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17 November 2004

The Hon Tam Heung-man  
 Chairman  
 Bills Committee on Bankruptcy (Amendment) Bill 2004  
 Legislative Council  
 Legislative Council Building  
 8 Jackson Road  
 Hong Kong

Dear Ms. Tam

**Bankruptcy (Amendment) Bill 2004**

We write to thank the Bills Committee for giving HKAB the opportunity to submit comments on the Bankruptcy (Amendment) Bill 2004.

It is understood that the Bankruptcy (Amendment) Bill 2003 was renamed as Bankruptcy (Amendment) Bill 2004 when the latter was recently introduced into the Legislative Council. We support the proposal to empower the Official Receiver to outsource the management of bankruptcy cases to private sector insolvency practitioners (PIPs), provided that the outsourcing arrangement is robust. Specifically, we consider it crucial that vigilant selection criteria and audit procedures, as well as effective procedures to deal with complaints regarding the quality of PIPs, are in place before the new legislation is introduced. We have communicated our concerns to the Administration and have since received assurances that the Official Receiver will only outsource the management of bankruptcy cases to competent PIPs in the accountancy and legal sectors. We continue, however, to be of the view that a preferred approach is to enshrine the assurances in the legislation itself, along the lines as proposed in our letter to the Financial Services and the Treasury Bureau dated 6 February 2004. We enclose a copy of the letter and hope that the Bills Committee will find the proposals contained therein helpful in its deliberations.

Yours sincerely

Katie Yip  
 Secretary

Enc

*Chairman* Standard Chartered Bank  
*Vice Chairmen* The Hongkong and Shanghai Banking Corporation Limited  
 Bank of China (Hong Kong) Ltd  
*Secretary* Katie Yip

主席 渣打銀行  
 副主席 香港上海滙豐銀行有限公司  
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6 February 2004

Ms Shirley Lam  
Financial Services and the Treasury Bureau  
18/F, Admiralty Centre, Tower 1  
18 Harcourt Road  
Hong Kong

Dear Ms Lam

**Bankruptcy (Amendment) Bill 2003**

Further to our letter to you dated 4 November 2003, we write with our comments on the Bankruptcy (Amendment) Bill 2003 gazetted on 28 November 2003.

As pointed out in our earlier letter dated 4 November 2003, our main concern over the Bankruptcy (Amendment) Bill relates to selection criteria of insolvency practitioners (“IPs”) as well as procedures dealing with complaints and supervision. Section 84 of the Bankruptcy Ordinance enables the court to enquire into the conduct of a trustee but the only sanction in respect of misapplication or loss to an estate seems to be that the court may order the trustee to repay or account for any misapplication or loss or pay compensation in respect of any misfeasance or breach of fiduciary duty. We believe that this would not afford adequate protection to safeguard the interests of both creditors and debtors under the proposed outsourcing arrangement. Accordingly, we would suggest that the Bill should contain provisions similar to Sections 394 to 398 of the U.K. Insolvency Act 1986 (extract attached) dealing with selection criteria of IPs, complaint handling and supervision. Alternatively, Section 84 of the Bankruptcy Ordinance should be amended to include provisions similar to section 168C to T of the Companies Ordinance to enable the court to make orders disqualifying a person from acting as a liquidator of a company.

Whilst on this topic, to further strengthen the robustness of the outsourcing arrangement, we also suggest that the Official Receiver make appropriate references, within the contractual arrangements with the IPs, to the timely provision of management information to facilitate effective monitoring of the output of IPs.

We should be grateful if you would convey our comments in the second and third paragraphs above to the Bills Committee and the Official Receiver respectively for their consideration.

*Chairman* Standard Chartered Bank  
*Vice Chairmen* The Hongkong and Shanghai Banking Corporation Limited  
Bank of China (Hong Kong) Ltd  
*Secretary* Katie Yip

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秘書 葉慧翠



Yours sincerely

A handwritten signature in black ink, appearing to read "Katie Yip".

Katie Yip  
Secretary

Enc.

*S. 393(1)*

The Secretary of State is the only competent authority for the time being: see the note to s. 392(2).

*S. 393(2)*

The regulations referred to above set out in some detail the matters which are to be taken into account in determining whether an applicant is a fit and proper person, ranging from his personal integrity and history as a law-abiding citizen to the adequacy of the systems of control and record-keeping in his business practice: see SI 1990 No. 439, reg. 4.

The same regulations (reg. 5) give details of educational requirements, but these apply only to applicants who were born after 15 December 1951 and do not already hold an authorisation (reg. 5(2)). Practical training and experience is demanded of all applicants: this may be reckoned in a number of ways, but a minimum of five appointments to office within the past five years or 1,000 hours of "higher insolvency work experience" within the same period is stipulated (reg. 8).

*S. 393(3)*

The regulations referred to fix a maximum period of three years from the date on which authorisation is granted (reg. 10).

*S. 393(4)*

The procedure for appeal from the withdrawal, or the refusal, of an authorisation is set out in ss. 394-398.

**Section 394 Notices**

**394(1) [Notice to applicant re grant]** Where a competent authority grants an authorisation under section 393, it shall give written notice of that fact to the applicant, specifying the date on which the authorisation takes effect.

**394(2) [Notice re proposed refusal, withdrawal]** Where the authority proposes to refuse an application, or to withdraw an authorisation under section 393(4), it shall give the applicant or holder of the authorisation written notice of its intention to do so, setting out particulars of the grounds on which it proposes to act.

**394(3) [Date to be stated re withdrawal]** In the case of a proposed withdrawal the notice shall state the date on which it is proposed that the withdrawal should take effect.

**394(4) [Notice to give details re rights]** A notice under subsection (2) shall give particulars of the rights exercisable under the next two sections by a person on whom the notice is served.

*(Former provision: IA 1985, s. 6)*

*General note*

The Insolvency Act 1985, s. 6, from which s. 394 is derived, was brought into force on 1 July 1986 (SI 1986 No. 840, reg. 3), together with IA 1985, ss. 7-9, on which ss. 395-398 below are based.

**s. 394(1)**

Without authorisation, the person will not be "qualified" under s. 390(2)(a), and will be automatically liable to criminal prosecution under s. 389 if he acts as an insolvency practitioner; but this will not affect any appointment which he already held when the Act came into force: see Sch. 11, para. 21.

**s. 394(2)-(4)**

It would appear from the repeated use of the word "propose" that a decision to refuse or withdraw an authorisation does not take effect until the applicant or holder is informed of his rights to make representations under s. 395(1) and to refer the matter for consideration to the Insolvency Practitioners Tribunal under s. 396, and given an opportunity to do so. It is submitted that the word "decision" in s. 396(2)(b) must mean "provisional decision", to be consistent with this view. There is no indication in s. 394(3) whether the authority is free to specify any date it chooses as the effective date, but it would seem that, to make sense of the scheme of the Act as a whole, the date should be fixed at least 28 days ahead, and the notice should probably state in addition "or such later date as the authority may subsequently fix, if steps are taken by the holder to have the case reconsidered or reviewed under s. 395 or s. 396."

**Section 395 Right to make representations**

**395(1) [Right exercisable within 14 days]** A person on whom a notice is served under section 394(2) may within 14 days after the date of service make written representations to the competent authority.

**395(2) [Representations to be considered]** The competent authority shall have regard to any representations so made in determining whether to refuse the application or withdraw the authorisation, as the case may be.

(Former provision: IA 1985, s. 7)

**General note**

Section 7 of IA 1985, from which s. 395 is derived, has been in force since 1 July 1986: see the note to s. 394.

In addition to his right to have the case referred directly to the Tribunal under s. 396, the person affected by a proposed refusal or withdrawal may ask the authority itself to reconsider its decision. This will not prevent him from seeking a review by the Tribunal if he is notified that the authority's earlier decision stands; and indeed he may apparently ask for a reconsideration under the present section and then change his mind and have the matter taken to the Tribunal without waiting for the authority to complete its reconsideration.

**Section 396 Reference to Tribunal**

**396(1) [Application of Sch. 7]** The Insolvency Practitioners Tribunal ("the Tribunal") continues in being; and the provisions of Schedule 7 apply to it.

**396(2) [Person served with notice]** Where a person is served with a notice under section 394(2), he may—

- (a) at any time within 28 days after the date of service of the notice, or
- (b) at any time after the making by him of representations under section 395 and before the end of the period of 28 days after the date of the service on him of a notice by the competent authority that the authority does not propose to alter its decision in consequence of the representations,

Mark J. Bradley

give written notice to the authority requiring the case to be referred to the Tribunal.

**396(3) [Reference]** Where a requirement is made under subsection (2), then, unless the competent authority—

(a) has decided or decides to grant the application or, as the case may be, not to withdraw the authorisation, and

(b) within 7 days after the date of the making of the requirement, gives written notice of that decision to the person by whom the requirement was made,

it shall refer the case to the Tribunal.

*(Former provisions: IA 1985, ss. 8(1), (2), (6), 11 (part))*

*General note*

The sections of IA 1985, from which s. 396 is derived, were brought into force on 1 July 1986: see the note to s. 394.

*S. 396(1)*

The Insolvency Practitioners Tribunal was established by IA 1985, s. 8(6) to discharge the functions set out in ss. 396, 397 of the present Act. For further discussion, see the note to Sch. 7 and the Insolvency Practitioners Tribunal (Conduct of Investigations) Rules 1986 (SI 1986 No. 952) which continue in force.

*S. 396(2)*

The present section provides a procedure which is in part alternative to s. 395 and in part supplementary to it. A person who has been notified by an authority that it proposes to refuse his application or withdraw his authorisation may invoke the jurisdiction of the Tribunal *either* (1) immediately and directly, *or* (2) after the authority's own procedure for reconsideration has run its course and the decision adverse to him is confirmed; and it appears that he may also interrupt the latter procedure and have the matter referred to the Tribunal without waiting for a second decision. He must act within 28 days of being notified of the authority's provisional decision (in case (1)) or of its confirmed decision (in case (2)). The case is then referred by the authority itself to the Tribunal for review.

*S. 396(3)*

On receipt of a notice, the authority has seven days in which to change its mind and notify the person of its revised decision; failing this, it must refer the matter to the Tribunal (though not necessarily within that seven-day period).

**Section 397 Action of Tribunal on reference**

**397(1) [Duties of Tribunal]** On a reference under section 396 the Tribunal shall—

(a) investigate the case, and

(b) make a report to the competent authority stating what would in their opinion be the appropriate decision in the matter and the reasons for that opinion,

and it is the duty of the competent authority to decide the matter accordingly.

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**397(2) [Copy of report to applicant]** The Tribunal shall send a copy of the report to the applicant or, as the case may be, the holder of the authorisation; and the competent authority shall serve him with a written notice of the decision made by it in accordance with the report.

**397(3) [Publication of report]** The competent authority may, if he thinks fit, publish the report of the Tribunal.

*(Former provision: IA 1985, s. 8(3)-(5))*

*General note*

Section 8 of IA 1985, from which s. 397 is derived, was brought into force on 1 July 1986: see the note to s. 394.

The Tribunal makes its own investigation of the case but does not itself make a decision: instead, it gives directions to the authority (which are binding), supported by its reasons.

The requirement that the Tribunal should give a reasoned ruling plainly contemplates that it is open to a dissatisfied applicant to seek judicial review of a decision.

### Section 398 Refusal or withdrawal without reference to Tribunal

**398** Where in the case of any proposed refusal or withdrawal of an authorisation either—

- (a) the period mentioned in section 396(2)(a) has expired without the making of any requirement under that subsection or of any representations under section 395, or
- (b) the competent authority has given a notice such as is mentioned in section 396(2)(b) and the period so mentioned has expired without the making of any such requirement,

the competent authority may give written notice of the refusal or withdrawal to the person concerned in accordance with the proposal in the notice given under section 394(2).

*(Former provision: IA 1985, s. 9)*

*General note*

Section 9 of IA 1985, from which s. 398 is derived, came into force on 1 July 1986: see the note to s. 394.

If a person who has been notified under s. 394(2) of a proposal to refuse his application or withdraw his authorisation does not take the appropriate action within 28 days, he cannot prevent the refusal or withdrawal from taking effect. Whether this happens automatically, or whether a written notice must be given, depends upon whether the word "may" is to be read in a permissive or a mandatory sense. The stipulation that the notice shall be written probably indicates the latter: the point will be important only in regard to a withdrawal.