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Practitioners Affairs

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5 January 2005

Ms. Connie Szeto
for Clerk to Bills Committee
Legislative Council Building
8 Jackson Road, Central, Hong Kong

Dear Ms. Szeto,

Re: Bills Committee on Bankruptcy (Amendment) Bill 2004

I refer to your letter dated 16 December 2004.

I attach the submissions prepared by the Law Society's Insolvency Law Committee for consideration by the Bills Committee.

Yours sincerely,

Joyce Wong
Director of Practitioners Affairs
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Encl.

THE LAW SOCIETY OF HONG KONG 香港律師會

Submissions on the Bankruptcy (Amendment) Bill 2004

1. We are asked to comment on the Bankruptcy (Amendment) Bill 2004 dealing with the possible outsourcing of bankruptcy cases to private insolvency practitioners (PIPs) from the perspective of solicitors who may wish to consider accepting such appointments.

2. While in general principle we welcome the concept that solicitors be candidates for such appointments if they wish, we have reservations as to whether the system currently being proposed is likely, in practice, to attract solicitors to accept such appointments. The reasons are as follows.

3. Accepting office involves an obligation to undertake a range of duties that are prescribed under the Bankruptcy legislation (and are not capable of being limited or otherwise circumscribed). These duties range from initial investigations of the bankrupt estate, the realisation of assets and also general administration throughout the term of the bankruptcy up to and including dealing with issues arising on discharge. In other words, it is a long term commitment where there is potentially a wide range of obligations that may arise in the course of the office. The full extent of these duties depends on the facts of the individual case.

4. In many cases they may be relatively limited in terms of scope and time commitment. But clearly in some cases the work involved could be extensive. However, what is actually going to be involved in any given case will only emerge after appointment and become apparent after that time.

5. Solicitors must obviously have regard to the business and economic viability of undertaking the role of officeholder as a part of their own individual practices. In the system being proposed, practitioners will typically face a situation where at the time of appointment the only certainty is that funding is available to the extent of the filing fees of $5,000 in order to meet the fees. This may possibly be supplemented by whatever estate assets are capable of being traced and realised. It will also be apparent that there is a variable and unpredictable time commitment for the officeholder to properly discharge his or her obligations as dictated by the Bankruptcy legislation and the circumstances of the case. Our view is that confronted with these circumstances many practitioners would choose not to accept appointments.

6. We consider that many solicitors would find it difficult even to fulfill the minimum duties for a fee that is the equivalent to the filing fees. If that is the case it would become generally recognised that in order to be fairly remunerated officeholders would have to be able to have recourse to additional estate assets.

7. We do not have the benefit of specific statistics but our perception is that there tend to be relatively few available assets (or at least assets that are easily traceable and realisable) in the case of personal bankruptcies. Certainly there appear to be fewer than there would in the case of a typical summary company liquidation (possibly this is because individuals are free to realise and deal with assets before choosing to petition). Whatever the case, it is likely to become quickly apparent that in the majority of cases there will be insufficient funding to pay for the work required.

8. Taking office will therefore tend to be seen as involving a speculative time investment for most practitioners. We do not regard this as being a desirable situation.

9. If there is a tension between officeholders' statutory obligations to investigate and administer the estate under the terms of the legislation and their ability to be fairly remunerated from the funds available, it is likely to produce two possible reactions. In most cases practitioners would recognise the financial limitations and difficulties of the situation relatively quickly. This would tend to cause them simply to decline such appointments. Some less experienced practitioners may accept appointments, at least initially, but then face difficulty in properly discharging the office. That may encourage practitioners to try to tailor their efforts to match the available funding. Neither of these situations would assist in meeting the objectives of the legislation or the scheme as it is contemplated.

10. It appears to us that there are potential solutions. Increasing filing fees is perhaps a possibility. But on balance we think that this is more likely to discourage self-petitioning by debtors and therefore defeat one of the objectives of the Bankruptcy legislation. It has been suggested that it may be possible to define the extent of the duties of the officeholder to some extent and render the amount of time and activity required in these cases more certain. But it is recognised that this presents its own difficulties in that it is hard to define what is an appropriate minimum requirement for all cases. In our view the better and more realistic course is for there to be a basic fee subsidy provided through the OR's Office, as is the case with summary company liquidations. It seems to us that this recognises the desirability of having the bankruptcy system operate properly and is in the public interest and interests of the business and general community at large. It is also the only realistic basis upon which solicitors (and probably most other PIPs) can be expected to undertake this office.

11. Recoveries and realisation are often difficult in any insolvency situation but perhaps particularly in the case of personal bankruptcy where personal claims or choses in action commonly constitute estate assets. In some cases there may be a justification to establish an additional fund which the OR could make available on a discretionary basis in the event there is some demonstrably cost effective recovery exercise which would benefit the estate and its creditors in question and also ultimately to compensate for funding concerned. We think that this may also be worth further consideration as a part of the overall system.

12. Our view is also that a panel system should be established. This would involve a review of the qualifications and experience of practitioners undertaking office and also that an equitable system for the allocation of appointments to panel members be established.

The Law Society of Hong Kong
Insolvency Law Committee
5 January 2005
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