

立法會
Legislative Council

LC Paper No. LS77/06-07

**Paper for the House Committee Meeting
on 1 June 2007**

**Legal Service Division Report on
Proposed Resolution under section 113 of the
Bankruptcy Ordinance (Cap. 6)**

Bankruptcy (Amendment) Rules 2007

The Secretary for Financial Services and the Treasury has given notice to move four related motions at the Legislative Council meeting to be held on 13 June 2007. The purpose of one of the motions is to seek the Legislative Council's approval of the Bankruptcy (Amendment) Rules 2007 (the Amendment Rules) made by the Chief Justice under section 113 of the Bankruptcy Ordinance (Cap. 6) (BO). The other three motions are dealt with in a separate report (LC paper No. LS80/06-07).

2. In July 2005, the Legislative Council enacted the Bankruptcy (Amendment) Ordinance 2005 (18 of 2005) (the Amendment Ordinance) to empower the Official Receiver (OR) to outsource bankruptcy cases to private insolvency practitioners in specified circumstances. Apart from sections 1, 12, 19 and 32, the Amendment Ordinance has not yet commenced operation. Before such commencement, consequential amendments to subsidiary legislation under BO are necessary for the implementation of the outsourcing scheme intended by OR. The Amendment Rules seek to amend the Bankruptcy Rules (Cap. 6 sub. leg. A) (the Rules) and are part of the subsidiary legislation package for that purpose.

3. The overwhelming majority of the provisions of the Amendment Rules concerns the replacement of references to OR by "trustee". In this sense, they are technical in nature. However, such replacements in certain provisions have the effect of removing duties and obligations from OR and transferring them to the trustee. An example of legal change may be the amendment to rule 80(3) of the Rules (section 22(b) of the Amendment Rules). The existing provision provides that OR must make a report on a bankrupt's conduct and affairs and the report is prima facie evidence of the statements contained in it. The amendment transfers the duty to the trustee but the trustee's report would no longer be prima facie evidence of the statements contained in the report.

4. The Amendment Rules also contain amendments which the Administration describes as minor amendments for modernizing the drafting of the

Rules. They are, broadly speaking, consequential to the amendments made in the Amendment Ordinance.

5. Members may refer to the LegCo Brief (File Ref.: FSB/C11/21) issued by the Financial Services and the Treasury Bureau on 23 May 2007 for background and further information.

6. According to the LegCo Brief, the Administration consulted in September 2004 and October 2005 various stakeholders on the draft provisions of the Amendment Rules. There was general support for the intent of the Amendment Rules. Technical and drafting comments made by respondents have been taken on board where appropriate.

7. The Panel on Financial Affairs has not discussed the Amendment Rules.

8. If the proposed resolution is passed, the Amendment Rules are to come into operation on the date appointed for the commencement of the Amendment Ordinance other than those sections already commenced. It is intended that this will be within 2007, subject to the completion of the preparations for the new outsourcing regime.

9. The Legal Service Division has sought clarification from the Administration on certain drafting points. The Administration has responded and there are no further queries. The correspondence exchanged is copied and attached as **Annex A** for Members' reference.

Encl.

Prepared by

KAU Kin-wah
Assistant Legal Adviser
Legislative Council Secretariat
30 May 2007

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Secretary for Financial Services and the Treasury
Financial Services and the Treasury Bureau
Financial Services Branch
(Mr Jackie LIU AS (FS)(4)2)
18th floor, Admiralty Centre Tower II
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By Fax (2527 0292)

29 May 2007

Dear Mr LIU

Bankruptcy (Amendment) Rules 2007

I am scrutinizing the captioned Rules with a view to advising Members on their legal and drafting aspects.

My observations are set out in the Schedule attached for your consideration. I would be most grateful if you could let me have the response of the Administration in writing in both English and Chinese within the next two days, so that Members may be informed at the House Committee meeting to be held on 1 June 2007.

Yours sincerely

(KAU Kin-wah)
Assistant Legal Adviser

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Schedule

General

- (a) Please state the principle or principles according to which the Administration has decided whether or not to repeal references to “Official Receiver” in the Bankruptcy Rules (Cap.6 sub. leg. A) (the Rules).
- (b) The amendments providing for repeal of the references to OR appear to operate under the assumption that provisional trustee or trustee will be appointed in each and every case. Please clarify whether any gap would occur if due to whatever reasons such trustee is not or cannot be appointed.
- (c) The Rules have been drafted on the assumption that OR is the standing supervisory authority in all matters relating to the bankruptcy process. The proposed amendments seem to have considerably weakened the role of OR as such supervisory authority.

Section 1

This rule providing for the commencement of these Rules is drafted on the assumption that the hitherto not yet commenced sections of the Bankruptcy (Amendment) Ordinance (18 of 2005) will be commenced simultaneously. Please confirm that the Administration will commence all the remaining sections of the Amendment Ordinance on the same date.

Section 2 (proposed rule 2A)

None of rules 99E, 99G, 99Q(a), 101, 138, 141, 149A(2), and 162(1) seems to contain any reference to “provisional trustee”. Please clarify whether those rules should be listed in rule 2A.

Existing Rule 78

- (a) Please clarify why the “Official Receiver” in this rule is not changed to “trustee”.
- (b) In view of the amendments to the preceding rules in relation to interim receiver, please clarify whether the Official Receiver is the appropriate party to make the requisite advertisements.

Section 22(b)(iii) (Amendments to rule 80(3))

The effect of the proposed amendment is that any report made by a trustee is

not prima facie evidence of the statements contained in such report. That means each statement in such report has to be proved in court. Please clarify (a) whether this is in accord with the legislative intention of the Administration; (b) whether the procedure for such application contemplated in rule 80 could accommodate such process of proof; and (c) whether requiring the trustee to prove facts stated in his report would unduly add to the length of time and the corresponding costs required for such application.

Section 28 (Amendments to rule 85)

Please consider whether it would serve the same purpose if the words “he may specify to the bankrupt that” are taken out of the proposed amendment.

Section 67 (proposed rule 163A)

Please clarify whether the obligation imposed on the trustee would conflict with any of the trustee’s obligation to keep confidential the information or documents that OR may require.

Chinese Version

Section 77(2)

Please consider adding after “23 條以外” the phrase “加添” , so as to make the meaning of the Chinese version consistent with that of the English.

**Administration’s Response to
the Observations of the Assistant Legal Adviser
of the Legislative Council**

BANKRUPTCY (AMENDMENT) RULES 2007

General

- (a) *Please state the principle or principles according to which the Administration has decided whether or not to repeal references to “Official Receiver” in the Bankruptcy Rules (Cap. 6, sub. leg. A) (“the Rules”).*

Section 113 of the Bankruptcy Ordinance provides that the Chief Justice may, with the approval of the Legislative Council, make rules providing for, generally, the carrying into effect the objects of this Ordinance. The proposed amendments in the Bankruptcy (Amendment) Rules 2007, made under section 113 of the Ordinance, seek to reflect the consequential amendments to the Bankruptcy Rules (Cap. 6, sub. leg. A) in connection with the enactment of the Bankruptcy (Amendment) Ordinance 2005. As stated in paragraphs 4 and 5 of the Legislative Council brief issued by the Financial Services and the Treasury Bureau, most of these amendments seek to adjust the references to “*Official Receiver*”, “*trustee*” and “*provisional trustee*” in the subsidiary legislation corresponding to their respective roles in the new outsourcing regime provided under the Bankruptcy (Amendment) Ordinance 2005. We have also taken the opportunity to modernise the drafting of various rules and forms to better serve the purposes of the principal Ordinance.

- (b) *The amendments providing for repeal of the references to “OR” appear to operate under the assumption that a provisional trustee or trustee will be appointed in each and every case. Please clarify whether any gap would occur if due to whatever reasons such trustee is not or cannot be appointed.*

2. Section 12(1A) of the Bankruptcy Ordinance (as amended under the Bankruptcy (Amendment) Ordinance 2005) reads -

"In the case of a debtor's petition, the Official Receiver as the provisional trustee *may* at any time appoint any person to act as the provisional trustee of the property of the bankrupt in his place if he considers that -

- (a) the value of the property of the bankrupt is unlikely to exceed \$200,000; and
- (b) the person has the qualifications prescribed in Schedule 3."

(emphasis added in *italics*)

3. In this light, as far as the legal position is concerned, it is not mandatory for the Official Receiver ("OR") to outsource each and every summary bankruptcy case in which the petition is presented by the debtor. Where such summary cases are not outsourced, OR shall remain the provisional trustee and the trustee by virtue of sections 12(1) and 112A of the Ordinance. In other words, OR, in the capacity of a provisional trustee or trustee, may exercise any power possessed by a provisional trustee and trustee, according to the provisions in the principal Ordinance and the Bankruptcy Rules prescribing the powers of a provisional trustee or trustee. In this light, there is no "gap" in the Bankruptcy (Amendment) Rules 2007 barring OR from exercising the powers of a provisional trustee and trustee in respect of those summary cases *not* outsourced, even though many amendments repeal the references to "*Official Receiver*" and substitute those to "*trustee*".

(c) *The Rules have been drafted on the assumption that OR is the standing supervisory authority in all matters relating to the bankruptcy process. The proposed amendments seem to have considerably weakened the role of OR as such supervisory authority.*

4. The duties of OR as regards the bankrupts' conduct and estates are set out in sections 77 and 78 of the principal Ordinance. Every trustee in a bankruptcy shall also provide OR with an annual statement of proceedings under section 89 of the principal Ordinance; and

OR may at any time require the trustee to provide him with the accounts concerning a bankruptcy case under section 93(1A) of the principal Ordinance. Sections 77, 78, 89 and 93 of the principal Ordinance were amended under the Bankruptcy (Amendment) Ordinance 2005.

5. The duties of a trustee as regards the bankrupts' conduct and estates are set out in sections 86A and 86B of the principal Ordinance (newly added under the Bankruptcy (Amendment) Ordinance 2005). A trustee is an officer of the court and is subject to the court's control under sections 83 and 84 of the principal Ordinance.

6. The proposed amendments contained in the Bankruptcy (Amendment) Rules 2007 correspond to the Bankruptcy (Amendment) Ordinance 2005, and are consistent with OR's powers as regards bankruptcy cases under the principal Ordinance.

Section 1

This rule providing for the commencement of these Rules is drafted on the assumption that the hitherto not yet commenced sections of the Bankruptcy (Amendment) Ordinance 2005 (18 of 2005) will be commenced simultaneously. Please confirm that the Administration will commence all the remaining sections of the Amendment Ordinance on the same date.

7. As the proposed amendments contained in the Bankruptcy (Amendment) Rules 2007 are consequential to the enactment of the Bankruptcy (Amendment) Ordinance 2005, the Administration intends to commence the Bankruptcy (Amendment) Rules 2007 and all the remaining sections of the Amendment Ordinance on the same date.

Section 2 (proposed rule 2A)

None of rules 99E, 99G, 99Q(a), 101, 138, 141, 149A(2) and 162(1) seem to contain any reference to "provisional trustee". Please clarify whether those rules should be listed in rule 2A.

8. The proposed rule 2A reads as follows –

“Save in rules 35, 36, 72A(3), 99A, 99B, 99E, 99F, 99G, 99Q(a), 99Y(2), 101, 113, 138, 141, 149A(2), 159(2), 159A, 162(1), 172 and 179, a provisional trustee shall, unless the context otherwise requires, be regarded as a trustee for the purposes of these rules.”

9. This is modelled on section 58(1B) of the Bankruptcy Ordinance (Cap. 6) (newly added under the Bankruptcy (Amendment) Ordinance 2005), which reads as follows -

“Save in sections 15(4), 17, 17A, 17B, 42(3), 58(2), 60, 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.”

10. Both section 58(1B) of the principal Ordinance and the proposed rule 2A carry the intent that references to “*trustee*” in the Ordinance and the Rules shall, unless the context otherwise requires, be construed to cover the meaning of “*provisional trustee*” (hereinafter as “general construction rule”). The saving proviso at the beginning of section 58(1B) of the Ordinance and the proposed rule 2A is important in minimising any problem of interpretation, where the general construction rule shall not apply to specific sections/rules in the Ordinance/Rules as the relevant roles of “*trustee*” in those specific sections/rules are not intended to be undertaken by the “*provisional trustee*”.

11. There may be situations where the sections/rules cited in the saving proviso may contain no references to “*provisional trustee*”. However, in order to avoid the references to “*trustee*” in those specific sections/rules being deemed to include the meaning of “*provisional trustee*”, we consider that they should still be included in the saving proviso. For example, sections 17, 42(3), 58(2), 81, 85 and 96(1) of the principal Ordinance, carrying no references to “*provisional trustee*”, are included in the saving proviso under section 58(1B) of the principal Ordinance. Likewise, rules 99E, 99G, 99Q(a), 101, 138, 141, 149A(2)

and 162(1) are included in the saving proviso under the proposed Rule 2A.

Existing Rule 78

- (a) *Please clarify why the “Official Receiver” in this rule is not changed to “trustee”.*
- (b) *In view of the amendments to the preceding rules in relation to interim receiver, please clarify whether the Official Receiver is the appropriate party to make the requisite advertisements.*

12. Rule 78 of the Bankruptcy Rules reads as follows -

“Where a bankruptcy order is made the Official Receiver shall forthwith send notice thereof to the Gazette and to such local newspaper or newspapers as he may think fit.”

13. This corresponds to section 78(f) of the principal Ordinance (as amended under the Bankruptcy (Amendment) Ordinance 2005) -

“As regards the estate of a bankrupt, it shall be the duty of the Official Receiver –
(f) to advertise the bankruptcy order;”

14. We thus consider that there is no need to amend Rule 78.

Section 22(b)(iii) (Amendments to rule 80(3))

The effect of the proposed amendment is that any report made by a trustee is not prima facie evidence of the statements contained in such report. That means each statement in such report has to be proved in court. Please clarify (a) whether this is in accord with the legislative intention of the Administration; (b) whether the procedure for such application contemplated in rule 80 could accommodate such process of proof; and (c) whether requiring the trustee to prove facts stated in his report would unduly add to the length of time and the corresponding costs required for

such application.

15. The principle that a report of OR to the court shall be *prima facie* evidence of the statements contained in such report derives from the existing rule 157, which *now* applies notwithstanding that occasionally in some cases outside trustees are appointed by creditors in place of OR. The proposed amendments to rule 80(3) preserve this *modus operandi* concerning the evidence put to the court by OR. We do not think the Bankruptcy (Amendment) Ordinance 2005 altered this intention.

16. We envisage that the court may, based on the circumstances of individual cases, consider how an outside trustee should provide proof for his report to the court. For instance, the court may, where necessary, require a trustee to file an affidavit in support, as in the arrangements under rules 88(2), 89(3) and 91. The Judiciary has been consulted and did not reflect any difficulties concerning the proposed amendments to rule 80(3).

Section 28 (Amendment to rule 85)

Please consider whether it would serve the same purpose if the words “he may specify to the bankrupt that” are taken out of the proposed amendment.

17. We consider that the present drafting provides necessary clarity and that it would be preferable to retain the words “*he may specify to the bankrupt that*” in the proposed amendment.

Section 67 (proposed rule 163A)

Please clarify whether the obligation imposed on the trustee would conflict with any of the trustee’s obligation to keep confidential the information or documents that OR may require.

18. As set out in paragraph 5(g) of the Legislative Council brief, the information-gathering power under the proposed rule 163A

corresponds to section 76(4) and new section 86A (added under the Bankruptcy (Amendment) Ordinance 2005) of the principal Ordinance under which the trustee has a duty to report to and assist OR in performing OR's duty as regards the bankrupts' conduct.

Chinese Text: Section 77(2)

Please consider adding after “23 條以外” the phrase “加添”, so as to make the meaning of the Chinese version consistent with that of the English.

19. The Chinese text of section 77(2) reads –

“本條是在《釋義及通則條例》(第 1 章)第 23 條以外的條文，而不減損該條的效力。”

20. The English text reads –

"This section is in addition to and not in derogation of section 23 of the Interpretation and General Clauses Ordinance (Cap. 1)."

21. We consider that the Chinese wording “以外的條文” corresponds to the English wording “*in addition to*”, and that no further change to the drafting is necessary.

**Financial Services and the Treasury Bureau
May 2007**