HONG KONG BAR ASSOCIATION
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1st September 2015

Miss Rita Yung
for Clerk to Bills Committee
Bills Committee on Bankruptcy (Amendment) Bill 2015
Legislative Council Complex
1 Legislative Council Road
Central, Hong Kong.

Dear Rita,

Bills Committee on Bankruptcy (Amendment) Bill 2015

I refer to your letter of 9th June 2015.

Please find herewith a copy of the Comments of the Hong Kong Bar Association dated 1st September 2015 on Bankruptcy (Amendment) Bill 2015 re replacement of the Abscondee Regime for the consideration of the Bills Committee. The same has been endorsed at the Bar Council Meeting held on 6th August 2015.

Yours sincerely,

Winnie Tam SC
Chairman

HONG KONG BAR ASSOCIATION'S COMMENTS ON THE BANKRUPTCY (AMENDMENT) BILL 2015 (RE REPLACEMENT OF THE ABSCONDEE REGIME)

Reasons for introducing the Bankruptcy (Amendment) Bill 2015

1. The background leading to the Bankruptcy (Amendment) Bill 2015 (ñthe Billò) has been set out in LC Paper No. LS65/14-15 and LC Paper No. CB(1)921/14-15(04). The key points are now summarised in the following paragraphs.

2. Under the existing Bankruptcy Ordinance (ñBOò), a bankrupt will automatically be discharged from bankruptcy upon the expiry of the relevant period, i.e. 4 years for first-time bankrupts (or 5 years for repeat bankrupts). To ensure that a bankrupt will continue to fulfil his obligation to co-operate with the trustee-in-bankruptcy (ñTIBò), there is a ñabscondee regimeò under s.30A(10) of the BO which provides as follows:-

   (1) Section 30A(10)(a): Where a bankrupt has, before the commencement of the bankruptcy, left Hong Kong and has not returned to Hong Kong, the relevant period shall not commence to run until such time as he returns to Hong Kong and notifies the TIB of his return.

   (2) Section 30A(10)(b): Where a bankrupt, after the commencement of his bankruptcy (i) leaves Hong Kong without notifying the trustee of his itinerary and where he can be contacted; or (ii) fails to return to Hong Kong on a date or within a period specified by the trustee, the relevant period shall not continue to run during the period he is absent from Hong Kong and until he notifies TIB of his return.

3. The Court of Final Appeal in *Official Receiver & Trustee in Bankruptcy of Chan Wing Hing & another v Chan Wing Hing & Another* (2006) 9 HKCFAR 545 held by majority (Ribeiro PJ dissenting) that s. 30A(10)(b)(i) of the BO (as referred to above) was unconstitutional as it was not considered a necessary restriction on the right to travel pursuant to Basic Law Art. 31 and Hong Kong Bill of Rights Ordinance (Cap. 383) s.8 Art. 8(2) for the following reasons (see (2006) 9 HKCFAR 545, 561-563, paras,44-50)[1]:-

(1) Once the mechanism under s.30A(10)(b)(i) was triggered, the relevant period was suspended indefinitely until the bankrupt returned to Hong Kong and notified the TIB of the same.

(2) The mechanism operated indiscriminately irrespective of (i) the reason for the bankruptôs failure to notify (which might be wholly innocent); (ii) the stage already reached in the relevant period; and (iii) whether it had occasioned any prejudice to the administration of the estate.

(3) The court did not have any power to disapply the sanction or to mitigate the consequences.

(4) The TIB and the creditors were already able to object to the bankruptôs discharge at the expiration of the relevant period on the grounds specified under s.30A(4), including the bankruptôs failure to co-operate and unsatisfactory conduct.

[1] Recently, the Court of Appeal in *Chang Hyun Chi v Official Receiver* [2015] 1 HKLRD 512 held that section 30A(10(a) was unconstitutional in view of the reasons provided by the Court of Final Appeal in *Chan Wing Hing* (above).

4. The Bill now introduces new arrangements to replace the existing abscondee regime under Section 30A(1), in the light of the above decision of the Court of Final Appeal.[2]

New arrangements proposed in the Bill

5. The proposed new arrangements (contained in the new s.30AB and 30AC in the Bill) can be summarised as follows:-

(1) Section 30AB(1)(a): The TIB can appoint a day for the bankrupt to attend an ñinitial interviewò for the purpose of the administration of the banktruptôs estate and also for the bankrupt to provide information concerning his or her affairs, dealings and property.

(2) Section 30AB(1)(b) &(c) and 30AB(2): The TIB may, within 6 months after the date of the bankruptcy order (or a longer period as specified by the court upon the TIBôs application for an extension of time), apply to the court for an order that the ñrelevant periodò is treated as not commencing to run on the date of bankruptcy order (i.e. non-commencement order) if:-

(a) the bankrupt

(i) has failed to attend the initial interview; or

(ii) has attended the initial interview, but failed to provide the trustee at the initial interview with all the information concerning the bankruptôs affairs, dealings and property as reasonably required by the TIB; and

[2] In fact, the Bill is already the Governmentôs second attempt to implement the Court of Final Appealôs decision in *Chan Wing Hing*. In 2007, the Government introduced the Statute Law (Miscellaneous Provisions) Bill 2007 (which included a provision to repeal s.30A(10)(b)(i)). The Bills Committee of LegCo then raised an issue regarding the scope of the proposed amendment. The Government finally agreed to withdraw the bill so that a more comprehensive review could be undertaken (see PY Lo, The Judicial Construction of Hong Kongôs Basic Law: Courts, Politics and Society after 1997, HKU Press, 2014), p.257).

(b) the administration of the bankruptôs estate was prejudiced by the matter referred to above.

(3) Section 30AC(1): The court may approve the application and make a non-commencement order against the bankrupt if (a) it is satisfied by the TIB as to the matters referred to above; and (b) it is not satisfied by the bankrupt that there is sufficient cause for the order not to be made.

(4) Section 30AC(2): The non-commencement order must (a) specify that the relevant period for the bankrupt is treated as not commencing to run on the date of the bankruptcy order; and (b) specify one or more terms that the bankrupt must comply with before the relevant period is to commence the term; and (c) may specify any terms that the court thinks fit.

The Bar's views

6. The Hong Kong Bar Association (ñHKBAò) welcomes the proposed new arrangements which are introduced to address the constitutional issues which have arisen from the present abscondee scheme. In particular, the court has a residual discretion to consider if there is any sufficient cause for not making the order (see s.30AC(1)) even if it is satisfied that the bankrupt has failed to comply with the requirements set out in s.30AB(1). Hence, the new scheme would not operate indiscriminately irrespective of the reasons for the bankruptôs failure to attend the interview or any other circumstances which might justify the courtôs refusal to make a non-commencement order. However, HKBA takes the view that the following issues should be further considered and addressed by the Government.

7. The term ñinitial interviewò is not specifically defined in s. 3 of the Bill. The Government has explained that according to

s.30AB(1)(a), the ñinitial interviewò is the ñmeeting between a bankrupt and the TIB on a day appointed by the latter for the administration of the bankruptôs estate, at which the bankrupt shall provide the TIB with information concerning his or her affairs, dealings and property (see LC Paper No. CB(1)921/14-15(04), para 4). However, HKBA submits that the term should be properly defined in order to deal with the following issues:-

(1) It appears that the new arrangements were intended to target at the bankruptôs failure to attend a ñface to faceò interview (see LC Paper No. CB(1)921/14-15(02), para. 8). Nonetheless, in the absence of any definition in this regard, it is unclear if an ñinitial interviewò could be conducted via video/web conferencing.

(2) An initial interview may need to be adjourned. Hence, the term should be specifically defined so as to include any subsequent interview adjourned from the first day of the initial interview appointed. This can avoid any argument as to whether a bankruptôs failure to attend an adjourned interview (having attended the first appointment) should be caught under s.30AB(1)(b).

8. Further, given the serious consequences which may flow from a bankruptôs failure to attend the initial interview, there should be clear provisions setting out how and when the notice of the appointment should be served on the bankrupt and the particulars which should be included in the notice (including, for example, a list of documents that a bankrupt should be required to bring to the interview, in view of the fact that his failure to provide information **at the interview** could trigger the TIBôs application for a non-commencement order).

9. Under the present abscondee regime, the court is empowered to make a suspension order (i.e. to the effect that the relevant period should not continue to run) if the bankrupt becomes not contactable after the commencement of his bankruptcy. However, under the new proposals, the TIB can apply to the court for a non-commencement order (i.e. to the effect that the relevant period, in its entirely, is treated as not commencing to run on the date of the bankruptcy order). Concerns have been raised by the Legal Service Division of the Legislative Council Secretariat as to whether the new arrangements (whereby non-commencement orders as opposed to suspension orders would be made) would lead to any unfair results (see LC Paper No. CB(1)921/14-15(03), pp.2-3). HKBA believes that such concerns are valid for the following reasons:-

(1) Although the TIB should in general apply to the court for a non-commencement order within 6 months of the bankruptcy order, he can seek an extension of time.

(2) If there is a delay on the part of the TIB in making the arrangements for the initial interview (or an adjourned interview) such that the same is scheduled to be held, say, 12 months, after the date of the bankruptcy order. If the court, on the TIBôs application and after extending the time for the TIB to make such application, is satisfied that a non-commencement order should be made, it would mean that the 12 months after the date of the bankruptcy order (which, albeit not caused by the bankrupt, has already passed) would not be counted towards the relevant period. This is because the court does not seem to have the power to grant a

suspension order (other than a non-commencement) under the new proposal[3].

(3) In order to minimise unfairness and/or prejudice which may be caused to the bankrupt in the circumstances as outline above (or similar circumstances), it is suggested that the court should be given the power to make an appropriate order after having regard to the situation of each case. For example, apart from a non-commencement order, the court should be at liberty to make a suspension order (so that the relevant period (already commenced) would stop running at a particular point in time) and also to specify the period for which the suspension order should take effect.

10. Finally, it is submitted that that transitional arrangements in respect of the bankruptcy orders made before 1 November 2016 (i.e. the proposed commencement date of the Bill) seem unclear:-

(1) The new s.30A(10A) under the Bill provides that despite the repeal of s.30A(10) as a result of the amendments, s.30A(10)(a) and (b)(ii) (of the existing statute) which has been and still remains in force before 1 November 2016 continues to apply to bankruptcy orders which have been made before 1 November 2016. In other words, the operation of the new regime is intended to be prospective and does not have retrospective effect.

(2) However, in response to the matters raised by the Assistant Legal Advisor, the Official Receiver (in LC Paper No. CB(1)921/14-15(04), expressed that ñ[s]hould the CFA uphold the Court of Appealôs ruling [in *Chang Hyun Chi*], the

[3] Although s.30AC(2)(b) provides that the court may specify any other terms the court thinks fit, it would be rather odd to construe this as empowering the court to make a suspension order (as opposed to a non-commencement order) as the whole new regime concerns whether an order for non-commencement of the relevant period should be made.

provision concerned will have no legal effect and be considered invalid as from the outsetò. In that case, according to the Official Receiverôs views, ñthe órelevant periodô for a pre-existing bankrupt will be considered to have commenced running since the date of his or her bankruptcy order, while the bankruptôs right to travel will not be affected by the invalid provision.ò.

(3) In view of subparagraph (2) above, the Government seems to contemplate that s.30A(10) (of the present statute) would be rendered invalid *ab initio* and therefore would not affect the rights of those whose bankruptcy orders have been granted before 1 November 2016. This, nonetheless, appears inconsistent with the new s.30A(10) of the Bill which stipulates that the existing s.30A(10)(a) and (b)(ii) will continue to apply to bankruptcy orders which have been made before 1 November 2016.

Hong Kong Bar Association

Dated: 1st September 2015