



26 June 2015

By email < bc_07_14@legco.gov.hk > and by post

Our Ref: RIF, M100942

Hon Chan Kam-lam,
Chairman,
Bills Committee on Bankruptcy (Amendment) Bill 2015,
Legislative Council Complex,
1 Legislative Council Road,
Hong Kong.

Dear Mr. Chan,

Bankruptcy (Amendment) Bill 2015

Thank you for inviting the views of the Hong Kong Institute of Certified Public Accountants ("the Institute") on the Bankruptcy (Amendment) Bill 2015. The Institute's Restructuring and Insolvency Faculty has considered the bill and has a few observations on it, as set out below.

The Institute was consulted by the Administration on the proposal to use a bankrupt's lack of cooperation at the initial interview as the trigger point for the trustee in bankruptcy (TIB) to apply for a non-commencement order, and so suspend the counting down of the clock towards the automatic discharge of the bankrupt. In view of the constitutional problems with the current "abscondee regime", under section 30A of the Bankruptcy Ordinance (Cap. 6), we acknowledged that, in principle, the bankrupt's conduct in terms of providing documents and information to the TIB at the initial stage of the bankruptcy could be a viable alternative test of cooperation. At the same time, we raised certain practical issues as to how the proposals might work and, now that the bill has been drafted, some of these questions still remain. In addition, there are one or two drafting points in relation to which, we believe, further clarification is needed.



Meaning of "initial interview"

An issue that we raised previously was that an "initial interview" might not be a one-off event. The TIB might need to meet the bankrupt two, or even three, times to complete his examination and his investigation into the bankrupt's affairs. While no specific definition is given in the bill of "initial interview", the implication of the reference, in the proposed section 30AB(1)(a)(i), to "an initial interview on a day appointed by the trustee..." is that this is envisaged to be a one-off event. We would suggest, therefore, that the initial interview be defined to 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, within the period of six months allowed for the TIB to make an application for a non-commencement order.

The question is, when does non-cooperation start? Without the above flexibility, we believe that it would be quite possible for a calculating bankrupt, who does not really intend to cooperate with TIB, to circumvent the new provisions. If "attendance" at follow-up interviews were to be required, as suggested, it may not be necessary for these to be face-to-face interviews. However, the bankrupt should be required to make himself or herself available to be interviewed electronically, if not in person, and should provide any materials reasonably required of him or her. Failure to attend or to cooperate, on this basis, at a follow-up interview, in our view, should also be grounds for the TIB to apply for a non-commencement order.

As matter of drafting, it is not clear that the proposed section 30AB(1) would currently allow a re-scheduled initial interview, where, for example, the TIB was unwell on the day originally appointed for the interview.

Period for applying for a non-commencement order

The period during which a TIB may apply for a non-commencement order does not seem to be entirely clear and we should like to seek some further clarification. Under the proposed section 30AB(2)(a), the TIB may apply for a non-commencement order within six months following the making of the bankruptcy order, or under subsection (2)(b), such longer period as specified by the court under subsection (3), following an "extension application" by the TIB. As regards when an extension application must be made, subsection (4) indicates that it must be made within the period specified under subsection (2)(a), i.e., within six months after the bankruptcy



order, or "(b) (if the court has specified a longer period under subsection (3)) that period".

However, the longer period that may be specified under subsection (3) would appear to relate to the period during which the TIB may apply for a non-commencement order and not to the period during which the TIB may apply for the extension order itself. These are, in principle, two different things. A more minor point is that, as a matter of drafting, it is not clear why the first part of subsection (4)(b) is bracketed

We note also that no particular grounds are specified, under the proposed section 30AB(3), for the trustee to make an "extension application". We envisage that this provision may be needed where, for example, the bankrupt has provided some, but not all, of the information required by the TIB and has asked for more time to provide the rest. There may be genuine reasons for a delay, but it could also be a sign of non-cooperation. Assuming that this uncertainty could constitute sufficient grounds to extend the time during which the TIB may apply for a non-commencement order, we would also propose that, at any time during that extended period, the TIB should be able to make an application for a further extension, if the situation continued to be unresolved. This should be subject to there being an overall limit on the time during which the TIB could apply for a non-commencement order. We would suggest that a limit of one year would be reasonable.

Should you have any questions on our submission, I can be contacted at the Institute on 2287 7228 or by email at: peter@hkicpa.org.hk

Yours sincerely,

A handwritten signature in black ink that reads 'Peter Tisman'. The signature is written in a cursive, slightly slanted style.

Peter Tisman
Director, Advocacy and Practice Development