

For discussion on
5 May 2014

**Legislative Council
Panel on Financial Affairs**

Review of the Abscondee Regime under the Bankruptcy Ordinance

Purpose

This note sets out the background for the review of the abscondee regime under the Bankruptcy Ordinance (Cap.6) (“BO”) and seeks views on two alternative reform approaches.

Background

Existing regime

2. Currently, the BO provides that a bankrupt will be automatically discharged from bankruptcy upon the expiry of the bankruptcy period. The bankruptcy period is four years for first-time bankrupts and five years for repeat bankrupts. Under section 30A(3) of the BO, a trustee-in-bankruptcy (“TIB”) or a creditor may apply to the court to object to the automatic discharge of the bankrupt on specified grounds set out in section 30A(4), e.g. the bankrupt’s failure to cooperate in the administration of the bankruptcy estate, in which case the court may make an order to extend the bankruptcy period to run up to a total of eight years.

Abscondee regime

3. On the other hand, the BO also expressly provides that under certain circumstances, the bankruptcy period will automatically be suspended from running and the suspension will continue to take effect until a particular event happens. This is commonly referred to as the abscondee regime, which is provided for in section 30A(10) of the BO. The abscondee regime was introduced on the recommendation of the Law Reform Commission (“LRC”) to ensure that bankrupts cannot avoid their obligations by staying away from Hong Kong until the end of the bankruptcy period. It has been in place since 1998.

4. Under section 30A(10)(a), where a bankrupt has left Hong Kong before the date of the bankruptcy order, the bankruptcy period will not commence to run until the bankrupt has returned to Hong Kong and notified the TIB of his return. Under section 30A(10)(b), if after commencement of his bankruptcy, a bankrupt leaves Hong Kong without notifying the TIB of his itinerary and means of contact (c.f. section 30A(10)(b)(i)); or the bankrupt fails to return to Hong Kong when required by the TIB (c.f. section 30A(10)(b)(ii)), the bankruptcy period will be suspended from running until the bankrupt has returned to Hong Kong and notified the TIB of his return.

Court ruling

5. Part of the abscondee regime, viz. the provision which provides for the automatic suspension of bankruptcy period if a bankrupt leaves Hong Kong without notifying the TIB of his itinerary and means of contact (section 30A(10)(b)(i)), was ruled unconstitutional in an earlier court case¹ and has since then become inoperative. The Court of Final Appeal considered that the restraint imposed by the provision on the bankrupt's right to travel, which is protected under the Basic Law and the Hong Kong Bill of Rights Ordinance (Cap.383), was more than necessary for the protection of the rights of creditors for the following considerations –

- (a) the sanction operates irrespective of the reason for the bankrupt's failure to notify the trustee of his departure from Hong Kong;
- (b) the sanction applies indiscriminately to all situations, irrespective of, for instance, the stage of relevant period already reached and whether it has occasioned any prejudice to bankruptcy administration; and
- (c) there is no discretion vested in the court to disapply the sanction or mitigate its consequences.

6. In this connection, there is also an ongoing court case in which a bankrupt challenges the constitutionality of section 30A(10)(a), which deals with cases where a bankrupt has left Hong Kong before the date of the bankruptcy order. The constitutionality of the provision was upheld by the Court of First Instance in 2013 but the bankrupt concerned has

¹ *Official Receiver & Trustee in Bankruptcy of Chan Wing Hing v Chan Wing Hing* FACV Nos. 7 and 8 of 2006.

subsequently obtained leave to appeal. The hearing date for the appeal has not been fixed yet.

Proposed Reform Approaches

7. Against the above background, we have conducted a review of the abscondee regime. In order to address the constitutional issue with relevant aspects of section 30A(10) of the BO as mentioned above, we propose to amend the BO such that in future, the bankruptcy period of a bankrupt may be suspended only by an order of the court after it has considered an application by the TIB, and the existing provisions for automatic suspension of one's bankruptcy period will be repealed. We have contemplated two alternative reform approaches to effect this proposed change.

Approach A. Modified Abscondee Approach

8. This approach would retain the abscondee regime with some modifications to address the constitutional issue. Its key features are as follows –

- (a) if a bankrupt is unresponsive or is uncooperative, the TIB may, at any time throughout the bankruptcy period, on ground that the bankrupt has departed from Hong Kong and the bankrupt's departure from Hong Kong has prejudiced the administration of the bankruptcy estate, apply to the court to suspend the bankruptcy period;
- (b) if the court is satisfied that the TIB has taken reasonable steps to ascertain that the bankrupt has departed from Hong Kong, and that the bankrupt's departure from Hong Kong has prejudiced the administration of the bankruptcy estate, the court may exercise discretion to make an order suspending the bankruptcy period;
- (c) the court may determine the terms of the order, including (but not limited to) when the bankruptcy period should start to be suspended, the length of suspension, and the conditions for lifting the suspension; and
- (d) the reason of the bankrupt's departure from Hong Kong should be one of the relevant factors to be considered by the court in determining whether or not to make a suspension order as well as the terms of the order.

9. This approach can address the constitutional issue with section 30A(10) of the BO. On one hand, it preserves the policy objective of the abscondee regime as recommended by LRC, viz. to ensure that bankrupts cannot evade their obligations by staying away from Hong Kong until the end of the bankruptcy period. On the other hand, it no longer requires a bankrupt to report his departure from Hong Kong to his TIB. Nevertheless, it is possible that TIBs may not have sufficient identity information of the bankrupts concerned and in practice there may not be fool-proof measures to ascertain the fact of whether and when a bankrupt has left or returned to Hong Kong in all cases.

Approach B. Interview Approach

10. Under this approach, the abscondee regime will be abolished and replaced by a new arrangement under which the fact of whether or not the bankrupt has departed from Hong Kong will no longer be a relevant consideration that may lead to suspension of his bankruptcy period. The key features of this approach are as follows –

- (a) under specified circumstances set out below, a TIB may, at any time throughout the bankruptcy period, apply to the court for a suspension of the bankruptcy period of a case :
 - (i) the bankrupt fails to attend a face-to-face interview for bankruptcy administration in person on a particular date or within a particular period whenever reasonably specified by the TIB; or
 - (ii) the bankrupt fails to cooperate with the TIB during an interview for bankruptcy administration, e.g. the bankrupt refuses to answer any question or provide any information as reasonably raised or required by the TIB;
- (b) if the court is satisfied that the bankrupt's failure to attend an interview or cooperate with the TIB in an interview has prejudiced the administration of the bankruptcy estate, the court may exercise discretion to make an order suspending the bankruptcy period;
- (c) same as for the modified abscondee approach under paragraph 8 (c), the court may determine the terms of the order, including (but not limited to) when the bankruptcy period should start to be suspended, the length of suspension, and the conditions for lifting the suspension;

and

- (d) similar to the arrangement under the modified abscondee approach under paragraph 8 (d), the reason of the bankrupt's failure to attend an interview or cooperate with the TIB in an interview should be one of the relevant factors to be considered by the court in determining whether or not to make an order as well as the terms of the order.

11. This approach should also be able to address the constitutional issue of section 30A(10) of the BO. However, compared with the modified abscondee approach, this approach departs from the stated objective of the abscondee regime as recommended by the LRC because it would mean abolishing the abscondee regime. On the other hand, the TIB will not have to ascertain whether a bankrupt has departed from Hong Kong. A TIB may apply to the court to suspend the bankruptcy period if the bankrupt fails to attend an interview for bankruptcy administration or cooperate with the TIB in such interview.

Overseas Experience

12. In the course of our review, we have drawn reference to the relevant regimes in Australia, the United Kingdom ("UK") and Singapore in handling cases of abscondees. We note that although these regimes are not identical in all aspects, it is possible under these regimes that an abscondee will not be discharged from bankruptcy until the abscondee has returned to the relevant jurisdiction. It is also possible that a bankrupt failing to attend an interview or cooperate in such interview will not be discharged from bankruptcy, or will have his bankruptcy period extended.

13. In Australia, TIBs may file with the relevant authority an objection to the automatic discharge of a bankrupt on ground of the latter having absconded from Australia, and the bankruptcy period of an abscondee can be suspended indefinitely if the abscondee does not return to Australia. For a bankrupt who fails to attend an interview or cooperate with the TIB in an interview, the TIB may also object to the automatic discharge of a bankrupt on one or more of the applicable grounds specified in the relevant legislation. In such case, the bankruptcy period could be extended to a run up to a maximum of eight years.

14. In the UK, the relevant authority may order that the bankruptcy period be suspended, on application by a TIB, for any specified period if the bankrupt fails to comply with his obligations. Therefore it is open to the relevant authority to order suspension of the bankruptcy period of an abscondee until the abscondee has returned to the UK, or of a bankrupt who fails to attend an interview or cooperate with the TIB during an interview. Whereas in Singapore, the bankruptcy period of a bankrupt will run indefinitely and a bankrupt may only be discharged from bankruptcy with the consent of the relevant authority.

Next Steps

15. We are engaging relevant stakeholder groups including creditor groups, private insolvency practitioners, professional bodies and other relevant organisations to gauge their views on the two alternative reform approaches. We will take into account the comments received in developing detailed legislative proposals based on the preferred reform approach. Our target is to introduce the relevant bill into the Legislative Council in 2015.

Advice sought

16. Members are invited to offer views on the two alternative reform approaches.

**Financial Services and the Treasury Bureau
April 2014**