

**立法會**  
***Legislative Council***

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**Paper for the House Committee Meeting  
on 15 May 2015**

**Legal Service Division Report on  
Bankruptcy (Amendment) Bill 2015**

**I. SUMMARY**

**1. The Bill**

The Bill amends the Bankruptcy Ordinance (Cap. 6) to repeal section 30A(10) which provides that under certain circumstances, the relevant period in relation to the discharge of a bankrupt from bankruptcy will automatically be suspended from running and the suspension will continue to take effect until a particular event occurs (abscondee regime); replace the abscondee regime by a new arrangement that the relevant period may be suspended only by an order of the court after it has considered an application made under specified circumstances by the trustee in bankruptcy; and provide for consequential and related matters.

**2. Public Consultation**

The Administration conducted consultation with relevant stakeholders including associations of banks, deposit-taking companies and money lenders, professional bodies as well as bankruptcy practitioners between May and July 2014 and received general support for the proposal.

**3. Consultation with  
LegCo Panel**

The Panel on Financial Affairs was consulted on 5 May 2014 and members had no objection to the Administration introducing the legislative proposal into the Legislative Council but made enquiries about certain aspects of the proposal.

**4. Conclusion**

In view of the importance of the proposal on the discharge of a bankrupt from bankruptcy and the enquiries raised by Panel members, Members may wish to form a Bills Committee to study the Bill in detail.

## II. REPORT

The date of First Reading of the Bill is 13 May 2015. Members may refer to the LegCo Brief (File Ref.: IB&W/3/1/1/1C(2015)) issued by Financial Services and the Treasury Bureau on 28 April 2015 for further details.

### Object of the Bill

2. The Bill amends the Bankruptcy Ordinance (Cap. 6) to -
- (a) repeal section 30A(10) which provides that under certain circumstances, the relevant period under section 30A(1)<sup>1</sup> will automatically be suspended from running and the suspension will continue to take effect until a particular event occurs (abscondee regime);
  - (b) replace the abscondee regime by a new arrangement that the relevant period may be suspended only by an order of the court after it has considered an application made under specified circumstances by the trustee in bankruptcy (trustee); and
  - (c) provide for consequential and related matters.

### Background

3. Under section 30A of Cap. 6, a bankrupt is to be automatically discharged from bankruptcy upon the expiry of a period of four years for the first-time bankrupts; or five years for repeat bankrupts. Such period is referred to as "the relevant period"<sup>2</sup>. The relevant period is to begin with the commencement of the bankruptcy. However, the trustee or the creditor(s) of the bankrupt may apply to the court to object to the discharge of a bankrupt or to suspend the running of the relevant period on the specified grounds under section 30A<sup>3</sup>.

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<sup>1</sup> Under section 30A(1), a bankrupt is discharged from bankruptcy by the expiration of the relevant period. Under section 30A(2), the relevant period referred to in section 30A(1) is as follows -

- (a) where a person has not previously been adjudged bankrupt, the period of 4 years; or
- (b) where a person has been previously adjudged bankrupt, the period of 5 years, beginning with the commencement of the bankruptcy.

<sup>2</sup> "Relevant period" is defined, in relation to a bankrupt, to mean the relevant period mentioned in section 30A(1) (Clause 3 of the Bill).

<sup>3</sup> Under section 30A(3) and (4), the specified grounds include bankrupt's unsatisfactory conduct and failure to co-operate in the administration of his estate.

4. Moreover, under the abscondee regime -

- (a) where a bankrupt has left Hong Kong before the commencement of the bankruptcy, the relevant period will not commence to run until the bankrupt has returned to Hong Kong and notified the trustee of his or her return (section 30A(10)(a)); or
- (b) (i) where a bankrupt has left Hong Kong after the commencement of his or her bankruptcy without notifying the trustee of his or her itinerary and means of contact, the relevant period will be suspended from running until the bankrupt has returned to Hong Kong and notified the trustee of his or her return (section 30A(10)(b)(i)); or
- (ii) where a bankrupt has left Hong Kong after the commencement of the bankruptcy and failed to return to Hong Kong on a date or within a period specified by the trustee, the relevant period will be suspended from running until the bankrupt has returned to Hong Kong and notified the trustee of his or her return (section 30A(10)(b)(ii)).

5. Section 30A(10) was first introduced together with the provision of automatic discharge of a bankrupt after the relevant period in 1996 on the recommendation of the Law Reform Commission for the purpose of "ensuring that bankrupts could not avoid their obligations under the Bankruptcy Ordinance by staying away from Hong Kong until the end of the bankruptcy period"<sup>4</sup>.

6. In 2006, the Court of Final Appeal (CFA) in *Official Receiver & Trustee in Bankruptcy of Chan Wing Hing v Chan Wing Hing* [2006] 9 HKCFAR 545 held that the restraints imposed by the provision on the bankrupt's right to travel (i.e. section 30A(10)(b)(i) of Cap. 6) which was protected under Article 31 of the Basic Law and Article 8(2) of the Hong Kong Bill of Rights was more than necessary for the protection of the rights of the creditors and hence declared it unconstitutional on the following grounds<sup>5</sup> -

- (a) the sanction operated irrespective of the reason for the bankrupt's failure to notify the trustee 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 the administration of the bankrupt's estate; and

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<sup>4</sup> The Law Reform Commission of Hong Kong Report on Bankruptcy 1995, at para. 17.49.

<sup>5</sup> Paragraphs 44 to 50 of the judgment.

- (c) there was no discretion vested in the court to disapply the sanction or mitigate its consequences.

7. In this connection, there is an ongoing court case in which a bankrupt challenges the constitutionality of section 30A(10)(a) of Cap. 6 (see paragraph 4(a) above). The constitutionality of the provision was upheld by the Court of First Instance in *Chang Hyun Chi v Official Receiver* [2013] HKCU 987 but on appeal, the Court of Appeal allowed the appeal<sup>6</sup> and declared the provision unconstitutional on grounds similar to those in the CFA's ruling in *Official Receiver & Trustee in Bankruptcy of Chan Wing Hing v Chan Wing Hing*. The Court of Appeal has granted the Official Receiver leave to appeal to the CFA. The case is now pending determination of the appeal to CFA and the Court of Appeal has granted a stay of the execution of the judgment until the determination of the appeal.

8. According to paragraph 2 of the LegCo Brief, the Administration needs to amend Cap. 6 to ensure the integrity of the bankruptcy regime having regard to the ruling made by CFA on the constitutionality of a relevant provision, i.e. section 30A(10)(b)(i) of Cap. 6. Further, according to paragraph 9 of the LegCo Brief, in preparing the Bill, the Administration has taken into account the latest developments of the case of *Chang Hyun Chi v Official Receiver*.

### **Provisions of the Bill**

9. The Bill mainly seeks to abolish the abscondee regime by repealing section 30A(10) of Cap. 6 (clause 4(6) of the Bill); and to introduce a mechanism of "non-commencement order" in relation to the running of the relevant period under the proposed new sections 30AB and 30AC (clause 5 of the Bill).

#### Non-commencement of the relevant period

10. Under the proposed new section 30AB, the trustee may apply to the court, within six months after the date of the bankruptcy order or a longer period specified by the court, for a non-commencement order that the relevant period for the bankrupt is treated as not commencing to run on the date of the bankruptcy order if the bankrupt has failed to attend the initial interview on a date as appointed by the trustee, or the bankrupt has attended the initial interview but failed to provide all information concerning the bankrupt's affairs, dealings and property as reasonably requested by the trustee. The proposed new section 30AC provides that on hearing the evidence from the parties, the court may make a non-commencement order and determine the terms that the bankrupt must comply with before the relevant period is to commence to run. The trustee must file a notice with the Registrar of the High Court (the Registrar)

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<sup>6</sup> [2015] 1 HKLRD 512.

within 14 days after a bankrupt has complied with all the terms specified in the order and the relevant period is treated as commencing to run on the date stated in the notice.

#### Application procedures

11. The Bill also amends the Bankruptcy Rules (Cap. 6A) to add two new rules, i.e. rules 89A and 89B (clause 10 of the Bill). The proposed new rule 89A provides for the relevant application procedures for a non-commencement order against a bankrupt under section 30AB. Rule 89A specifically requires the trustee to set out the particulars of the steps taken for notifying the bankrupt of the time and place for the initial interview and the terms proposed to be complied with by the bankrupt for the relevant period to commence to run. Other requirements including the time frame for the parties to respond are similar to the procedures for the suspension of the relevant period under the existing section 30A(3) and the corresponding rule 88 of Cap. 6A. The proposed new rule 89B provides that the trustee's notice to be filed with the Registrar under section 30AC must be in a prescribed form.

#### Prescribed forms and fee

12. Consequently, the Bankruptcy (Forms) Rules (Cap. 6B) and the Bankruptcy (Fees and Percentages) Order (Cap. 6C) are respectively amended to provide for two new forms, namely Form 82A (the non-commencement order) and 82B (the notice of commencement) (clause 13 of the Bill); and to set the court fee for application for a non-commencement order under section 30AB at \$528 (clause 15 of the Bill).

#### Transitional arrangements

13. By the proposed new section 30A(10A), despite the repeal of section 30A(10), section 30A(10)(a) and (b)(ii) as in force immediately before 1 November 2016 (the proposed commencement date of the Bankruptcy (Amendment) Ordinance 2015, upon its enactment) continues to apply to a bankrupt against whom a bankruptcy order has been made before that date (clause 4(7) of the Bill).

### **Commencement**

14. If passed, the Bill would come into operation on 1 November 2016 (clause 1(1) of the Bill).

### **Public Consultation**

15. According to paragraph 16 of the LegCo Brief and further information provided by the Administration, the Administration, having

consulted the Panel on Financial Affairs on 5 May 2014, conducted further engagement through meetings and written communications with relevant stakeholders including the Hong Kong Association of Banks, the Hong Kong Association of Restricted Licence Banks and Deposit-taking Companies, the Hong Kong Institute of Certified Public Accountants, the Law Society of Hong Kong, the Licensed Money Lenders Association, the Hong Kong Bar Association, the Caritas Family Crisis Support Centre as well as bankruptcy practitioners between May and July 2014 and received general support for the proposal.

### **Consultation with LegCo Panel**

16. The Clerk to the Panel on Financial Affairs has advised that the Panel was briefed on 5 May 2014 on the outcome of the Administration's review of the abscondee regime under Cap. 6 and consulted on two alternative reform approaches for addressing the constitutional issues relating to the regime. Panel members in general indicated preference for the "Interview Approach" to provide for court discretion in determining an application from a trustee for a non-commencement order against a bankrupt taking into account the bankrupt's attendance and conduct at an interview with the trustee. Members made enquiries about a number of issues, including the circumstances to be considered and set out in the proposed legislative amendments under the "Interview Approach", engagement with relevant stakeholders on details of the proposed amendments, and review of other aspects of Cap. 6.

### **Conclusion**

17. Legal Service Division is seeking clarifications from the Administration on certain matters relating to the policy objectives and the operation of the proposal. In view of the importance of the proposal on the discharge of a bankrupt from bankruptcy and the enquiries raised by members of the Panel, Members may wish to form a Bills Committee to study the Bill in detail.

Prepared by

TAM Shuk-fong, Clara  
Assistant Legal Adviser  
Legislative Council Secretariat  
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