Bills Committee on Bankruptcy (Amendment) Bill 2004
Fifth meeting on 11 March 2005
Responses to List of Follow-up Actions

Introduction

This paper sets out the responses of the Administration to the list of the follow-up actions arising from the discussion at the Bills Committee meeting held on 11 March 2005.

A. In relation to the proposed tendering scheme to outsource summary bankruptcy cases to private-sector insolvency practitioners (PIPs) and in the light of Members' views, the Administration should re-examine:

(a) The financial viability and cost-effectiveness of the proposed scheme

2. As mentioned in our earlier paper "Bills Committee on Bankruptcy (Amendment) Bill 2004 – Third meeting on 11 January 2005: Responses to List of Follow-up Actions", the estimated amount available in a typical summary bankruptcy case for payments for the costs of persons properly employed by the PIP and the PIP's remuneration, even without additional asset realized and without income contribution made by the bankrupt, is between $4,150 and $5,750. With this amount, together with the relatively straight-forward nature of the administration of such cases, and that the relevant cases would be outsourced in batches so as to achieve economies of scale, we believe that there would be sufficient interest from PIPs in tendering.

3. In any case, the proposed Bill aims to give the ORO an option (not an obligation) to outsource summary bankruptcy cases. PIPs are free to decide whether or not to participate in the tendering exercise, taking into account the relevant arrangements and their own business considerations. In the very unlikely event that the balance of deposit, i.e. deposit paid by the petitioner deducted by the relevant fees and expenses incurred by the ORO, is less than the likely amount of disbursements plus the remuneration tendered by the PIPs, the ORO will **not** outsource the case.

(b) The feasibility of stipulating a minimum tender price

4. As mentioned in our previous papers issued to the Bills Committee, the Administration's intention is to outsource the cases to qualified PIPs through

competitive tender. We consider that this is the best way to outsource the cases because under this arrangement, PIPs will be given the flexibility to submit bids, taking into account market environment as well as their own business considerations. There would also be a high degree of transparency in the process. Moreover, the efficiency achieved through market competition would result in more assets left for estate of the bankrupt, which would be available for other uses including the possible distribution of dividends to creditors.

5. We do not consider it appropriate for the Government to set a minimum fee for all PIPs, as there are no comparable benchmarks. Such measure may also carry anti-competition implications.

6. We would also like to reiterate that there would be a range of statutory and non-statutory measures to help ensure the quality of services provided by PIPs in administering the outsourced cases.

B. To facilitate the clause-by-clause examination of the Bill, the Administration is requested to provide draft proposed Committee Stage amendments for consideration by the Bills Committee.

7. We intend to propose a few changes to the Bill. We have indicated the proposed changes by way of a mark-up version of the actual provisions (see Annex). The reason for proposing the changes are set out in the Annex as footnotes and the mark-ups seek to indicate the provisions that we propose to amend in order to reflect the policy intent. The wordings are not final and are subject to further consideration by the Law Draftsman. As the Bills Committee starts the clause-by-clause scrutiny of the Bill, more changes to the Bill by way of Committee Stage Amendments may be introduced after Members have expressed their views.

Financial Services and the Treasury Bureau/
The Official Receiver's Office

March 2005

Annex

Mark-up version of those provisions
in the Bankruptcy (Amendment) Bill 2004
to which the Administration intends to propose amendments

3. Effect of bankruptcy order

Section 12 is amended -

(a) in subsection (1), by repealing "the Official Receiver shall be thereby constituted receiver" and substituting ", the Official Receiver shall thereby become the provisional trustee";

(b) by adding -

"(1A) In the case of a debtor's petition, if[1] ~~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.

(1B) The power of the Official Receiver to appoint a person as provisional trustee includes power to appoint 2 or more persons as joint provisional trustees; but such an appointment

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[1] This amendment aims to reflect the policy intent that only debtor-petitioned bankruptcy cases may be outsourced.

must make provision as to the circumstances in which the provisional trustees must act together and the circumstances in which one or more of them may act for the others.".

15. Vesting and transfer of property

Section 58(1) is repealed and the following substituted -

"(1) On the making of a bankruptcy order, the property of the bankrupt shall vest in the Official Receiver.

(1A) On the appointment of a person other than the Official Receiver as provisional trustee, the property shall forthwith pass to and vest in the provisional trustee appointed.

(1B) Save in sections 15(4), 17, 17A, 17B, 42(3), ~~43A, 43B, 43C,~~ [2] 58(2), 60~~(1)~~ [3], 79, 80, 81, 85, 85A, 96(1) and 112A, the provisional trustee shall, unless the context otherwise requires, be regarded as the trustee for the purposes of this Ordinance.".

17. Powers of provisional trustee and trustee to deal with property of the bankrupt

Section 60 is amended -

(a) by renumbering it as section 60(1);

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[2] This amendment aims to enable provisional trustees to have the same power of trustees in claiming after-acquired property and certain items of excess value under existing sections 43A, 43B and 43C of the Bankruptcy Ordinance (BO).

[3] This amendment is consequential to the amendments made to clause 17 below.

(b) in subsection (1) -

(i) by repealing ", the trustee" and substituting ", a trustee or the Official Receiver when acting as provisional trustee";

(ii) in paragraph (a), by repealing "Official Receiver or" and substituting "trustee or the Official Receiver when acting as provisional";

(c) by adding -

"(2) Notwithstanding any other provisions of this Ordinance but subject to subsections (3) and (4), a provisional trustee other than the Official Receiver may do all or any of the following things -

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

(b) sell or dispose of perishable goods, or any property (other than derivatives, warrants, options, shares or choses in action) the estimated value of which is less than $100,000 and is likely to significantly diminish if such property is

not immediately sold or disposed of;

(c) subject to section 61, do all such other things as may be necessary for protecting or preserving the bankrupt's property;

(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[4]; and

(e) subject to section 61, do all such other things as may be necessary for administering the estate pending the appointment of a trustee.[5]

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[4] This amendment aims to clarify that a provisional trustee may exercise all the powers vested in him — including monitoring the conduct of a bankrupt and ensuring that the bankrupt performs his duties. Similar provision can be found in the existing section 60(d) of the BO.

[5] This amendment aims to clarify that a provisional trustee has powers to administer the estate — which include interviewing a bankrupt and taking possession of his

(3) A provisional trustee other than the Official Receiver may also exercise a power under subsection (1) if the power is exercised under an order of the court or with the prior approval of the Official Receiver.

(4) A provisional trustee other than the Official Receiver shall not sell or dispose of anything under subsection (2)(b) to a person who is an associate of the bankrupt, unless the sale or disposal is under an order of the court or with the prior approval of the Official Receiver.

(5) For the purposes of subsection (4), any question whether a person is an associate of another person shall be determined in accordance with section 51B as if -

(a) that section were applicable also for the purposes of such determination; and

(b) references to the "debtor" in that section were references to the "bankrupt" in subsection (4).

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property. The phrase "administering the estate" is also used in section 60(e) of the BO.

(6) The Official Receiver shall not be personally liable for any costs and charges incurred by any person as a result of any refusal to grant approval under subsection (3) or (4).".

28. Sections added

The following are added immediately after section 86 -

"**Duties of trustee as regards the bankrupt's conduct and estate**

86A. Duties of trustee as regards the bankrupt's conduct[6]

(1) As regards the conduct of a bankrupt, it shall be the duty of the trustee to investigate the conduct of the bankrupt and to report to the court on any conduct that justifies the court in refusing, suspending or qualifying an order for the bankrupt's discharge.

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[6] Section 86A of the Bill originally provides that it shall be the duty of a trustee to (a) investigate the conduct of a bankrupt, and to submit a report to the court (if the trustee is the OR) or OR (if the trustee is a person other than OR), stating whether there is reason to believe that the bankrupt has committed any act that constitutes an indictable offence under the BO; and (b) to report to the court on any conduct of the bankrupt that justifies the court in refusing, suspending or qualifying an order for the bankrupt's discharge. On the former duty, new section 86A(1) aims to clarify that the trustee should also investigate the conduct of the bankrupt (a similar duty is also found in existing section 77 of the BO). As regards the latter duty, the existing arrangement is that whenever there is any report of an offence (whether indictable or not) under the BO, the OR will initiate the prosecution action, where appropriate. In view of this, it is not considered necessary to impose a reporting duty on the OR in relation to any conduct which constitutes an indictable offence under the BO. Furthermore, the scope of the reporting duty imposed on a trustee (other than the OR) should be expanded to cover both indictable and summary (not indictable) offences. New section 86A(2) aims to give effect to these changes.

(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 he reasonably believes 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 any bankrupt as the Secretary for Justice or the Official Receiver may direct.

~~(1) As regards the conduct of a bankrupt, it shall be the duty of the trustee –~~

~~(a)to investigate the conduct of the bankrupt and to submit a report in accordance with subsection (2) or (3), as the case may be, stating whether there is reason to believe that the bankrupt has committed any act that constitutes an indictable offence under this Ordinance;~~

~~(b)to report to the court on any conduct of the bankrupt that justifies the court in refusing, suspending or qualifying an order for the bankrupt's discharge;~~

~~(c)to take such part and give such assistance in relation to the prosecution of any bankrupt as~~

~~the Secretary for Justice or the Official Receiver may direct.~~

~~(2) Where the trustee is a person other than the Official Receiver, the report referred to in subsection (1)(a) shall be submitted to the Official Receiver.~~

~~(3) Where the trustee is the Official Receiver, the report referred to in subsection (1)(a) shall be submitted to the court.~~

47. Consequential amendments

The enactments specified in column 2 of the Schedule are amended in the manner set out in column 3 of the Schedule.

SCHEDULE [s. 47]

CONSEQUENTIAL AMENDMENTS

Item	Enactment	Amendment
1.	Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405)	(a) In section 16(5), repeal "receiver" where it twice appears and substitute "trustee". (b) In section 18(3)(b)(i), repeal "receiver, interim receiver, special manager or trustee" and substitute "trustee (including provisional trustee), interim trustee or special manager".

2.	Drug Trafficking (Recovery of Proceeds) (Designated Countries and Territories) Order (Cap. 405 sub. leg. A)	(a) In Schedule 2, in section 16(5), repeal “receiver” where it twice appears and substitute “trustee”. (b) In Schedule 2, in section 18(3)(b)(i), repeal “receiver, interim receiver, special manager or trustee” and substitute “trustee (including provisional trustee), interim trustee or special manager”.
3.	Organized and Serious Crimes Ordinance (Cap. 455)	(a) In section 2(1), in the definition of “insolvency officer”, in paragraph (b)(i), repeal “receiver, interim receiver, special manager or trustee” and substitute “trustee (including provisional trustee), interim trustee or special manager”. (b) In section 21(5), repeal “receiver” where it twice appears and substitute “trustee”.
4.	Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525)	(a) In Schedule 2, in section 12(5), repeal “receiver” where it twice appears and substitute “trustee”.

		(b) In Schedule 2, in section 14(3)(b)(i), repeal "receiver, interim receiver, special manager or trustee" and substitute "trustee (including provisional trustee), interim trustee or special manager".
5.	Securities and Futures (Licensing and Registration) (Information) Rules (Cap. 571 sub. leg. S)	In Schedule 1, in Part 2, in section 1(k), repeal "receiver" and substitute "provisional trustee".
6.	Clearing and Settlement Systems Ordinance (Cap. 584)	In section 2 [7], in the definition of "relevant insolvency office-holder", repeal "receiver" and substitute for "trustee"[8].

[7] Copy of section 2, Cap. 584 at Appendix.

[8] This is a consequential amendment to the Clearing and Settlement Systems Ordinance, which was enacted in July 2004.

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Chapter:	584	Title:	CLEARING AND SETTLEMENT SYSTEMS ORDINANCE	Gazette Number:	L.N. 145 of 2004
Section:	2	Heading:	**Interpretation**	Version Date:	04/11/2004

In this Ordinance, unless the context otherwise requires—

"applicant" (申請人), in relation to any proceedings under Part 4, means the person who refers a decision to the Tribunal for review under section 35(1);

"book-entry securities" (記帳證券) means any securities issued under any law transferable by a book-entry (whether on a register or of any other kind);

"certificate of finality" (終局性證明書) means a certificate issued by the Monetary Authority under section 16(3);

"Chairman of the Tribunal" (審裁處主席) means the person appointed as such under section 34(3);

"clearing and settlement system" (結算及交收系統) means a system established for—

(a) the clearing or settlement of payment obligations; or
(b) the clearing or settlement of obligations for the transfer of book-entry securities, or the transfer of such securities;

"collateral security" (附屬抵押品), in relation to a clearing and settlement system, means any realizable assets provided, whether under a charge or a re-purchase or similar agreement or otherwise (including money provided under a charge), for the purpose of securing rights and obligations potentially arising in connection with participation in the system;

"default arrangements" (違責處理安排), in relation to a clearing and settlement system, means the arrangements in place within the system for limiting systemic and other types of risk in the event of a participant appearing to be, or likely to become, unable to meet his obligations in respect of a transfer order; and, without affecting the generality of the foregoing, includes any arrangements for—

(a) the netting of obligations owed to or by the participant;
(b) the closing out of open positions held by the participant; or
(c) the realizing of collateral security securing obligations owed by the participant;

"defaulting participant" (違責參與者), in relation to a clearing and settlement system, means a participant in respect of whom action has been taken by the system operator or settlement institution under the system's default arrangements;

"designated system" (指定系統) means a clearing and settlement system that has been designated for the purposes of this Ordinance by the Monetary Authority under section 4(1);

"directors' voluntary winding up statement" (董事自動清盤陳述書) means a statement made under section 228A(1) of the Companies Ordinance (Cap 32), and a reference to such a statement taking effect is a reference to it being delivered for registration as specified in section 228A(3) of that Ordinance;

"disposition of property" (財產產權處置), in the context of a disposition made to or by a participant in a designated system, includes a payment made to or by the participant in the designated system or in a clearing and settlement system, wherever located, that is utilized by the designated system to effect payments;

"Monetary Authority" (金融管理專員) means the Monetary Authority appointed under section 5A of the Exchange Fund Ordinance (Cap 66);

"netting" (淨額計算), in relation to a clearing and settlement system, means the conversion of the various obligations owed to or by a participant, as between that participant and all the other participants in the system, into one net obligation owed to or by the participant;

"obligations" (義務), in the context of the default arrangements under a clearing and settlement system, means obligations resulting from the issue and receipt of transfer orders between participants, or otherwise resulting from action taken under the operating rules of the system;

"officer" (高級人員), in relation to a corporation, means a director, manager or secretary of, or any other person involved in the management of, the corporation and, where the corporation is a system operator or settlement institution of a designated system, means in addition the chief executive of the designated system;

"operating rules" (運作規則), in relation to a clearing and settlement system, means the rules or terms that govern the functioning or operations of the system;

"participant" (參與者), in relation to a clearing and settlement system, means a person who for the time being is a party to the arrangement by which the system is established;

"relevant insolvency office-holder" (有關破產清盤人員) means—

(a) the Official Receiver appointed under section 75 of the Bankruptcy Ordinance (Cap 6);
(b) a person acting under the laws of Hong Kong in relation to a company as its liquidator, provisional liquidator, receiver or manager or an equivalent officer;
(c) a person acting under the laws of Hong Kong in relation to an individual as his trustee in bankruptcy or interim receiver of his property or an equivalent officer; or
(d) a person appointed under the laws of Hong Kong pursuant to an order for the administration in bankruptcy of an insolvent estate of a deceased person;

"resolution for voluntary winding up" (自動清盤決議) means a resolution under section 228(1)(c) of the Companies Ordinance (Cap 32);

"settlement account" (交收帳戶), in relation to a clearing and settlement system, means an account at a settlement institution used to hold funds or securities (or both) and to settle transfer orders between participants in the system;

"settlement institution" (交收機構), in relation to a clearing and settlement system, means a person providing settlement accounts to the participants and to any central counterparty in the system for the settlement of transfer orders within the system and, as the case may be, for extending credit to such participants and any such central counterparty for settlement purposes;

"system operator" (系統營運者), in relation to a clearing and settlement system, means any person who, for the purposes of the system's operating rules, is responsible for the operation of the clearing or settlement functions of the system;

"transfer order" (轉撥指令), in relation to a clearing and settlement system, means either of the following instructions—

(a) an instruction—
  (i) by a participant to place at the disposal of another participant an amount of money by means of a book-entry on the accounts of a settlement institution for the system; or
  (ii) which results in the assumption or discharge of a payment obligation for the purposes of the operating rules of the system; or
(b) an instruction by a participant either to settle an obligation for the transfer of book-entry securities, or for the transfer of such securities;

"Tribunal" (審裁處) means the Tribunal established under section 34(1).

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