or 112A(1)(i) or paragraph 6 of Part II of Schedule 1".

11 In paragraph (a)(ii) -

(a) in the proposed section 37(1)(a), by deleting "remuneration of, fees, commissions, percentages and charges payable to" and substituting "fees, charges and percentages payable to the Official Receiver as

prescribed in the Bankruptcy (Fees and Percentages) Order (Cap. 6 sub. leg. C)";

(b) in the proposed section 37(1)(c), by adding "墊付" before "支出";

(c) in the proposed section 37(1)(f), by adding "墊付" before "支出".

15 In the proposed section 58(1B) -

(a) by deleting "43A, 43B, 43C,";

(b) by deleting "60(1)" and substituting "60".

17 (a) In paragraph (b), by adding -

"(ia) by adding before paragraph (a) -

"(aa) take into his custody or under his control all the property to which the bankrupt is or appears to be entitled;"

(b) In paragraph (c), in the proposed section 60(2) -

(i) in paragraph (c), by deleting the full stop and substituting a semicolon;

(ii) by adding -

"(d) exercise any power the capacity to exercise which is

vested in the provisional trustee under this Ordinance and execute any powers of attorney, deeds and other instruments for the purpose of carrying into effect the provisions of this Ordinance;

(e) subject to section 61, do all such other things as may be necessary for administering the estate pending the appointment of a trustee.".

24 (a) In the proposed section 80(1), by deleting "shall each be regarded as a provisional trustee for the purposes of this Ordinance" and substituting "are in this Ordinance included under the term "provisional trustee"".

(b) In the proposed section 80(1A), by deleting "shall each be regarded as a trustee for the purposes of this Ordinance" and substituting "are in this Ordinance included under the term "trustee"".

27 In the proposed section 85A(3), by deleting everything after "remuneration," and substituting "the court may,

on application, order the payment out of the bankrupt's estate to him of such amount as the court considers sufficient to reimburse him for any necessary disbursements incurred by him in the course of the administration of the estate. Such application may be made by the trustee or the Official Receiver."

28 By deleting the proposed section 86A and substituting -

"86A. Duties of trustee as regards the bankrupt's conduct

- (1) It shall be the duty of the trustee -
 - (a) to investigate the conduct of the bankrupt; and
 - (b) to report to the court on any conduct that justifies the court in refusing, suspending or qualifying an order for the bankrupt's discharge.
- (2) In the case of a trustee other than the Official Receiver, it shall also be the duty of the trustee -
 - (a) to investigate the conduct of the bankrupt and to immediately report to the Official Receiver when there is reason to believe that the bankrupt has committed an act that

constitutes an offence under this Ordinance; and

- (b) to take such part and give such assistance in relation to the prosecution of the bankrupt as the Secretary for Justice or the Official Receiver may direct."

36 By deleting the clause and substituting -

"36. Review and appeals in bankruptcy

Section 98(2) is amended by repealing "The appeal shall be commenced within 21 days from the time when the decision appealed against is pronounced or made" and substituting "The notice of appeal shall be served within the time for appealing against an order made in the matter of any bankruptcy as specified in Order 59, rule 4(1)(b) of the Rules of the High Court (Cap. 4 sub. leg. A)".

New By adding immediately after clause 46 -

"46A. Schedule 3 added

The following is added -

"SCHEDULE 3 [s. 12(1A)&
(1C)]

QUALIFICATIONS FOR APPOINTMENT
UNDER SECTION 12(1A)

To qualify for appointment under section 12(1A) of this Ordinance, a person shall -

(a) be -

(i) a certified public accountant within the meaning of section 2 of the Professional Accountants Ordinance (Cap. 50);

(ii) a solicitor within the meaning of section 2(1) of the Legal Practitioners Ordinance (Cap. 159); or

(iii) a current member of The Hong Kong Institute of Company Secretaries; and

(b) satisfy any reasonable conditions that the Official Receiver may impose and has made accessible to the

public.".".

Schedule By adding -

"6. Clearing and Settlement Systems Ordinance (Cap. 584)	In section 2, in the definition of "relevant insolvency office-holder", in paragraph (c), repeal "receiver" and substitute "trustee"."
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