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Your Ref.: C3/17 (2003) Pt. 8
Our Ref.: C/IPC, M31792

10 December 2004

The Hon. Tam Heung-man,
Chairman of the Bills Committee
on Bankruptcy (Amendment) Bill,
Room 425, West Wing,
Central Government Offices,
11 Ice House Street,
Hong Kong.

Dear Ms. Tam,

Bankruptcy (Amendment) Bill 2004

Thank you for the invitation to comment on the Bankruptcy (Amendment) Bill 2004. The views of the Hong Kong Institute of Certified Public Accountants ("HKICPA") are set out below.

The Framework

According to the Legislative Council ("LegCo") Brief, the Bankruptcy (Amendment) Bill 2004 was re-introduced into the LegCo to facilitate the Official Receiver ("OR') in outsourcing summary bankruptcy cases to private sector insolvency practitioners ("PIPs").

In principle, the HKICPA supports the policy of contracting out government services to suitably qualified persons in the private sector, wherever possible and practicable. In order to do so, there should be an adequate framework and procedure, and the availability of an appropriate level of financial resources, to ensure that persons with the necessary skills and experience are in a position to and are encouraged to take up the work.

It is stated in the LegCo Brief (see Annex C, under the heading "Financial and Civil Service Implications"), that the OR's Office ("ORO") will, after deducting the costs and disbursements incurred by the Department, transfer the balance of the deposits given by the bankruptcy petitioners to the accounts of provisional trustees and trustees. The balance will form the assets of the bankrupts' estates, and PIPs can receive the remuneration according to the order of priority in section 37(1) of the Bankruptcy Ordinance ("BO") as amended under clause 11. It is also stated that no additional resources are required to meet the remuneration of the PIPs.

As discussed under the heading clause 11 (*Priority of costs and charges*) below, the Bill provides that the remuneration of any trustee other than the OR should rank last, except for the actual out-of-pocket expenses necessarily incurred by the creditors' committee subject to approval of the trustee. This means that, in practice, a private sector trustee may

undertake significant work simply to realise sufficient funds to meet, for example, the costs and expenses incurred or authorised by the OR and, where applicable, the costs of the solicitors acting for the petitioning creditor.

The Bills Committee should be made aware of the fact that most bankruptcies are "non-remunerative", i.e. have very limited assets, and, therefore, in our view, it is important that whatever framework is put in place is able to ensure that there will be sufficient funds available for suitably qualified and experienced PIPs acting as trustees to be remunerated at reasonable level for work properly undertaken. In this regard we should be interested to know how much approximately the ORO currently spends in total on the administration of bankruptcy cases.

In connection with the comments made in relation to clause 3 below, the proposed framework should also ensure that the OR would appoint only those who are adequately qualified and experienced to act as (provisional) trustees.

The Institute would appreciate further information as to how the Administration sees the proposed arrangements for the outsourcing of bankruptcy cases working in practice.

Specific Provisions

Clause 3 (Re. s.12, BO) – Effect of bankruptcy order

The wording of the proposed new section 12(1A), i.e., "Where the Official Receiver as the provisional trustee considers that the value of the property of the bankrupt is unlikely to exceed $200,000, he may at any time appoint any person as provisional trustee of the property of the bankrupt in his place", is similar to the wording of section 194(1A) of the Companies Ordinance ("CO").

We would assume that these provisions in the Bill, like those in s.194(1A), CO, are intended to form part of a broader regulatory framework for the contracting out of bankruptcy cases to the private sector. We believe, therefore, that the one of the reasons for distinguishing cases where the value of property of the bankrupt is not expected to exceed HK$200,000 from those where the value of the property is expected to exceed that threshold, is that cases falling below the threshold will generally be less complex and may be suitable to be undertaken by PIPs who may not be sufficiently qualified and experienced to carry out more complex cases. This being so, it will be important for the ORO to take reasonable steps to ensure adherence to the requirements of the proposed new section 12(1A) of the BO.

We suggest that where the ORO is of the view that the property of the bankrupt is unlikely to exceed $200,000, the Department should support its view with reasons and confirm to the court that reasonable enquiries have been made beforehand. We would suggest that this arrangement also be formalised in relation to the procedure under s.194(1A), CO. Where the ORO is unable, on the basis of the information available or otherwise, to form a view as to the value of the bankrupt's property, arguably, no appointment should be made under the provision.

It would appear from the LegCo Brief as if something similar to the administrative arrangements under the Panel 'A' scheme for liquidation cases in which the assets are expected to exceed HK$200,000, is also envisaged for bankruptcy cases above the same

threshold. However, we should appreciate further clarification as to how bankruptcy cases with assets likely to be above HK$200,000 will be handled once the Bill is implemented.

Clause 4 (Re. s.13) – Power to appoint interim trustee

The proposed amendment to s.13 of the BO merely changes the title of the appointee, from "interim receiver" to "interim trustee". The section does not provide for any person other than the OR to be appointed as interim trustee. This may be contrasted with the position under s.193(2), CO, which provides that the "Official Receiver or any other fit person" may be appointed as provisional liquidator.

We believe that it would be sensible to allow for the possibility of appointing PIPs as interim trustees under the BO, even though such appointments are likely to be quite rare, given that the proposed legislation intends to allow for PIPs to take up more bankruptcy work.

The BO should be amended to converge more closely with the equivalent provisions in the CO, i.e. s.193 and s.194(1)(aa). A provision similar to Rule 28(3) of the Companies (Winding-up) Rules should also be incorporated into the Bankruptcy Rules to allow the interim trustee to be paid his remuneration out of the assets of the estate in the event that a bankruptcy order is not ultimately made.

Clause 8 (Re. s.18) – Statement of affairs

The Institute's comments on clauses 8 and 9 should be read in light of its comments under clause 15 (*Vesting and transfer of property*) below.

Clause 8 amends s.18 of the BO to require the bankrupt to submit a statement of affairs "to the trustee not more than 21 days after" the date of the making of the bankruptcy order. However, in practice, a trustee may not have been appointed under the proposed legislation within 21 days of the making of the bankruptcy order, given that, upon the making of the bankruptcy order, a provisional trustee is appointed, and there is then a lapse of up to 12 weeks before a trustee is appointed (s.17A(1), BO).

In view of the potential inconsistencies between the provisions, we would suggest instead amending s.18(1) of the BO to read, "the bankrupt shall submit…to the trustee or provisional trustee, as the case may be, not more than 21 days after…".

Clause 9 (Re. s.19) – Public examination of bankrupt

To enable a provisional trustee to undertake his duties as soon as possible, s.19 of the BO should also allow a provisional trustee to undertake a public examination.

In this connection, it is also suggested that the power given to the OR or trustee, under s.64 of the BO, to inspect goods held by way of security, should be made available to a provisional trustee, even though these powers are currently available to the OR only as trustee, and not in his capacity as receiver.

Clause 11(re. s.37) – Priority of costs and charges

The Bill seeks to introduce similar provisions as regards priority of costs to those contained in Rule 179 of the Companies (Winding-up) Rules. The remuneration of the trustee is some way down the pecking order, ranking last except for the actual out-of-pocket expenses necessarily incurred by the creditors' committee subject to approval of the trustee.

As the intention behind the proposed legislation is to contract out more work to PIPs, we would suggest that consideration be given to elevating the priority of the trustee's remuneration further up the scale, which would provide a greater incentive for the trustee to pursue claims that were worth pursuing but which might not result in immediate recoveries.

Given that no subsidy will be payable by the OR to private sector trustees, unlike under the former Panel 'B' scheme, and now the tender arrangements, for contracting out summary winding up cases, the level of interest among PIPs to undertake this work will depend, in part, on the amount that the ORO will in the ordinary course of events retain out of the petitioner's deposit.

We note that in the case of a self-petition, i.e., a petition by the debtor which constitute the majority of bankruptcy petitions, the deposit is currently HK$8650. Under s.30A, BO, and subject to the facility, under s.30B, BO, to apply for early discharge, a first-time bankrupt will not be discharged from bankruptcy until the expiration of 4 years, and if there are objections to his or her discharge by the trustee or one or more creditors, he or she may not be discharged for up to 7 years. Throughout this time, the trustee retains responsibilities. Under the circumstances, the HKICPA would like to obtain further clarification from the Administration as to how much is likely to be made available to private sector trustees out of the petitioner's deposit.

We should also like to seek the views of the Administration as to whether the costs incurred by trustee in preserving and realising assets should be regarded as "the expenses properly incurred in preserving, getting in or realising any of the assets of the bankrupt", which will, therefore, be payable ahead of the priorities referred to in the proposed s.37 (1)(a)-(i).

We note that the Bills reverses the order of priority of the remuneration, etc. of the special manager and the taxed costs of the petition, as compared with the order of priority under the existing s.37, BO.

It would seem unnecessary to include the second part of the proposed s.37 (1)(e) beginning, "except expenses properly incurred…", as it appears that the point is already covered by proposed subsection (3), when this is read in conjunction with the introductory part of subsection (1).

Clause 15 (Re. s.58, BO) – Vesting and transfer of property

The Bill seeks to replace the existing s.58 (1). The proposed new s.58 (1B) provides that "the provisional trustee shall, unless the context otherwise requires, be regarded as the trustee for the purposes of this Ordinance".

It is possible that this provision would resolve the concerns raised above in relation to clauses 8 and 9, but it is not entirely clear from the drafting. If the provisional trustee may do anything that a trustee may do, other than in relation to those sections of the Ordinance that are specifically excluded in clause 15, this may need to be stated more explicitly. As drafted,

this provision is likely to create some uncertainty and debate. For example, in relation to the priority of payments from the assets of the bankrupt, under clause 11, it is unclear whether, in view of the proposed s.58(1B), the provisional trustee should be regarded as the trustee in relation to the priority of payments under the proposed s.37 (1)(h), or whether, in view of clause 27, the remuneration of the provisional trustee should be treated as "costs, charges and expenses incurred or authorised by, the Official Receiver" under s.37 (1)(a).

Clause 23 (Re. s79) – Section substituted

Clause 23 provides for the official names of the provisional trustee and trustee. They are described, respectively, as the provisional trustee and trustee "of the property of…". Similarly, clause 2 of the Bill defines "provisional trustee" as, inter alia, "… provisional trustee of the property of…". However, section 2 of the BO currently defines "trustee" as the "trustee in bankruptcy of a bankrupt's estate".

For the sake of consistency, we would suggest that s.2, BO, should be amended with wording similar to that proposed in clauses 2 and 23 of the Bill.

Clause 27 – Section added

Clause 27 proposes to introduce a new s.85A. Section 85A(1) proposes that the remuneration of the provisional trustee and the first trustee constituted under s.112A(1) is to be fixed by the OR in accordance with a scale of fees or "on such other basis as the Official Receiver may from time to time approve in writing". Although this provision appears to be based on s.196, CO, we believe that the wording is too open-ended and could create uncertainty. It seems to be reasonable that a PIP should not be left in any doubt about the basis on which he will be remunerated before taking on a case. In practice, similar ambiguity in the CO and Companies Winding-up Rules and their application has given rise to uncertainty, as yet unresolved, in relation to the basis of liquidators' remuneration in summary winding-up cases. We believe, therefore, that the opportunity should be taken to ensure greater clarity from the outset under the Bill. More specifically, we should like to know how the Administration believes that this section will operate and what bases of remuneration could be applied and under what circumstances?

Section 85A(2) provides that, if one-fourth in number or value of the creditors apply to the OR, or the OR is of the opinion that the remuneration of the trustee or provisional trustee should be reviewed, the OR may apply to the court, and the court may confirm, increase or reduce such remuneration. We would suggest that clause 27 should specify the grounds on which the court may confirm, increase or reduce the remuneration of the trustee.

More generally, we should also appreciate clarification as to the source of the wording of the proposed new s85A.

Clause 28 – Section added

Clause 28 proposes to introduce, inter alia, a new s.86B. Section 86B(1) lists out certain duties of the trustee as regards the estate of a bankrupt. However, the provisions of

paragraph (a), i.e. “to raise money in any case where in the interests of the creditors it appears necessary so to do so”, seems to be more a power than a duty, and paragraph (f), i.e. “to assist the bankrupt in preparing his statement of affairs in case the bankrupt has no solicitor acting for him and is unable properly to prepare it himself…”, is not a duty of the liquidator under the corresponding provisions of the CO, and could be onerous, given the lack of available resources in most bankruptcies.

We believe that the application of s.86B (1) should be extended to the provisional trustee. Under clause 15, we assume that this is intended to be the case, but please see our comments above in relation to clause 15.

We should also appreciate clarification as to the source of, and the reason for introducing, the wording of the proposed new s.86B.

Clause 30(Re. s.88) – Trustee to provide statements of accounts

In amending s.88, BO, we would suggest that clause 30 should include a provision similar to that contained in the proposed s.19(4A) (Clause 9 - *Public examination of bankrupt*), empowering the trustee to require a creditor to pay a deposit as a pre-condition for taking the action requested.

Clause 31(Re. s.89) – Annual statement of proceedings

The wording of clause 31 suggests that the format of accounts (Form 150) should follow the requirements of s.89, BO.

The Bill would seem to offer a good opportunity to review the format of accounts with the aim of simplifying them to facilitate compilation, and to make them more meaningful to creditors. This would also apply to Form 137, produced by the trustee in his application for release.

Other Matters

Unfair preferences

There are deficiencies in the provisions dealing with unfair preferences under the BO (s.50, s51B, etc.), for example, in relation to the onus of proof required, which makes the provisions difficult to apply effectively. As some of the provisions of the BO are imported into the CO, by virtue of s.266 and s.266B of the CO, there are also significant deficiencies in the unfair preference provisions as applied to company liquidations. For example, unfair preferences given to fellow subsidiaries or holding companies are not caught by the provision, due to the limited definition of “associate” under s.51B of the BO.

The Institute would like to draw attention to this issue and to propose that, given the opportunity presented by this Bill, consideration should also be given to reviewing and strengthening the unfair preference provisions of the BO.

We trust that you find the above comments to be constructive. If you have any questions on this submission, please feel free to contact Mr. Peter Tisman, Technical Director (Business Members & Specialist Practice) at 2287 7084.

Yours sincerely,

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CHIEF EXECUTIVE & REGISTRAR

WCC/PMT/ay

c.c. Ms. Emma Lau, Financial Services and the Treasury Bureau
Mr. Eamonn O'Connell, Official Receiver's Office