



中華人民共和國香港特別行政區
Hong Kong Special Administrative Region of the People's Republic of China



立法會秘書處 法律事務部
LEGAL SERVICE DIVISION
LEGISLATIVE COUNCIL SECRETARIAT

來函檔號 YOUR REF : IB&W/3/1/1/1C(2015)
本函檔號 OUR REF : LS/B/14/14-15
電話 TELEPHONE : 3919 3512

傳真 FAX : 2877 5029
電郵 E-MAIL : ctam@legco.gov.hk

URGENT

By Fax (2869 4195)

5 November 2015

Mr WONG Yan-yin, Paul
Prin AS for Financial Services & the Treasury
(Financial Services)6
Financial Services and the Treasury Bureau
15th Floor
Queensway Government Offices
66 Queensway
Hong Kong

Dear Mr WONG,

Re: Bankruptcy (Amendment) Bill 2015 (the Bill)

I refer to Hong Kong Bar Association (HKBA)'s submissions on the Bill (vide LC Paper Nos. CB(1)1229/14-15(01) and CB(1)1296/14-15(01)) and your response (vide LC Paper No. CB(1)1293/14-15(01)) and set out my observations on the issues raised as follows -

Meaning of "initial interview" in the Bill

Under the Bill, a bankrupt's failure to attend an initial interview would be a ground on which a trustee in bankruptcy (TIB) may apply for a non-commencement order against a bankrupt. Under the proposed section 30AB(1)(a) of the Bill, the bankrupt is required to attend an initial interview on a day appointed by TIB for the administration of the bankrupt's estate. The term "initial interview" is not defined in the Bill.

HKBA submits that it is unclear that whether the initial interview may be conducted via video/web conference and include adjournments of the interview. Similar concerns have been raised by Hong Kong Institute of Certified Public Accountants that an initial interview might not be a one-off event and suggested that the initial interview include adjourned or subsequent

interviews to follow up on information or documentation provided, or that the bankrupt was unable to provide at the first meeting (LC Paper No. CB(1)1044/14-15(03)).

It is stated in your response to HKBA that the "initial interview" shall mean the meeting appointed by the TIB for the administration of the bankrupt's estate but not any adjourned interview or subsequent interviews. It is also stated in your response that as one of the objectives of the initial interview is for the TIB to verify the bankrupt's identity by checking his/her identity documents and this cannot be achieved without physical presence of the bankrupt at the interview.

From the present drafting of the proposed section 30AB(1)(a), it is noted that, in absence of a definition of "initial interview", it is open for interpreting the "initial interview" to include an adjourned one and the conduct of the initial interview by way of video/web conference has not been excluded. Moreover, your intended objective of verifying the bankrupt's identity in the initial interview which justifies the requirement of physical presence has not been reflected in the provisions of the Bill.

Also, the law discourages the bringing of legal proceedings without preliminary attempts to settle the matter informally as litigation is pointless where the bankrupt would have been willing to attend the initial interview but has not been given an opportunity to do so. The proposed section 30AB(1)(a) provides that the initial interview shall be on a day appointed by the trustee. It is not clear from the Bill that whether a bankrupt who has a justifiable reason for his/her absence from the appointed interview may be given an alternative interview and if so, whether such interview may be treated as an initial interview under the Bill.

Giving of notice for initial interview

HKBA expressed concerns that there should be clear provisions setting out how and when the notice of the appointment for the initial interview should be served on the bankrupt and the particulars which should be included in the notice. Since the proof of bankrupt's failure to attend the initial interview may very much depend on whether he/she received TIB's notice of appointment, we share HKBA's view that in the absence of clear provisions in the Bill on the service of notice, it may be difficult for the court to adjudicate disputes over the service of the notice.

Non-commencement order

HKBA shared our views that the operation of the non-commencement order as provided by the Bill may cause unfairness to the bankrupt. Under the Bill, the TIB is allowed to apply for the non-commencement order against the bankrupt within six months from the bankruptcy order and this period may be extended for more than once with no maximum limit. The present drafting of the proposed section 30AC requires the Court to make an order that the relevant period is treated as not commencing from the date of the bankruptcy order and the Court has no discretion to take into account the lapse of any period which is not caused by the bankrupt's conduct.

I also note that views of the Law Society of Hong Kong (LC Paper No. CB(1)1044/14-15(01)) and the Caritas Family Crisis Line and Education Centre (LC Paper No. CB(1)1044/14-15(02)) that the proposed replacement of "suspension order" by the new "non-commencement" mechanism will probably cause confusion to the bankrupts and the public. The Law Society has specifically submitted that "the initial interview approach should be included as an additional ground for objection within section 30A(4) and there would be confusion if another regime is introduced to only and specifically apply to uncooperative conducts during interviews".

From the information provided by you on the overseas jurisdictions which adopted the "interview approach", it is noted that none of them (i.e. Australia and the United Kingdom) adopted the mechanism of non-commencement order.

Transitional provisions

While the Bill seeks to abolish abscondee regime by repealing the existing section 30A(10) of the Bankruptcy Ordinance (Cap. 6), the transitional provisions in the Bill proposes that certain parts of the abscondee regime (including section 30A(10)(a) which was ruled as unconstitutional by the Court of Appeal in *Chang Hyun Chi v Official Receiver* [2015] 1 HKLRD 512 which is now under appeal to the Court of Final Appeal (CFA)) will continue to apply to those cases where the bankruptcy order is made before 1 November 2016.

HKBA has queried whether it is an appropriate transitional arrangement. In fact, I previously raised concern on the transitional arrangements (LC Paper No. CB(1)921/14-15(03)) and you replied that "having regard to the legislative interests of creditors, it will be unfair to repeal the abscondee regime without saving its application to the pre-existing bankrupts" (LC Paper No. CB(1)921/14-15(04)). It is noted that under the existing Cap. 6, there are other provisions under which the TIB may apply to suspend the

running of the relevant period to safeguard the interest of creditors. Also, there may cause doubts or confusion on the legal effect of the repealed provision under the present proposed transitional arrangements should CFA uphold the CA's ruling.

I shall be grateful if you would consider the above issues and let me have your response in bilingual form on or before 9 November 2015 so that the Bills Committee may consider it at its meeting on 10 November 2015.

Yours sincerely,



(Clara TAM)

Assistant Legal Adviser

cc. DoJ (Attn: Mr Alan CHONG (By Fax: 3918 4613))
Clerk to Bills Committee