



REVIEW OF ABSCONDEE REGIME UNDER THE BANKRUPTCY ORDINANCE

SUBMISSIONS

1. In a review of the “abscondee regime” under the Bankruptcy Ordinance, Cap 6 (“BO”), the Financial Services and the Treasury Bureau in April 2014 put forth two proposed approaches, namely a “*Modified Abscondee Approach*” and an “*Interview Approach*”. These proposals are said to address the constitutional issue arising from section 30A(10) of the BO.

Background

2. Section 30A(10) of the BO provides for a suspension of the bankruptcy period when the bankrupt leaves Hong Kong, either before or after the commencement of his bankruptcy. Technically this is called the abscondee regime; it is aimed to deter bankrupts from evading their obligations by staying away from Hong Kong. The bankruptcy period is either 4 years for a first-time bankrupt and 5 years for a repeat bankrupt (Section 30A(1) of BO).
3. The Law Society is given to understand that the abscondee regime has been and is continually subject to judicial challenges as being unconstitutional; in one case the Court of Final Appeal considered the restraint provided under Section 30A(10) interfered with the rights of the bankrupt to travel and that was more than necessary for the protection of the rights of creditors.

Comments

4. The Law Society acknowledges the above problem and agrees that section 30A(10) of the BO should be repealed.
5. In respect of the two approaches now proposed by the Administration, the Law Society

- (a) could identify problems with the Modified Abscondee Approach; and
- (b) prefers the Interview Approach.

Modified Abscondee Approach

6. The Law Society is given to understand that, under this proposal, the abscondee regime is retained but with modification, chiefly, that in lieu of an automatic suspension, the trustee-in-bankruptcy ('TIB') is empowered to apply to the Court to suspend the bankruptcy period, on the basis that the TIB has satisfied two pre-conditions, i.e. firstly, the bankrupt is "unresponsive or uncooperative" and then secondly and consequently the TIB has taken reasonable steps to ascertain the bankrupt has departed from Hong Kong. The Law Society considers that this Approach would put the TIB in an unreasonable and disadvantaged position.
7. It is the frequent experience of the TIB (other than the Official Receiver acting as such) that under the current regime, when the TIB requests movement records of the bankrupts, their requests are almost invariably being rejected by the Immigration Department, on the ground that the information is protected under the Personal Data (Privacy) Ordinance Cap 486. Even if the Immigration Department sees it fit to provide the movement records of the bankrupts to the TIB, it usually takes time and hence, causes delay in the application for suspension.
8. In practice, it is therefore very difficult, if not impossible, for the TIB to discharge the burden of proof in the intended application under this proposal. Furthermore, the TIB will have to incur very substantial costs in his discharge of the above evidential burden.
9. Conceptually, this Approach is also not appropriate: by reason of the requirement that the bankrupt needs to be "unresponsive or uncooperative" before the application can be made, the Modified Abscondee Approach goes beyond the current legislative intent of s.30A(10), i.e. to ensure that bankrupts cannot evade their obligations by staying away from Hong Kong until the end of the bankruptcy period. This additional requirement is also unnecessary as it is not relevant to the constitutional issue identified by the CFA.
10. In any event, the Law Society notes that, at its meeting on 5 May 2014, the Legislative Council Panel on Financial Affairs did not express preference for this Modified Abscondee Approach.

Interview Approach

11. The Law Society understands that under the Interview Approach, the TIB may apply to the Court for a suspension of the bankruptcy period if the bankrupt does not attend a face-to-face interview or is uncooperative during that interview.

Sections 30A(3) and (4) of the BO, under which the TIB could object to the automatic discharge of the bankrupt on certain grounds, would continually be available to address bankrupt's behaviour outside the interview.

12. The Law Society considers that this approach is comparatively speaking more realistic, economical and efficient. **The Law Society supports this approach** subject to the following.

- (a) If the TIB makes several attempts to contact the bankrupt at his/her last known address to arrange an interview (which should be the same address to which the bankruptcy proceedings have been served) and the bankrupt does not respond, **there should be a deeming provision** that the bankrupt has absconded. Such a presumption may assist the court in exercising its discretion on an application by the TIB for the suspension of the bankruptcy period, that the bankrupt's obstruction/non attendance has hindered and thus prejudiced the administration of the bankruptcy estate.
- (b) It is undesirable to have an indefinite period of suspension as it would put an indefinite duty on the TIB. **It is suggested that under this Approach, the maximum period of suspension should be 8 years.**
- (c) Among the jurisdictions surveyed by the Administration, Australia (and also the UK) seems to have adopted the Interview Approach. When it is to proceed with the legislative process, **the Administration should therefore consider making reference to those procedures and rules adopted in that jurisdiction(s)**, in particular those rules relating to objection to any automatic discharge of the bankruptcy.

13. While the Interview Approach is more preferable, the Law Society suggests this approach ought to be included as an additional ground for objection within section 30A(4), and not a replacement for section 30A(10), as a new separate regime. There would be confusion if another regime is introduced to only and specifically apply to uncooperative conducts during interviews.

Conclusion

14. On the basis of the materials given, and subject to the exact wording of any amendment bill to be issued in this regard, the Law Society considers that the Interview Approach, as proposed, is more preferable from the perspective of the TIB.

The Law Society of Hong Kong
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