

立法會
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Bills Committee on Bankruptcy (Amendment) Bill 2015

Background brief

Purpose

This paper provides background information on the Bankruptcy (Amendment) Bill 2015 which seeks to amend the Bankruptcy Ordinance (Cap. 6) ("BO") to replace the abscondee regime. It also summarizes the major views and concerns expressed by members of the Panel on Financial Affairs ("FA Panel") when related issues were discussed in 2014.

Background

The present regime for discharge from bankruptcy

2. Currently, BO provides that a bankrupt will automatically be discharged from bankruptcy upon the expiry of the "relevant period"¹, which runs for four years for first-time bankrupts or five years for repeat bankrupts. To protect the rights of creditors, a bankrupt's automatic discharge from bankruptcy may be deferred pursuant to the following mechanisms –

- (a) *Objection regime*: Under section 30A(3) of BO, a trustee-in-bankruptcy ("TIB") or a creditor may apply to the court to object to the automatic discharge of the bankrupt on specified grounds set out in section 30A(4), e.g. that the bankrupt has failed to cooperate in the administration of the bankruptcy estate, in which case the court may make an order to suspend the running of the "relevant period" for up to four years for first-time bankrupts (or up to three years for repeat bankrupts); and

¹ Under BO, the term "relevant period" refers to the period of time after which a bankrupt is discharged from bankruptcy.

- (b) *Abscondee regime*: Section 30A(10) of BO provides for automatic suspension of the running of the "relevant period" for a bankrupt under three specified circumstances, viz. –
- (i) a bankrupt has left Hong Kong before the commencement of bankruptcy (section 30A(10)(a));
 - (ii) a bankrupt has left Hong Kong after the commencement of bankruptcy without notifying the TIB of his or her itinerary and contact means (section 30A(10)(b)(i)); or
 - (iii) a bankrupt has left Hong Kong after the commencement of bankruptcy and failed to return to Hong Kong as required by the TIB (section 30A(10)(b)(ii));

in which case the "relevant period" will only commence or resume running (as the case may be) when the bankrupt has returned to Hong Kong and notified the TIB of his or her return.

3. The abscondee regime was introduced on the recommendation of the Law Reform Commission and the relevant provisions came into operation in 1998². The regime seeks to ensure that a bankrupt will stay on the TIB's radar until the end of the "relevant period" so that the TIB could obtain his or her cooperation in the administration of the bankrupt's estate when required.

Court of Final Appeal's ruling

4. In an earlier court case³, section 30A(10)(b)(i) of BO was ruled by the Court of Final Appeal ("CFA") (see paragraph 2(b)(ii) above) unconstitutional and as a result has become inoperative. CFA considered that the restraint imposed by that provision on the bankrupt's right to travel went beyond what was necessary for the protection of the rights of creditors because –

- (a) the sanction operated irrespective of the reason for the bankrupt's failure to notify the TIB of his or her departure from Hong Kong;

² The abscondee regime was introduced under the Bankruptcy (Amendment) Bill 1996 which was passed at the Council meeting of 18 December 1996 and enacted as the Bankruptcy (Amendment) Ordinance 1996 ("Amendment Ordinance"). The Amendment Ordinance came into operation with effect from 1 April 1998. Before commencement of the Amendment Ordinance, there was no automatic discharge of bankrupts. A bankruptcy order would normally last for a lifetime, unless a bankrupt applied to the court for discharge and the application was approved.

³ *Official Receiver & Trustee in Bankruptcy of Chan Wing Hing v Chan Wing Hing* (2006) 9 HKCFAR 545.

- (b) the sanction applied indiscriminately to all situations, irrespective of, for instance, the stage of the bankruptcy already reached and whether it had occasioned any prejudice to bankruptcy administration; and
- (c) there was no discretion vested in the court to disapply the sanction or mitigate its consequences.

Proposals to Reform the Abscondee Regime

5. In the light of CFA's ruling, the Administration conducted a review of the abscondee regime and proposed new arrangements⁴ to address the constitutionality issues mentioned above by providing the court with discretionary power in deciding, on application by the TIB according to prescribed procedures as follows, whether the "relevant period" should be treated as not commencing to run –

- (a) a TIB may, within six months after the date of the bankruptcy order against a bankrupt⁵, apply to the court for an order that the "relevant period" for the bankrupt is treated as not commencing to run on the date of the bankruptcy order (non-commencement order) if the TIB has appointed a day for the bankrupt to attend the initial interview with the TIB for the purpose of administration of the bankrupt's estate and for the bankrupt to provide information concerning his or her affairs, dealings and property, and that the bankrupt has failed to complete the initial interview⁶ such that the administration of the bankrupt's estate was prejudiced⁷;

⁴ When FA Panel was briefed on the outcome of the review of the abscondee regime on 5 May 2014, the Administration presented two alternative approaches to reform the regime. While both approaches provide for court discretion in determining a TIB's application for a non-commencement order against a bankrupt, one of the approaches retains a bankrupt's departure from Hong Kong as the triggering factor (i.e. the Modified Abscondee Approach) while the other instead takes into account the conduct of the bankrupt at an interview with TIB (i.e. the Interview Approach). The Interview Approach, as set out in paragraph 5 above, is adopted in the Bill.

⁵ The court may extend the deadline on application by the TIB.

⁶ Specifically, a bankrupt has failed to complete the initial interview if he or she has failed to attend the initial interview with the TIB, or attended the initial interview but failed to provide at that interview all the information concerning his or her affairs, dealings and property as reasonably required by the TIB.

⁷ According to the Administration, the initial interview is critical to TIB's work in bankruptcy case administration, and a bankrupt's failure to complete the interview will likely cause prejudice to the administration of the bankruptcy estate as the TIB will not have sufficient information and documents at the outset to perform his or her duties properly.

- (b) on application by the TIB, if the court is satisfied that the bankrupt has failed to complete the initial interview and that such failure has prejudiced the administration of the bankrupt's estate, it may make a non-commencement order and, if so, must also determine the term(s) to be complied with by the bankrupt for the "relevant period" to commence to run (commencement term(s)); and
- (c) the TIB must file a notice with the Registrar of the High Court within 14 days after a bankrupt has complied with the commencement term(s), and the "relevant period" will commence to run on the date on which the commencement term(s) are complied with.

The Bankruptcy (Amendment) Bill 2015

6. The Bankruptcy (Amendment) Bill 2015 was published in the Gazette on 30 April 2015 and received its First Reading at the LegCo meeting of 13 May 2015 to introduce the new arrangements mentioned in paragraph 5 above⁸. The Bill also provides for various measures to ensure fairness of the new arrangements. For instance, the bankrupt may contest the TIB's application for a non-commencement order with reference to the causes of his/her failure to complete the initial interview or any other relevant matters, and the information to be provided by the bankrupt at the initial interview must be reasonably requested by the TIB. The main provisions of the Bill are set out in **Appendix I**.

Members' views and concerns

Panel on Financial Affairs

7. At the meeting on 5 May 2014, the Administration consulted FA Panel on the outcome of its review of the abscondee regime and proposals to address the constitutional issues relating to the regime. The ensuing paragraphs summarized the major views and concerns raised by Panel members.

⁸ According to the Administration, after enactment of the Bill, the relevant provisions under section 30A(10) of BO relating to the automatic suspension of the running of the "relevant period" for a bankrupt under specified circumstances will continue to apply to those cases where the bankruptcy order is made before the commencement of the Bill (pre-existing cases).

The proposed "Interview Approach" to replace the abscondee regime

8. Panel members in general indicated preference for the "Interview Approach" (vis-à-vis the "Modified Abscondee Approach")⁹ as the approach would provide the court with discretion in determining an application from a TIB for a non-commencement order against a bankrupt's bankruptcy period taking into account the bankrupt's attendance and conduct at an interview with the TIB instead of simply the bankrupt's physical presence in Hong Kong. There was a suggestion that the specified circumstances to be considered under the Interview Approach, such as the failures of the bankrupt to attend a face-to-face interview and to cooperate with a TIB during the interview, should be set out as clearly as possible in the legislative amendments. The Administration advised that the law would set out the tasks that were important for bankruptcy administration which the bankrupt was expected to perform during the interview. However, it might not be possible to set out in very specific terms an exhaustive list of such tasks which would be applicable to all cases. It was believed that the court's discretion in whether to suspend the bankruptcy period would be an appropriate check and balance under this approach.

Review of other aspects of BO

9. Some members enquired if the Administration would take the opportunity to review other aspects of BO, including implementation issues relating to the discharge of bankrupts which had occasionally led to disputes. The Administration advised that the current review exercise aimed to address the constitutional issue arising from CFA's ruling of section 30(A)(1)(b)(i) of BO. It was not an overall review of BO which would be much more complicated and take much more time to complete. Given the aim to complete the legislative exercise in the current LegCo term, it would not be possible to expand the scope of the current exercise to cover other aspects of BO.

Council questions

10. Questions relating to bankruptcy petitions and automatic discharge from bankruptcy were raised at the Council meetings of 6 February 2002, 29 June 2005, 2 May 2007 and 18 June 2008. Issues covered in the questions included transitional arrangements for implementation of the automatic discharge mechanism, concerns about persons who had been adjudged bankrupt for a prolonged period and not yet discharged from bankruptcy, rising number of bankruptcy petitions, and measures to prevent debtors from abusing the

⁹ Please refer to footnote 4.

bankruptcy mechanism to evade liabilities. The details of the questions and the Administration's responses are hyperlinked in **Appendix II**.

Latest development

11. At the House Committee meeting on 15 May 2015, Members agreed to form a Bills Committee to study the Bill.

Relevant papers

12. A list of relevant papers is in **Appendix II**.

Council Business Division 1
Legislative Council Secretariat
1 June 2015

Main provisions of the Bankruptcy (Amendment) Bill 2015

The Bankruptcy (Amendment) Bill 2015 contains 15 clauses. The main provisions are as follows –

- (a) **Clause 1** sets out the short title of the Bill and specifies 1 November 2016 as its commencement date;
- (b) **Clause 4** amends section 30A of the Bankruptcy Ordinance (Cap. 6) ("BO") to deal with the relationship between the grounds for objection to discharge and the proposed new arrangements, as well as the transitional arrangements for pre-existing cases;
- (c) **Clause 5** amends BO by adding two new provisions (sections 30AB and 30AC) which concern the application for, and the effect of, a non-commencement order as well as the filing of a notice relating to the commencement of the running of the "relevant period";
- (d) **Clause 6** amends section 30B of BO to provide that the court is not to make an order for early discharge of a bankrupt if the "relevant period" has not commenced to run pursuant to a non-commencement order;
- (e) **Clause 10** amends the Bankruptcy Rules (Cap. 6 sub. leg. A) to provide for two new rules on the relevant court procedures;
- (f) **Clause 13** amends the Bankruptcy (Forms) Rules (Cap. 6 sub. leg. B) to provide for two new forms (Forms 82A and 82B), viz. the non-commencement order and the notice of commencement; and
- (g) **Clause 15** amends the Bankruptcy (Fees and Percentages) Order (Cap. 6 sub. leg. C) to provide for the fee payable to the court on an application for a non-commencement order.

[*Source* : Paragraph 11 of the Legislative Council Brief on the Bankruptcy (Amendment) Bill 2015 issued by the Financial Services and the Treasury Bureau on 28 April 2015 (File Ref: IB&W/3/1/1/1C(2015)).]

List of relevant papers

Date	Event	Paper/Minutes of meeting
18 December 1996	<p>Council meeting</p> <p>(Resumption of debate on Second Reading of Bankruptcy (Amendment) Bill 1996 which sought to introduce, amongst others, the abscondee regime under the Bankruptcy Ordinance (Cap. 6))</p>	<p>Hansard (pages 106 to 111)</p>
6 February 2002	<p>Council meeting</p>	<p>Hansard</p> <p>Oral question raised by Hon Ambrose LAU on "Rising number of bankruptcy cases" (pages 15 to 24)</p>
29 June 2005	<p>Council meeting</p>	<p>Hansard</p> <p>Oral question raised by Hon LEUNG Kwok-hung on "Automatic discharge from bankruptcy" (pages 21 to 30)</p>
2 May 2007	<p>Council meeting</p>	<p>Press release on a written question raised by Hon LEUNG Kwok-hung on "Automatic discharge from bankruptcy" and the Administration's reply</p>
18 June 2008	<p>Council meeting</p>	<p>Press release on a written question raised by Hon LEUNG Kwok-hung on "Automatic discharge from bankruptcy" and the Administration's reply</p>

Date	Event	Paper/Minutes of meeting
7 January 2013	Meeting of the Panel on Financial Affairs ("FA Panel")	Administration's paper on "Retention of two Supernumerary Directorate Posts for Implementation of the New Companies Ordinance and Review of the Abscondee Regime under the Bankruptcy Ordinance" (LC Paper No. CB(1)358/12-13(06)) Minutes (LC Paper No. CB(1)782/12-13) (paragraphs 58 to 63)
5 May 2014	Meeting of FA Panel	Administration's paper on "Review of abscondee regime under the Bankruptcy Ordinance (Cap. 6)" (LC Paper No. CB(1)1309/13-14(06)) Minutes (LC Paper No. CB(1)1942/13-14) (paragraphs 68 to 75)
13 May 2015	Introduction of the Bankruptcy (Amendment) Bill 2015 into the Legislative Council	The Bill Legislative Council Brief (File Ref: IB&W/3/1/1/1C(2015)) Legal Service Division report (LC Paper No. LS65/14-15)