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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**

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.

18th February 2005