

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

**Responses to Hong Kong Bar Association’s Comments on the Bill**

	<u>Comments</u>	<u>Responses</u>
1	<p>The term “initial interview” is not specifically defined in clause 3 of the Bankruptcy (Amendment) Bill 2015 (“the Bill”). It appears that the new arrangements were intended to target at the bankrupt’s failure to attend a “face to face” interview. Nonetheless, in the absence of any definition in this regard, it is unclear if an “initial interview” could be conducted via video/web conferencing. HKBA submits that the term should be properly defined.</p>	<p>The new arrangements, including the initial interview, aim to encourage a bankrupt to fulfill his or her primary obligation in relation to the work of a trustee-in-bankruptcy (“TIB”) in commencing the administration of the bankruptcy estate. As we explained at the Bills Committee meeting held on 7 July 2015, one of the objectives of the initial interview is for the TIB to verify the bankrupt’s identity by checking his or her identity documents. Practically, this cannot be achieved without the physical presence of the bankrupt at the interview and the TIB will not be able to commence the administration of a bankrupt’s estate properly without such an important piece of information. We believe the relevant provisions in the Bill can achieve the stated policy intention.</p>
2	<p>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 bankrupt’s failure to attend an adjourned interview (having attended the first appointment) should be caught under section 30AB(1)(b).</p>	<p>The initial interview, as provided for in the proposed section 30AB(1)(a), is the meeting between a bankrupt and a 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.</p> <p>If the TIB is allowed to seek to extend the application of the new arrangements to the next meeting by “adjourning” the initial interview or by holding subsequent meetings, the bankrupt could</p>

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		<p>dispute or be confused whether a subsequent meeting is a continual session of the initial interview or actually a separate meeting. With the benefit of stakeholders engagement as we developed the details of the legislative proposals, this proposal is a balancing act, taking into account, <i>inter alia</i>, the need to minimise uncertainties as well as to avoid potential abuse by the TIB.</p>
3	<p>Given the serious consequences which may flow from a bankrupt's 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 TIB's application for a non-commencement order).</p>	<p>During our earlier public engagements, some stakeholders have expressed concern that a bankrupt may find it difficult to attend an interview due to work or other commitments and it might not be fair if he or she would be sanctioned purely on this ground.</p> <p>Compared with specifying a fixed mode and time period for serving a notice, there is generally more flexibility under the new arrangements for the TIB to appoint a day for holding the initial interview with the bankrupt. The new arrangements allow the TIB to discuss with the bankrupt about using other means, including electronic means, for appointing and confirming the appointed day for holding the initial interview as expeditiously as possible.</p> <p>To minimise any subsequent dispute, the proposed new rule 89A(2)(b) provides that if the TIB is to apply for a non-commencement order on the ground that the bankrupt has failed to attend the initial interview, he or she must provide an account of the steps taken for notifying the bankrupt of the time and place for the initial interview.</p> <p>As regards the particulars that a bankrupt should be required to bring to the interview, given that the circumstances of individual</p>

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		<p>cases may vary, it will be difficult in practice to specify in the Bill an exhaustive list of information to be made available by the bankrupt at the initial interview. On the other hand, the proposed section 30AB(1)(b)(ii) already specifies that the information to be provided by the bankrupt at the initial interview must be about his or her affairs, dealings and property as reasonably required by the TIB.</p> <p>If the bankrupt considers that the TIB has not taken reasonable steps to notify him or her of the time and place for the initial interview, or the information required by the TIB at the initial interview is unreasonable, he or she may object to the granting of a non-commencement order. The court will have the discretion to decide whether to make a non-commencement order against a bankrupt after taking into account all relevant facts and factors (including the information provided under the new rule 89A(2)(b)). Pursuant to the proposed section 30AC(1)(b), the court will not make a non-commencement order if it is satisfied by the bankrupt that there is sufficient cause for the order not to be made.</p>
4	<p>HKBA is concerned as to whether the new arrangements would lead to any unfair results for the following reasons:</p> <p>(a) 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.</p> <p>(b) 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, and the court,</p>	<p>The initial interview is critical to the TIB's work in bankruptcy case administration which will provide the TIB with sufficient information and documents at the outset to perform his or her duties properly. Without such information, the TIB may not be able to commence administration of a bankrupt's estate. That is why the relevant period which counts towards the discharge from bankruptcy should be treated as not commencing to run from the date of the bankruptcy order if the bankrupt fails to complete the initial interview. Subject to this stipulation and the other relevant</p>

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	<p>on the TIB’s 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.</p> <p>(c) In order to minimise unfairness and/or prejudice which may be caused to the bankrupt in the circumstances as outlined above (or similar circumstances), HKBA 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.</p>	<p>provisions (in particular the proposed new section 30AC(2)), the court has full discretion to set the terms for ending the non-commencement of the relevant period having regard to individual circumstances of different cases.</p> <p>The TIB is required to justify any extension application having regard to specific circumstances of the case, whereas the approval of the extension application will be at the full discretion of the court, having considered all factors including that the relevant period is to be deemed to have not commenced to run from the date of the bankruptcy order and the reason of any delay in holding the initial interview (whether it is arising from the (in)actions of the bankrupt or the TIB).</p> <p>If the court considers that a delay is caused by the TIB without any reasonable ground, it has the power not to grant an extension. This arrangement aims to ensure fairness to both the TIB and the bankrupt.</p>
5	<p>The transitional arrangements in respect of the bankruptcy orders made before 1 November 2016 (i.e. the proposed commencement date of the Bill) seem unclear as the Government seems to contemplate that section 30A(10) (of the present statute) would be rendered invalid <i>ab initio</i> should the Court of Final Appeal (CFA) uphold the Court of Appeal (CA)’s ruling 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 section 30A(10) of the Bill which stipulates that the existing section 30A(10)(a) and (b)(ii)</p>	<p>In December 2014, on appeal by a bankrupt, the CA overturned an earlier ruling of the Court of First Instance and ruled section 30A(10)(a) unconstitutional (<i>Chang Hyun Chi v Official Receiver</i> [2015] 1 HKLRD 512). The CFA will hear an appeal by the Official Receiver concerning the constitutionality of section 30A(10)(a) of the Bankruptcy Ordinance.</p> <p>The proposed section 30A(10A) provides for a standard transitional arrangement and has the effect that the suspension of the relevant period under the existing section 30A(10)(a) and (b)(ii) of a</p>

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	<p>will continue to apply to bankruptcy orders which have been made before 1 November 2016.</p>	<p>bankrupt against whom a bankruptcy order has been made before 1 November 2016 (i.e. the proposed commencement date in the Bill) will remain in place after that date.</p> <p>However, despite section 30A(10A), if the CFA upholds the CA's ruling on the unconstitutionality of section 30A(10)(a), the latter section automatically becomes inoperative by reason of the CFA's ruling. In other words, the suspension of the relevant period under section 30A(10)(a) will be regarded as not having existed at all in the first place and only the suspension under section 30A(10)(b)(ii) will remain in force after 1 November 2016.</p> <p>Given the uncertainty as to the final outcome of the appeal case, we consider that the present formulation of section 30A(10A) sets out the most practical way to cater for both scenarios (i.e. whether the CFA upholds or disagrees with the CA's ruling).</p>

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