

**Bills Committee on
Bankruptcy (Amendment) Bill 2015**

Response to Matters Raised by the Assistant Legal Advisor

This paper sets out the Government's response to the matters concerning the Bankruptcy (Amendment) Bill 2015 ("the Bill") as raised in the letter of the Assistant Legal Advisor of the Legislative Council ("LegCo") dated 13 May 2015.

Policy Objective of the New Arrangements

2. The existing Bankruptcy Ordinance ("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 ensure that a bankrupt will continue to fulfill his or her obligation to co-operate with the trustee-in-bankrupt ("TIB") under this automatic discharge regime, the "relevant period" may be suspended pursuant to the following mechanisms –

- (a) *Objection regime* : Under section 30A(3) of the BO, a 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. the bankrupt's failure to co-operate 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
- (b) *Abscondee regime* : Section 30A(10) provides for suspension of the running of the "relevant period" under specified circumstances². In these cases, the relevant

¹ The term "relevant period" is defined in section 30A of the BO to refer to the time before a bankrupt's discharge from bankruptcy.

² These circumstances are as follows –

- (a) a bankrupt has left Hong Kong before the date of the bankruptcy order (section 30A(10)(a));
- (b) a bankrupt leaves Hong Kong after the commencement of bankruptcy without notifying the TIB of his itinerary and where he can be contacted (section 30A(10)(b)(i)); or
- (c) a bankrupt leaves Hong Kong after the commencement of bankruptcy and fails to return to Hong Kong when required by the TIB (section 30A(10)(b)(ii)).

period will only commence or resume running when the bankrupt has returned to Hong Kong and notified the TIB of his return.

3. After reviewing the abscondee regime in the light of an earlier ruling of the Court of Final Appeal (“CFA”) on the constitutionality of a provision thereunder, we seek to introduce new arrangements through the Bill to replace the abscondee regime. Under the proposed new arrangements, the court will be provided with discretionary power to determine, on application by a TIB on grounds that a bankrupt has failed to complete an initial interview³ and thereby caused prejudice to the administration of the bankrupt’s estate, whether the “relevant period” which counts towards the discharge from bankruptcy should be treated as not commencing to run until the bankrupt complies with the relevant terms specified by the court in a non-commencement order. The initial interview is critical to the TIB’s work in commencing bankruptcy case administration, and a bankrupt’s failure to complete the interview will likely cause prejudice to the administration of the bankrupt’s estate as the TIB will not have sufficient information and documents to perform his or her duties properly from the outset. Similar to the abscondee regime, the sanction under the new arrangements will be lifted conditional upon a bankrupt’s compliance with certain conditions rather than the passage of a period of time.

Initial Interview

4. The meaning of “initial interview” is provided for in the proposed section 30AB(1)(a). The initial interview is the meeting between a bankrupt and the TIB on a day appointed by the latter for the administration of the bankrupt’s estate, at which the bankrupt shall provide the TIB with information concerning his or her affairs, dealings and property.

5. Currently, section 26(2) of the BO provides for a general requirement for bankrupts to give certain information and to do acts and things in relation to his or her property as may be reasonably required by the TIB. Rule 150(2) and (3) of the Bankruptcy Rules (Cap.6A) also

³ A bankrupt has failed to complete the initial interview if he or she has –

- (a) failed to attend the initial interview with the TIB; or
- (b) 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.

provides that the TIB may hold interviews with the bankrupt for the purpose of investigating the bankrupt's affairs, and it shall be the duty of the bankrupt to attend these interviews at such times and places as the TIB may appoint. These provisions provide the legal basis for a TIB to request for the initial interview with a bankrupt.

6. As the new arrangements specifically target a bankrupt's failure to complete the initial interview, we consider it more appropriate to put in place a corresponding sanction which is commensurate with the prejudice caused to the administration of the bankrupt's estate (i.e. non-commencement of the "relevant period"), instead of relying on a general criminal sanction available under section 26(4) of the BO⁴.

Non-commencement of "Relevant Period"

7. As explained above, a bankrupt's failure to complete the initial interview will likely cause prejudice to the administration of the bankrupt's estate from the outset. Given that (a) the court must be satisfied that the failure has prejudiced the administration of the bankrupt's estate before making a non-commencement order, and (b) the bankrupt is entitled to make a representation for the court to determine whether or not there is sufficient cause for not making a non-commencement order⁵, it is unlikely that non-commencement of the "relevant period" will unduly prolong the bankruptcy period.

8. To encourage a bankrupt to fulfil the obligations in relation to the TIB's work in commencing the administration of the bankrupt's estate, the new arrangements provide that subject to the bankrupt's compliance with the relevant term(s) as specified by the court in the non-commencement order (such as provision of the requisite information to the TIB), his or her "relevant period" will commence to run. In this connection, setting a time limit on the length of the non-commencement order will defeat the purpose of the new arrangements, as the sanction against the bankrupt may be lifted without having taken the requisite actions for the TIB to commence the administration of the bankrupt's estate.

⁴ Pursuant to section 26(4) of the BO, a bankrupt may be guilty of contempt of court and be subject to punishment for, among other things, willful failure to complete the initial interview under certain circumstances.

⁵ For example, the bankrupt may provide reasonable explanation to account for his or her failure to provide the requisite information as requested by the TIB.

9. In our study of the bankruptcy regimes in Australia and the United Kingdom, we note that although these regimes are not identical in all aspects, it is possible under those jurisdictions that a bankrupt failing to complete the initial interview will impact on his or her discharge from bankruptcy. Specifically –

- (a) in Australia, a TIB may file with the relevant authority an objection to the automatic discharge of a bankrupt on one or more of the applicable grounds specified in its bankruptcy legislation, which include (i) failure to comply with the TIB’s request for written information about the bankrupt’s property, income or expected income, or (ii) failure to attend an interview or examination without reasonable explanation⁶; and
- (b) in the United Kingdom, the relevant authority may order that the period for discharge from bankruptcy be suspended, on application by a TIB, if the bankrupt fails to comply with his obligations, e.g. to complete an initial interview.

Transitional Arrangements

10. We propose that TIBs may apply to the court for a non-commencement order only in respect of a bankrupt whose bankruptcy order is made on or after the commencement date of the new arrangements. It is fair to do so as pre-existing bankrupts⁷ are unaware of the consequences of failing to complete the initial interview at the time when they become bankrupt. Having regard to the legitimate interests of creditors, it will be unfair to repeal the abscondee regime without saving its application to the pre-existing bankrupts.

11. Should the CFA uphold the Court of Appeal’s ruling⁸ that the current section 30A(10)(a) is unconstitutional, the provision concerned will have no legal effect and be considered invalid as from the outset. In other words, the “relevant period” for a pre-existing bankrupt will be considered to have commenced running since the date of his or her bankruptcy order, while the bankrupt’s right to travel will not be affected

⁶ Section 149D(1)(d) and (m) of the Australian Bankruptcy Act 1966.

⁷ A pre-existing bankrupt is a debtor where the bankruptcy order against whom was made on or after the commencement date of the new regime.

⁸ *Chang Hyun Chi v Official Receiver* [2015] 1 HKLRD 512.

by the invalid provision. The Government has already formulated relevant administrative arrangements to handle such bankruptcy cases should the CFA reach such a verdict.

Timing of the Bill

12. The Government has been reviewing the abscondee regime but it takes time to examine the relevant operational experience and the complex human rights implications in order to come up with a reasonable proposal acceptable to stakeholders. We have also kept in view other relevant developments, such as the judicial proceedings on the constitutionality of section 30A(10)(a). With the approval of the Finance Committee, the Government has devoted dedicated directorate manpower resources to lead the legislative exercise beginning from 2012-13 to expedite the matter.

**Financial Services and the Treasury Bureau
Official Receiver's Office
May 2015**