

立法會
Legislative Council

LC Paper No. LS7/04-05

**Paper for the House Committee Meeting
on 15 October 2004**

**Legal Service Division Report on
Bankruptcy (Amendment) Bill 2004**

I. SUMMARY

1. **Objects of the Bill**
 - (a) To enable the Official Receiver ("OR") to outsource bankruptcy cases to private-sector insolvency practitioners ("PIP") in specified circumstances;
 - (b) To revise the priority of payment of costs and charges out of a bankrupt's estate contained in section 37 of the Bankruptcy Ordinance ("BO") to bring it in line with rule 179(1) of the Companies (Winding-up) Rules (Cap. 32, sub. leg. H); and
 - (c) 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.
2. **Comments**
 - (a) The Bill reintroduces wholly the Bankruptcy (Amendment) Bill 2003.
 - (b) The outsourcing will only apply to cases where the value of the property of the bankrupt is not more than \$200,000.
 - (c) The appointed provisional trustees have apparently no legal obligations to OR nor has OR any control over them after appointment. The Court seems to be the only supervisory authority of the outsourced cases. It is not clear how the consistency and uniformity of standards in the performance of duties by the PIP in the place of OR could be ensured.
3. **Public Consultation** In June 2002, a public consultation exercise was conducted on the review of the role of the OR's Office in the provision of insolvency administration services. The submissions received from responding parties indicated general support for the proposal for outsourcing.
4. **Consultation with LegCo Panel** At the meeting of the Panel on Financial Affairs held on 5 May 2003, members expressed concern about the possible malpractice of PIPs; the funding for the engagement of PIPs; and whether it was appropriate for the government to subsidize PIPs in handling bankruptcy cases.
5. **Conclusion** Since the Bill seeks to implement a new scheme of managing bankruptcy cases involving estates of modest value, members may wish to explore the policy implications of the new arrangement. It is recommended that as in the last term a Bills Committee be formed to study the details of the legislative proposal.

II. REPORT

Objects of the Bill

To amend the Bankruptcy Ordinance (Cap. 6) ("BO") to-

- (a) enable the Official Receiver ("OR") to outsource bankruptcy cases to private-sector insolvency practitioners ("PIP") in specified circumstances and to provide for the powers and duties of a provisional trustee in bankruptcy;
- (b) revise the priority of payment of costs and charges out of a bankrupt's estate contained in section 37 of BO to bring it in line with rule 179(1) of the Companies (Winding-up) Rules (Cap. 32, sub. leg. H); and
- (c) 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.

LegCo Brief Reference

2. C3/17 (2003) Pt. 8 issued by the Financial Services Branch of the Financial Services and the Treasury Bureau in October 2004.

Date of First Reading

3. 13 October 2004.

Background

4. The Bankruptcy (Amendment) Bill 2003 (the 2003 Bill) was introduced into the Legislative Council on 10 December 2003. Pursuant to a decision of the House Committee at its meeting held on 12 December 2003, a Bills Committee was formed to scrutinize the 2003 Bill. However, owing to the unavailability of a Bills Committee slot, it lapsed upon the expiry of the Second Term Legislative Council. The Bill is a reintroduction of the 2003 Bill.

Comments

5. The Bill is contents-wise the same as the 2003 Bill. The only alterations are purely textual to adapt to the new dates and to make a correction (Please refer to the marked-up copy of the Bill (Annex B to the LegCo Brief)).

6. The main proposal is to empower the OR as the provisional trustee to appoint "any person" as provisional trustee in his place at any time when he considers that the value of the property of the bankrupt is unlikely to exceed \$200,000 (clause

3 – proposed section 12(1A)). In exercising such power, OR could appoint two or more persons to act jointly as such trustee (proposed section 12(1B)). The intention is to appoint PIP to be such trustees, but this has not been expressly stated in the Bill. It is also unclear how the value of the property of a bankrupt will be calculated for the purposes of exercising the power of appointment and whether the subjective estimate of OR would suffice. Since this power could only be exercised by OR as provisional trustee and since in the normal course of events OR has to summon a general meeting of the bankrupt's creditors within 12 weeks of the bankruptcy order (section 17A(1)), it is very likely that OR could only make an informed guess of what the value of the bankrupt's property would be before deciding whether to exercise the power. If OR must investigate the bankrupt's affairs to ascertain the value of the property, it would defeat the purpose of outsourcing.

7. The remuneration of the provisional trustee and the first trustee would 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 (clause 27 - proposed section 85A(1)). It seems that subject to any supervisory jurisdiction of the Court, OR has an unfettered discretion to fix the remuneration. The Bill is silent on the question whether such remuneration would be paid out of the bankrupt's estate or the public revenue.

8. It appears that the appointed provisional trustees have no legal obligations to OR nor has OR any intention to monitor their work after appointment. The Court seems to be the only supervisory authority of the outsourced cases. It is not clear how the consistency and uniformity of standards in the performance of duties by the PIP in the place of OR could be ensured (clause 28 – proposed section 86A and 86B).

9. The proposed amendment to section 37(1) (clause 11) practically reproduces the relevant provisions in rule 179(1) of the Companies (Winding-up) Rules (Cap. 32, sub. leg. H).

Public Consultation

10. In June 2002, a public consultation exercise was conducted on the review of the role of the OR's Office ("ORO") in the provision of insolvency administration services. The submissions received from responding parties indicated general support for the proposal for outsourcing (para. 10 of LegCo Brief).

Consultation with LegCo Panel

11. At the meeting held on 5 May 2003, the Panel on Financial Affairs ("FA Panel") was briefed of the outcome of the Consultation Study on the Review of the Role of ORO and the need for legislative amendments. Members then expressed concern about the possible malpractice of PIP; the funding for the engagement of PIPs;

and whether it was appropriate for the government to subsidize PIP in handling bankruptcy cases. Members may refer to the minutes of the FA Panel meeting (LC Paper No. CB(1) 2017/02-03) for further information.

12. The FA Panel was informed of the legislative proposal by the Information Note on the Proposed Amendments to Bankruptcy Ordinance: Outsourcing of Bankruptcy Cases by Official Receiver's Office to Private Sector Insolvency Practitioners (LC Paper No. CB(1)98/03-04(01) issued on 17 October 2003).

Conclusion

13. Since the Bill seeks to implement a new scheme for managing bankruptcy cases involving estates of modest value, members may wish to explore the policy implications of the new arrangement. It is recommended that as in the last term a Bills Committee be formed to study the details of the legislative proposal.

14. Clarification on a number of drafting and other matters is being sought. A further report would be issued if necessary after the reply from the Administration has been received.

Prepared by

KAU Kin-wah
Assistant Legal Adviser
Legislative Council Secretariat
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