

立法會
Legislative Council

LC Paper No. LS32/10-11

**Paper for the House Committee Meeting
on 4 March 2011**

**Legal Service Division Report on
Mandatory Provident Fund Schemes (Amendment) Bill 2011**

I. SUMMARY

- 1. Objects of the Bill** To amend the Mandatory Provident Fund Schemes Ordinance (Cap. 485) (the Ordinance) to provide explicitly that the statutory protection of accrued benefits under section 16 of the Ordinance covers the bankruptcy of a scheme member and to rectify a clerical error.
- 2. Comments**

 - (a) In *Re: Ng Shiu Fan* (CACV 298/2008), the Court of Appeal expressed reservations as to the effectiveness of section 16 of the Ordinance to protect a scheme member's accrued benefits in the event of his bankruptcy. The Bill seeks to clarify the legislative intent of section 16 that accrued benefits derived from mandatory contributions in a registered Mandatory Provident Fund scheme are excluded from the property of the scheme member and would not vest in the trustee in bankruptcy for the purposes of the Bankruptcy Ordinance (Cap. 6).
 - (b) The Bill also seeks to rectify a clerical error "祖" appearing in the Chinese rendition of "grandparent" in the definition of "close relative" (近親).
- 3. Public Consultation** The Administration has not consulted the public on the legislative proposal.
- 4. Consultation with LegCo Panel** The Panel on Financial Affairs discussed the proposal at its meeting held on 29 November 2010. Members did not object but raised various concerns.
- 5. Conclusion** No difficulties have been identified in relation to the legal and drafting aspects of the Bill.

II. REPORT

Objects of the Bill

The Bill seeks to:

- (a) amend the Mandatory Provident Fund Schemes Ordinance (Cap. 485) (the Ordinance) to provide explicitly that the statutory protection of accrued benefits under section 16 of the Ordinance covers the bankruptcy of a scheme member; and
- (b) rectify a clerical error in the Chinese text of the definition of "close relative" (近親) in section 2(1) of the Ordinance.

LegCo Brief Reference

2. File Ref.: G4/65C (2011) Pt.4 issued by the Financial Services and the Treasury Bureau on 16 February 2011.

Date of First Reading

3. 2 March 2011.

Background

The Ordinance

4. Section 16 of the Ordinance protects a scheme member's accrued benefits derived from mandatory contributions in a registered Mandatory Provident Fund (MPF) scheme in that no part of any such benefits shall be taken in execution of a judgment debt or be the subject of any charge, pledge, lien, mortgage, transfer, assignment or alienation by or on behalf of the scheme member and any purported disposition to the contrary is void.

Bankruptcy Ordinance

5. Section 43(1) of the Bankruptcy Ordinance (Cap. 6) (BO) provides that a bankrupt's estate comprises:

- (a) all property¹ belonging to or vested in the bankrupt at the commencement of the bankruptcy; and
- (b) any property which by virtue of any of the provisions of BO is comprised in that estate or is treated as falling within paragraph (a).

The above is, however, subject to the provisions of any enactment not contained in BO under which any property is to be excluded from a bankrupt's estate².

6. Under sections 12(1) and 58(1) of BO, on the making of a bankruptcy order, the property of the bankrupt shall vest in the Official Receiver who shall thereby become the provisional trustee of the property of the bankrupt. Section 58(2) of BO further provides that the property of the bankrupt shall forthwith pass to and vest in the trustee in bankruptcy upon his appointment. Under section 58(3), the property of the bankrupt shall pass from trustee to trustee and vest automatically in the trustee for the time being without any conveyance, assignment or transfer whatever.

Re: Ng Shiu Fan

7. In *Re: Ng Shiu Fan* (CACV 298/2008), the Court of Appeal considered the effect of section 85(3)³ of the Education Ordinance (Cap. 279) (EO) and held that the entitlement of a former subsidized school teacher who is a discharged bankrupt to his contributions to the Subsidized Schools Provident Fund under EO formed part of his estate and vested in the Official Receiver and trustee under BO when he was adjudged bankrupt. The Court of Appeal considered that section 85(3) of EO did not prevent the accrued benefits from automatic statutory vesting in the Official Receiver and trustee. In April 2010, the Court of Appeal granted leave to the applicant to appeal to the Court of Final Appeal.

8. Although the Court of Appeal's decision did not turn on the interpretation of the Ordinance, Hon Tang VP observed that the wording of section 16(1) of the Ordinance would not prevent the accrued benefits of a scheme member from vesting in a trustee in bankruptcy.

¹ Under section 2 of BO, "property" includes money, goods, things in action, land and every description of property, whether real or personal and whether situate in Hong Kong or elsewhere, also obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property as above defined.

² Section 43(6) of BO

³ Section 85(3) of EO provides that no contribution or donation to or dividend or interest on a dividend from a provident fund shall be assignable or transferable or liable to be attached, sequestered or levied upon, for or in respect of any debt or claim whatsoever.

Comments

9. Clause 4 of the Bill seeks to clarify the legislative intent of section 16 of the Ordinance by adding a new subsection (1A) to explicitly exclude from a bankrupt scheme member's property his right or entitlement to any accrued benefits derived from mandatory contributions in a registered MPF scheme. According to paragraph 4 of the LegCo Brief, the Mandatory Provident Fund Schemes Authority and the Administration consider that the proposed amendment is necessary in the light of the decision in *Re: Ng Shiu Fan*. The effect of the new subsection is that the scheme member's right or entitlement to such accrued benefits would not form part of his estate or vest in the trustee in bankruptcy for the purposes of BO, such that the benefits would not be made available to his creditors in the event of his bankruptcy.

10. Clause 3 of the Bill also seeks to repeal a clerical error "祖" (wherever it appears) and substituting it by "祖" in the Chinese text of the definition of "close relative" (近親) in section 2 of the Ordinance. The effect of this amendment is to change the Chinese rendition of "grandparent" from "祖父、祖母、外祖父、外祖母" to "祖父、祖母、外祖父、外祖母".

Commencement

11. The Bill, when enacted, will come into operation on the day on which it is published in the Gazette as an Ordinance.

Public Consultation

12. The Administration has not consulted the public on the proposal.

Consultation with LegCo Panel

13. At the meeting held on 29 November 2010, the Panel on Financial Affairs discussed the proposal to amend section 16 of the Ordinance. Panel members and other Members attending the meeting did not object to the proposal but raised various concerns. The main concerns and the Administration's responses are summarized as follows:

- (a) as to whether the outcome of *Re: Ng Shiu Fan* would impact on the legislative proposal, the Administration advised that since different language was used in the relevant provisions of EO and the Ordinance, the appeal should have no direct impact on the proposal;
- (b) on whether a scheme member's accrued benefits would be affected if he was bankrupt when he became eligible for drawing out such benefits, the Administration advised that under the legislative proposal, accrued benefits derived from mandatory contributions would be excluded from a scheme member's property for the purposes of BO until they were withdrawn from the scheme; and
- (c) as to how the amount of mandatory contributions would be affected if the scheme member was adjudged bankrupt while still working, the Administration advised that the amount should be based on the employee's salary, irrespective of whether he had been adjudged bankrupt.

Conclusion

14. No difficulties have been identified in relation to the legal and drafting aspects of the Bill.

Prepared by

LOO Chi-pong, Bonny
Assistant Legal Adviser
Legislative Council Secretariat
2 March 2011