

LEGISLATIVE COUNCIL BRIEF

Bankruptcy Ordinance (Chapter 6)

BANKRUPTCY (AMENDMENT) BILL 2015

INTRODUCTION

At the meeting of the Executive Council on 21 April 2015, the Council ADVISED and the Acting Chief Executive ORDERED that the Bankruptcy (Amendment) Bill 2015 (the Bill), at **Annex**, should be introduced into the Legislative Council (LegCo).

JUSTIFICATIONS

2. We need to amend the Bankruptcy Ordinance (BO) (Cap. 6) to ensure the integrity of the bankruptcy regime having regard to a ruling made by the Court of Final Appeal (CFA) on the constitutionality of a relevant provision of the abscondee regime under the BO.

The present regime for discharge from bankruptcy

3. Currently, the 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 the BO, a trustee-in-bankruptcy (TIB) or a creditor may apply to the

¹ Under the BO, the term “relevant period” refers to the period of time after which a bankrupt is discharged from bankruptcy. The running of the “relevant period” may be suspended pursuant to the two mechanisms as discussed in paragraph 3.

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

- (b) *Abscondee regime* : Section 30A(10) of the 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.

CFA’s ruling

4. The abscondee regime was introduced on the recommendation of the Law Reform Commission and the relevant provisions came into operation in 1998. 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. In an earlier court case², the CFA ruled section 30A(10)(b)(i) (see paragraph 3(b)(ii) above) unconstitutional and as a result that section has become inoperative. The 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

² *Official Receiver & Trustee in Bankruptcy of Chan Wing Hing v Chan Wing Hing* (2006) 9 HKCFAR 545.

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;
- (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.

Proposed new arrangements to replace the abscondee regime

5. We conducted a review of the abscondee regime against the above background. Noting that the main issue of contention is the automatic suspension of the “relevant period”, and that a bankrupt may stay out of reach of the TIB even if he or she has not left Hong Kong, we propose to introduce new arrangements for replacing the abscondee regime. The proposed new arrangements aim 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 bankrupt³, 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 interview such that the administration of the bankrupt’s estate was prejudiced. Specifically, a bankrupt has failed to complete the initial interview if he or she has —
 - (i) failed to attend the initial interview with the TIB; or

³ The court may extend the deadline on application by the TIB.

- (ii) 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;
- (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.

6. The initial interview is critical to the 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. In addition, under the proposed new arrangements, there will no longer be an automatic suspension of the "relevant period" as in the abscondee regime. The court will be provided with discretionary power in determining whether or not to make a non-commencement order.

Measures to ensure fairness

7. The Bill will provide for various measures to ensure fairness —
- (a) the bankrupt may contest the TIB's application for a non-commencement order with reference to the causes of his or her failure to complete the initial interview or any other relevant matters;
 - (b) the information to be provided by the bankrupt at the initial interview must be reasonably requested by the TIB;
 - (c) if an application for non-commencement order is made on the ground that the bankrupt has failed to attend the initial interview, the TIB must, when making the application to the court, provide an account of the steps he or she has

taken for notifying the bankrupt of the time and place for the initial interview; and

- (d) where the court has determined the TIB's application and, as a result, made a non-commencement order against a bankrupt or otherwise, the matters in respect of the bankrupt's failure to complete that initial interview as referred to in the application may not form the basis for any grounds for a subsequent objection to the discharge of the bankrupt.

Transitional Arrangements

8. While the Bill will abolish the abscondee regime, the relevant provisions under section 30A(10) will continue to apply to those cases where the bankruptcy order is made before the commencement of the Bill (pre-existing cases). Taking into account that the Official Receiver's Office (ORO) needs around nine to ten months' lead time to carry out the necessary preparation work for the implementation of the new arrangements, we propose that the new arrangements will commence operation on 1 November 2016, assuming that the Bill will be enacted around end of 2015.

9. In preparing the Bill, we have taken into account the latest developments of an ongoing court case⁴ concerning the constitutionality of section 30A(10)(a) of the BO (see paragraph 3(b)(i) above). In December 2014, on appeal by a bankrupt, the Court of Appeal of the High Court (CA) overturned an earlier ruling of the Court of First Instance and ruled section 30A(10)(a) unconstitutional, citing similar grounds as set out in the CFA's ruling for the other earlier case mentioned in paragraph 4 above. In April 2015, the CA granted the Official Receiver (OR) leave to appeal to the CFA. Execution of the judgment of the CA has been stayed pending determination of the appeal by the CFA. We have provided for appropriate transitional arrangements in the Bill.

OTHER OPTIONS

10. Introducing legislative amendments to the BO is the only option for reforming the abscondee regime.

⁴ *Chang Hyun Chi v Official Receiver* [2015] 1 HKLRD 512.

THE BILL

11. The Bill 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 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 the 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 the 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 court⁵ on an application for a non-commencement order.

LEGISLATIVE TIMETABLE

12. The legislative timetable for the Bill is as follows —

⁵ A TIB shall pay a fee of \$528 to the court for each application for non-commencement order for recovery of the cost incurred in the provision of court services.

Publication of the Bill in the Gazette	30 April 2015
First Reading and commencement of Second Reading in LegCo	13 May 2015
Resumption of Second Reading	To be notified

IMPLICATIONS OF THE PROPOSAL

Economic Implications

13. The proposal will encourage bankrupts to fulfil their primary obligation in relation to the TIBs' work in commencing the administration of the bankruptcy estate and will better protect the interests of creditors, thereby enhancing the integrity of our bankruptcy regime.

Civil Service and Financial Implications

14. The financial implications of the proposal are negligible as the number of applications for non-commencement order is expected to be small. The ORO (in relation to the OR's function as the TIB of certain bankruptcy cases⁶) plans to rely on their existing resources to implement the new arrangements. Additional resources, if required, should as far as possible be absorbed internally by the ORO through re-engineering and re-prioritisation, and, where necessary, sought in accordance with the established mechanism. As regards the implications to the Judiciary, under the established funding arrangements agreed between the Government and the Judiciary, the Government should provide the Judiciary with the necessary manpower and financial resources relating to this proposal should such needs arise in future.

Other Implications

15. The proposal has no competition, environmental, family, productivity and sustainability implications. It is in conformity with the Basic Law, including the provisions concerning human rights. It will not affect the current binding effect of the BO.

⁶ The ORO currently outsources around one-fourth of the summary debtor petition bankruptcy cases to private insolvency practitioners. The rest is handled by the ORO or outside trustees appointed by creditors or by the court. While an estimate on the number of applications for non-commencement orders is unavailable, the ORO's assessment is that such applications will more likely arise from some of the bankruptcy cases presented by creditors, which account for a small proportion of all bankruptcy cases.

PUBLIC CONSULTATION

16. We briefed the LegCo Panel on Financial Affairs on the outcome of the review of the abscondee regime on 5 May 2014 and presented two alternative approaches. 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 while the other instead takes into account the conduct of the bankrupt at an interview with the TIB. The Panel supported the introduction of court discretion and indicated preference for the latter approach, which formed the basis of our proposal. We also conducted further stakeholder engagement between May and July 2014 and received general support for our proposal.

PUBLICITY

17. A press release will be issued on the gazettal of the Bill. A spokesperson will be made available for answering media enquiries.

ENQUIRIES

18. Enquiries in relation to the LegCo Brief should be directed to Mr Paul WONG, Principal Assistant Secretary for Financial Services and the Treasury (Financial Services) 6 at 2528 6384.

Financial Services and the Treasury Bureau
Financial Services Branch
28 April 2015